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.

Civil Action No.: 1:14-cv-01523-RCL

REPLY IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

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AFSP	Annual Filing Season Program
CBC	Criminal Background Checks
CPA	Certified Public Accountant
EA	Enrolled Agent
EAP&M	Enrolled Agent Policy and Management
EFIN	Electronic Filing Identification Number
ERPA	Enrolled Retirement Plan Agent
FTE	Full-Time Equivalent
GAO	U.S. Government Accountability Office
IOAA	Independent Offices Appropriation Act
IRS	Internal Revenue Service
NPRM	Notice of Proposed Rulemaking
OMB	U.S. Office of Management and Budget
OPR	Department of Treasury, Office of Professional Responsibility
PDC	Professional Designation Checks
PTC	Personal Tax Compliance
PTIN	Preparer Tax Identification Number
RPO	Return Preparer Office
RTRP	Registered Tax Return Preparer
SDN	Specially Designated National
SUMF	Statement of Undisputed Material Facts
TPPS	Tax Professional PTIN System
VPBR	Vendor Processes and Business Requirements

I. **Introduction**

The IRS has the legal authority to charge a PTIN user fee to recover its costs of issuing and renewing PTINs, established under its PTIN Program. *Montrois v. United States*, 916 F.3d 1056, 1068 (D.C. Cir. 2019). The PTIN user fee has two components, a fee paid to the IRS and a fee payable directly to a contractor, Accenture (the vendor fee). The only issue before this Court is whether the IRS portion of the PTIN user fee is reasonable under the Independent Offices Appropriation Act (IOAA). *Id*. The United States demonstrated in its Motion for Partial Summary Judgment that when the IRS determined the PTIN user fee for fiscal years 2011 through 2017, it followed the IOAA and OMB Circular A-25 guidelines to develop biennial cost models to determine the amount of the PTIN user fee. Thus, the Government is entitled to partial summary judgment because the undisputed material facts demonstrate that the fee, as adjusted by the concessions, is permissible under the IOAA.

The only unusual circumstance in this otherwise normal deferential review of an agency's user fee determination is that when the IRS first enacted the PTIN user fee, it was designed around two regulatory programs: the RTRP Program and the PTIN Program. The RTRP Program was invalidated by the D.C. Circuit in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), while the PTIN Program was upheld as a statutorily authorized program. *Montrois*, 916 F.3d at 1068. After *Loving*, the IRS could not condition eligibility for a PTIN on being a credentialed return preparer as required by the RTRP Program and, therefore, certain costs that the IRS originally included in the user fee could no longer be charged. *Id.; Loving v. I.R.S.*, 920 F. Supp. 2d 108, 109–10 (D.D.C. 2013). The PTIN user fee that was once designed in part around the requirements of the RTRP Program became definitionally excessive by law with the invalidation of the RTRP Program. Importantly, the PTIN user fee calculated before *Loving* was excessive because of the legal invalidation of the RTRP program. The user fee was not excessive because the IRS modeling of

future costs was unreasonable or determined without adequate process.

As explained in its opening brief, the United States does not defend certain costs that were originally included in the 2010 Cost Model that the IRS used to first determine the IRS portion of the PTIN user fee that were then invalidated by *Loving*. The opening brief therefore only sought to have the PTIN user fee for 2011 through 2013 of $17 considered reasonable, conceding $33.00 per initial and renewal enrollment for fees charged for 2011 through 2013. Since the opening brief was filed, the United States formally conceded costs connected to activities that the United States did not defend in its opening brief, plus additional costs that were not PTIN-related activities. The Second Declaration of RPO Director Carol Campbell filed with this reply brief explains the conceded activity costs for fiscal years 2011 through 2013. This Reply, therefore, requests that the Court find that the adjusted PTIN user fee of $14.05 for fiscal years 2011 through 2013 is reasonable.

And while the logic is the same, the analysis is slightly different for the PTIN user fee for fiscal years 2014 through 2017, because the 2013 and 2015 Cost Models that served as the basis for the PTIN user fees in fiscal years 2014 and 2015, and fiscal years 2016 and 2017, respectively were created in a different manner than the 2010 Cost Model. As the United States' opening brief and this Reply explain, concessions were made for fiscal years 2014 and 2015 and for fiscal years 2016 and 2017 to account for *Loving* (decided in 2014, after the 2013 Cost Model). In short, the original cost models were created during a time when much of the legal landscape was changing. The 2019 Cost Model is the first model created after *Loving* and *Montrois* and provides the appropriate lens through which to look to recalibrate and then recalculate the PTIN user fees for 2014 through 2017. As a result, the concessions for fiscal years 2014 through 2017 used the 2019 Cost Model as the guidepost. The explanation of those concessions is in the Declaration of RPO

Director, Carol Campbell. Dkt. No. 183-2. Therefore, along with the relief described above related to fiscal years 2011 through 2013, and as explained in its opening brief, United States asks this Court to find that the adjusted PTIN user fee for fiscal years 2014 and 2015 in the amount of $37.75 is reasonable and find that the adjusted PTIN user fee for fiscal years 2016 and 2017 in the amount of $24 is reasonable.

As to the vendor fee paid to Accenture, no adjustment was necessary. The United States asks this Court to hold that the fee is reasonable for all years at issue. The Plaintiffs' opening brief alleged that the Accenture vendor fee was excessive—they did not contend the vendor fee was not a direct or indirect cost of the PTIN program. Dkt. No. 175 at 18–20. As shown in the United States' Opposition, the Accenture vendor fee was not excessive because the facts on record show that the fee was based on the narrow capabilities in the first release of the TPPS database. Dkt. No. 183 at 27–29 (Pl. Ex. Y). And, the cost of the vendor fee was determined through a competitive bidding process and thus presumptively reasonable. Dkt. No. 177-8 (Pl. Ex. Y). Plaintiffs admit that Accenture "directly performed the service identified by *Montrois* . . . for which a fee may be charged under the IOAA." Dkt. No. 185 at 18. Now, at the eleventh hour, Plaintiffs have changed their position and argue the Accenture vendor fee must be refunded *entirely* because the fee was not established by regulation. Dkt. No. 175 at 20–24. The argument should be barred by the law of the case doctrine and because it was not raised in the amended complaint. Moreover, this reply shows that Plaintiffs' new argument is without merit because the Accenture vendor fee was noticed in the regulations and Plaintiffs' argument contradicts the *Montrois* holding.

The United States has shown that the PTIN user fee, as adjusted for concessions, is reasonable and should be upheld under controlling precedent. Plaintiffs, however, have offered the Court a list of grievances with the PTIN user fee under an ever-changing theory that ignores case

law.[1] And although they are many and varied, none of the Plaintiffs' theories address the issue on remand: whether the amount of the adjusted PTIN user fee is reasonable and consistent with the IOAA and OMB Circular A-25. *Montrois*, 916 F.3d at 1068. Plaintiffs have not demonstrated that the adjusted PTIN user fee is arbitrary and capricious. *See Ayuda, Inc. v. Att'y Gen.*, 848 F.2d 1297, 1299 (D.C. Cir. 1988) (increased fees readily withstood the arbitrary-and-capricious challenge to a fee determined in a biennial review; completed under cost accounting procedures; subject to notice and comment procedures.). Perhaps in realization of their failure to meet this burden, Plaintiffs instead ask the Court to step in as a receiver to micromanage the PTIN Program.

But that is not the role of the Court. When only the reasonableness of a statutorily authorized fee is at issue, the fee is either upheld because the agency has shown that the fee was developed by reasonable decision-making, or it is remanded to the agency to develop or explain its fee in a reasonable manner. *Engine Mfrs. Ass'n v. Env't Protection Agency*, 20 F.3d 1177, 1184 (D.C. Cir. 1994) (citing *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966–67 (D.C. Cir. 1990) ("We have commonly remanded without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking," and remanding "the matter to the agency for a clear explanation for the cost basis for the fee schedule it adopted"). In the unlikely event that the Court finds that the adjusted PTIN user fee is still unreasonable,

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[1] In their first motion to compel, Plaintiffs identified the issue as "whether the IRS charged PTIN fees for activities that exceeded the scope of its authority." Dkt. No. 169 at 2. In their second motion to compel, the Plaintiffs changed course, arguing that because "the costs of issuing PTINs and maintaining a PTINs database are the only costs that can be charged . . . only [Accenture's] fees are potentially chargeable." Dkt. No. 167-9 at 2–3. Then, in their motion for summary judgment, this theory changed, again, to whether IRS costs were "necessary" to issue and maintain a database of PTINs. Dkt. No. 175 at 6. Plaintiffs' proposed order for summary judgment even included a list of IRS activities they believe are "necessary," even though governing caselaw sets the standard at "reasonable." Dkt. No. 175-3. Now, for the first time Plaintiffs claim that the Accenture vendor fee must be refunded entirely because it was not established by regulation. Dkt. No. 185 at 7.

remand is the appropriate remedy because neither the Court nor a party challenging the fee may seize the authority to develop the fee that has been granted to the agency by Congress.

As explained by the United States in its memoranda, supporting declarations, and other evidence, the concession process undertaken by the United States renders the need for remand unnecessary. The amounts no longer permitted after *Loving* have been removed from the fee. The United States has put forth evidence in declarations and other supporting documents to show that the adjusted PTIN user fee is now reasonably related to the costs of the PTIN Program under the IOAA—which is the only issue the *Montrois* Court remanded. The United States, therefore, requests that the Court find that: (1) for fiscal years 2011 through 2013, a $14.05 PTIN user fee is reasonable and consistent with the IOAA; (2) for fiscal years 2014 and 2015, a $37.75 PTIN user fee is reasonable and consistent with the IOAA; (3) for fiscal years 2016 and 2017, a $24 PTIN user fee is reasonable and consistent with the IOAA; (4) that the vendor fees during all the years at issue were reasonable; and (5) that against the United States' $110 million of conceded liability for fiscal years 2011 through 2017, the United States is entitled to an offset of $88,195,377 that it had to forgo or expend in support of the PTIN Program while it was enjoined from charging any PTIN user fee in fiscal years 2018 through 2020. An amended proposed order has also been resubmitted for the Court's consideration that includes the final concession.

II. The United States does not seek special treatment. It seeks to have this case determined under long-standing D.C. Circuit precedent.

The D.C. Circuit held that Congress granted the IRS the statutory authority under the Internal Revenue Service Restructuring Act of 1998 to require return preparers to obtain a PTIN and that the IRS could charge a fee under the IOAA because (1) the IRS provided a service in exchange for the fee; (2) the PTIN Program conferred a special benefit; and (3) the IRS provided the service and the benefit to "identifiable recipients." *Montrois v. United States*, 916 F.3d 1056,

1058–59 and 1063–66 (D.C. Cir. 2019). The Circuit remanded the case to determine "whether the amount of the fee is reasonable and consistent with the [IOAA]." *Id*. at 1068.

Despite the overwhelming amount of on-point D.C. Circuit caselaw in the government's opening brief, Plaintiffs still attempt to argue that "the IRS is entitled to *no* deference" because the amount of the fee is a matter of interpretation of the law. Dkt. No. 185 at 4. Plaintiffs are incorrect. Once it is established that an agency has the statutory authority to enact a program (such as requiring a PTIN under 26 U.S.C. § 6109) and may charge a fee to recover the costs to the agency for that program, "the [agency] in exercising that authority is at the zenith of its powers; the [agency's] fees, therefore, are entitled to more than mere deference or weight." *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985) (citations omitted).

Plaintiffs ask this Court to ignore the D.C. Circuit and allow a challenging party to usurp agency discretion and supplant the agency's judgment with its own. Plaintiffs seek to minimize the importance and applicability of *Cent. & S. Motor Freight* by reducing the standard it announces to "snips from a 1985 D.C. Circuit case." Their argument is disingenuous at best. To be clear, the full standard applied in that case reads as follows:

> Inasmuch as the fee schedule at issue here is an agency rule promulgated pursuant to express statutory authority, the scope of our review is narrow. This court is obligated to uphold the ICC's fees unless they are found to be arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Because Congress has expressly delegated to the ICC the responsibility for setting these fees, the ICC in exercising that authority is at the zenith of its powers; the ICC's fees, therefore, are entitled to more than mere deference or weight. Under settled principles, we are not to substitute our own judgment for that of the agency. Rather, we must ascertain whether the ICC's fees were based upon a consideration of the relevant factors and whether the ICC committed any clear errors of judgment.

Id. at 729 (citations and internal quotations omitted). This standard is more than a mere "snip" that

can be discarded. It is binding precedent that this Circuit has applied to similar cases[2] and the holding has been adopted by at least one other circuit.[3] In fact, the *Montrois* decision itself relies on *Cent. & S. Motor Freight* to determine that the IRS could charge a PTIN user fee under the IOAA. *Montrois*, 916 F.3d at 1064 (citing *Cent. & S. Motor Freight* for the standards to determine a "private benefit" under the IOAA). Because the Circuit Court in *Montrois* relies on the standards announced in *Cent. & S. Motor Freight*, this Court can do no less.

Plaintiffs also argue the Court should disregard the deferential standard because "when it first set the fee, [the IRS] was simultaneously engaged in regulatory overreach, operating under an improper understanding of its own authority." Dkt. No. 185. The government does not dispute that *Loving* invalidated the RTRP Program. As explained, the PTIN user fee was determined based on activities from two separate regulatory schemes: some costs of the RTRP Program (invalidated by *Loving*) and the PTIN Program (upheld by *Montrois*). Dkt. No. 178-1 at 6–10; Dkt. No. 183 at 12–13. The Court of Appeals held that the IRS has the statutory authority to charge a PTIN user fee under the PTIN Program. *Montrois*, 916 F.3d at 1068. All the other courts that have decided this issue have agreed. *See Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012) (affirming the district court's decision that the IRS had both the authority under 26 U.S.C. § 6109 (a)(4) to issue a PTIN and the authority under 31 U.S.C. § 9701 to charge a fee); *Buckley v. United States*, No.

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[2] *See, e.g.*, *CF Industries, Inc. v. Surface Transp. Bd.*, 255 F.3d 816, 826 (D.C. Cir. 2001) ("Because Congress has expressly delegated to the Board responsibility for determining whether a [carrier's] . . . rate is reasonable, the Board is at the zenith of its powers when it exercises that authority, and [is] therefore entitled to particular deference.")(internal quotations omitted); *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 114 F.3d 206, 210–11 (D.C. Cir. 1997) (applying *Cent. & S. Motor Freight* to uphold Surface Transportation Board's determination of a reasonable rate charged to plaintiff); *Assoc. of Am. R.Rs. v. Interstate Com. Comm'n*, 978 F.2d 737, 740 (D.C. Cir. 1992) (applying *Cent. & S. Motor Freight*, to apply "highly deferential" standard to determine whether I.C.C.'s adoption of a cost valuation standard is reasonable.).

[3] *See, e.g.*, *Neb. Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 905 (8th Cir. 1997) (applying standard announced in *Cent. & S. Motor Freight* to uphold a STB's user fee.).

1:13-CV-1701, 2013 WL 7121182, at *1 (N.D. Ga. Dec. 4, 2013) (agreeing with *Brannen*).

This Court should reject Plaintiffs' unsupported requests to ignore established D.C. Circuit precedent and apply the long-standing deferential standard afforded to agencies acting within congressionally delegated authority. Because *Montrois* held the IRS is within its statutory authority to charge a PTIN user fee, the reasonableness of its schedule is entitled to more than mere deference, must be upheld if reasonable, and can be overturned only if the IRS committed clear errors of judgment inconsistent with the relevant factors in the IOAA and OMB Circular A-25. *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 729.

III. **After concessions, the PTIN user fees are reasonable.**

While great deference is given to the agency's determination of fees, the IOAA and OMB Circular A-25 provide guidance to determine whether a fee is reasonable. The IOAA requires agencies to broadly base any fee on policies prescribed by the President and four factors: (1) the cost to the Government; (2) the value of the service or thing to the recipient; (3) public policy or interest served; and (4) other relevant facts. 31 U.S.C. § 9701 (b)(2). OMB Circular A-25, a policy prescribed by the President, provides additional guidance by providing broad categories of direct and indirect costs that may be in a fee. The Circular further requires an agency to re-visit its user fee calculation by developing cost models biennially, and the IRS complied with this requirement.

Yet courts have "never held that the amount of a user fee must be precisely calibrated to the use that the party makes of the government services." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). The Supreme Court rejected the notion that a "perfect user-fee system" is possible when the government charges a user fee to a large number of parties. *Id.* at 65. For that reason, courts rejected calculation of fees with "scientific precision." *See, e.g.*, *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 736 (Costs need not be "calculated with scientific precision."); *Nat'l Cable Television Ass'n, Inc. v. Fed. Commc'ns Comm'n*, 554 F.2d 1094, 1105 n.40 (D.C. Cir.

1976) (same). User fees are only expected to be accurate within reasonable limits. *Nat'l Cable Television Ass'n, Inc.*, 554 F.2d at 1105. Without a showing of clear errors of judgment inconsistent with the relevant factors in the IOAA and OMB Circular A-25, the Court should defer to the agency fee computations. *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 729.

As the United States' briefing has shown, the adjusted PTIN user fees that it defends for fiscal years 2011 through 2017 contain only those activity costs directly or indirectly related to the PTIN Program and not the invalidated *Loving*-related costs associated with the RTRP Program. Dkt. No. 178-1 at 17–28; Dkt. No. 183 at 12–29. The IRS correctly used the 2019 Cost Model, the first Cost Model created after both *Loving* and *Montrois*, as a guidepost to review the fee charged in fiscal years 2011 through 2017 (originally based on previous cost models created in 2010, 2013, and 2015) to determine what costs should be conceded.[4] *Id*. In other words, the IRS performed a retroactive review of previously charged fees using current information (post-*Loving* and post-*Montrois*). Plaintiffs argue that (1) even with the concessions, the PTIN user fees are excessive, and thus unreasonable, and (2) that the IRS cannot rely on either its 2013 or 2019 Cost Models to justify its fees. Plaintiffs are wrong on both counts and those arguments will be addressed in turn.

A. The adjusted PTIN user fees for fiscal years 2011 through 2017 are reasonable because they capture the direct and indirect costs of the PTIN Program.

In its motion for summary judgment, the government defended the portion of the original PTIN user fee after removal of the *Loving*-related costs. After all the concessions are considered, the issues before the Court are whether the adjusted PTIN user fees are reasonable, specifically, (1) a $14.05 PTIN user fee charged in fiscal years 2011 through 2013; (2) a $37.75 PTIN user fee

[4] The government's approach conforms with the stipulated agreement that understanding how the IRS currently operates is relevant to understanding how the IRS operated in prior years. Dkt. No. 144, ¶ 4.

charged in fiscal years 2014 and 2015; and (3) a $24 PTIN user fee charged in fiscal years 2016 and 2017.

Plaintiffs wrongly assert that the United States has not explained how it arrived at the adjusted per-PTIN user fee. Dkt. No. 185 at 19. Each fiscal year's adjustment is explained in the United States' SUMF (Dkt. No. 173-2), ¶¶ 68–70 for fiscal years 2011 through 2013; ¶¶ 87–90 for fiscal years 2014 and 2015; and ¶¶ 100–03 for fiscal years 2016 through 2017. With its final concession, the activities associated with costs conceded for fiscal years 2011 through 2013 are identified in the Second Campbell Declaration. And the United States identified the activities associated with the costs for fiscal years 2014 and 2015, and 2016 and 2017. Dkt. No. 183-2 (Campbell Decl.), ¶¶ 8 and 10. There are no mystery costs that cannot be explained.

1. <u>Fiscal Years 2011 through 2013</u>

The United States' opening brief does not defend 65% of the 2010 Cost Model projected costs, effectively reducing the PTIN user fee from $50 to only $17. Dkt. No. 178-1 at 21. Unlike the concessions for fiscal years 2014 through 2017, at the time of the opening briefs, a concession for fiscal years 2011 through 2013 had not yet been officially approved. Without the benefit of this specific concession, the United States instead identified *Loving*-related activity costs from the 2010 cost model that it would not defend in their entirety. *Id.* at 20–21.

Since the filing of the United States' opening brief, the United States conceded additional cost for fiscal years 2011 through 2013. Second Campbell Decl., ¶ 4. The activity costs conceded for fiscal years 2011 through 2013 align the PTIN user fee determined by the 2010 Cost Model with the 2019 Cost Model and concede RTRP Program costs invalidated by *Loving* and any other non-PTIN related activity. *Id.*, ¶ 5. The result of the concession effectively reduces the PTIN user fee an additional $2.95 from the opening brief, thus adjusting the $50 fee to only $14.05. In other

words, the United States concedes 72% of the original PTIN user fee cost activities for fiscal years 2011 through 2013. The chart below shows the adjusted per-PTIN user fee by dividing the three-year concession amount by the three-year PTIN registration total.

	FY 2011	FY 2012	FY 2013	3- Year Total
Concession[5]	$26,576,661	$26,623,420	$25,685,247	$78,885,328
PTIN Registrations[6]	739,318	740,620	714,520	2,194,458
Concession per PTIN				$35.95

Plaintiffs contend that additional "administrative costs" need to be trimmed around the edges to create a perfect PTIN user fee model for fiscal years 2011 through 2013. Dkt. No. 185 at 12–13. But the fee need not be perfect; it needs to be reasonable. *Sperry Corp.*, 493 U.S. at 65. By performing a retroactive review of the 2010 Cost Model, tantamount to what the IRS would do on remand, the concession has razed the user fee down and is now undoubtably charging only for items that are reasonably related to PTIN activities. Second Campbell Decl., ¶¶ 5–6. The Court should grant summary judgment for the United States and find that the adjusted $14.05 PTIN user fee for fiscal years 2011 through 2013 is reasonable.

2. <u>Fiscal years 2014 through 2015</u>

The United States' opening brief explained that after its concession, the PTIN user fee was adjusted from $50.00 to $37.75 for fiscal years 2014 and 2015. Dkt. No. 178-1 at 23. A detailed explanation of the activity costs conceded is in the declaration of RPO Director Carol Campbell. Dkt. No. 183-2, ¶ 8.

It is unclear from Plaintiffs' Opposition specifically which costs for fiscal years 2014 and 2015 they contend are excessive as they have commingled fiscal years 2011 through 2013 with fiscal years 2014 and 2015. Plaintiffs attack the forward-looking projected costs (three years out)

[5] Second Declaration of Carol Campbell ¶¶ 4 and 6.
[6] Def. Appx. Ex. 49.

under OMB Circular A-25 because they are not exact down to the penny. But courts have never required the cost models to be perfect—only that they are approximately correct. *Nat'l Cable Television Ass'n, Inc.*, 554 F.2d at 1105. In *Central & S. Motor Freight*, the plaintiffs similarly objected to administrative costs that the court rejected as "quibbling over trifles at its worst." *Cent. & S. Motor Freight Tarif Ass'n. Inc.*, 777 F.2d at 738. The Court held that as long as the agency's decisions were reasonable, even if they add some additional costs, the Court should uphold the fee schedule because the Court does "not sit as a board of auditors, steeped in accountancy and equipped to second-guess an estimate . . . ." *Id.* The same legal standard applies to results of the backward-looking analysis required by the changing legal landscape after *Loving* and *Montrois*. Because Plaintiffs failed to rebut the reasonableness of the costs in the readjusted PTIN user fee for 2014 and 2015, the Court should find that the adjusted $37.75 PTIN user fee for fiscal years 2014 and 2015 is reasonable.

3. <u>Fiscal Years 2016 and 2017</u>

The United States' opening brief explained that after its concession, the PTIN user fee was adjusted from $33 as determined by the 2015 Cost Model to $24. Dkt. No. 178-1 at 24. A detailed explanation of the activity costs conceded is in the declaration of RPO Director Carol Campbell. Dkt. No. 183-2, ¶ 10. As a catchall, Plaintiffs complain that unidentified "operational costs" are excessive. Dkt. No. 185 at 14. Like Plaintiffs' quibbles with the fiscal year 2011 through 2015 user fee, the Court should reject Plaintiffs' request in the face of a reasonable fee schedule and a reasonable concession.

Plaintiffs more specifically allege that certain Suitability activity costs and Compliance activity costs included in the PTIN user fee for fiscal years 2016 and 2017 are excessive. Dkt. No. 185 at 14–16. Plaintiffs' arguments either misstate the facts or rely on evidence that does not

support their position that the PTIN user fee for fiscal years 2016 and 2017 was not reasonable.

Suitability Department: For the Suitability department, the 2015 Cost Model included 100% of the Suitability department's activity costs for fiscal years 2016 and 2017. Dkt. No. 183-2, ¶ 10 ("Suitability" row in chart). The concession adjusts the allocation to 71.5% based on what the government determined are costs reasonably related to PTIN-related activities (*i.e.,* PDC, SDN checks, Prisoner List checks, and referrals). *Id*. Although the Suitability department was one of the departments most impacted by the *Loving* decision, costs associated with non-PTIN activities were removed from the user fee. Dkt. No. 173-2, ¶¶ 42–43.

It is reasonable to include the PDC, SDN checks, Prisoner List checks, and Suitability referrals in the PTIN user fee. The United States explained how each of these activities is a direct or indirect cost that is reasonably related to the PTIN Program. Dkt. No. 183 at 20–24. Plaintiff's Opposition, however, mistakenly states that the "IRS argues that because it is entitled to regulate tax practitioners, it is allowed to include some of the costs of regulating them (i.e., professional designation checks) in the PTIN fee." Dkt. No. 185 at 14. Plaintiffs distort the United States' position. The IRS is not regulating the credentials or suitability of some or any return preparers when it performs a PDC. It is merely verifying that the credential self-reported to the IRS by a return preparer is accurate. Except for Enrolled Agents, which are subject to a separate user fee not at issue here, the Suitability department has no part in an individual's actual credentialing. PDC is about identification of return preparers—not regulation of return preparers' credentials.

Finally, the Plaintiffs wrongly state the IRS is including costs related to the Annual Filing Season Program (AFSP) as part of the cost of running Suitability. It is not. While the AFSP is administered by the RPO, it is not part of what the IRS considers a PTIN-related activity and is not included in the PTIN user fee. These costs have been removed as part of the concessions for

fiscal years 2016 and 2017. Dkt. No. 183-2, ¶¶ 8, 10 ("Suitability" row).

Compliance Department: The 2015 Cost Model allocates 100% of the Compliance department's activity costs to the PTIN user fee. Dkt. No. 183, ¶ 10 ("Compliance/Complaint Referrals" row). The government's concession includes a concession for the partial reduction of costs related to one employee for work performed on non-PTIN related activities. *Id*.

Plaintiffs argue that the PTIN user fee for fiscal years 2016 and 2017 for the Compliance department was excessive because the fee included "costs related to ensuring the preparation of compliant tax returns, proper use of the earned income tax credit, and compliance with e-file requirements." Dkt. No. 185 at 16. Plaintiffs also complain that the Compliance department was handling referrals related to disciplinary decisions requiring review by the Office of Professional Responsibility, and issues related to Circular 230. *Id.* In support of this argument, they cite Ex. BV (Dkt. No. 186-1) and Ex. BW (Dkt. No. 186-2). Ex. BV is a Compliance and Enforcement Employee Desk Guide from November 2011, and Ex. BW is a general RPO "Context Document" from August 2012. These documents predate the *Loving* decision and are not representative of what Compliance was doing in fiscal years 2016 and 2017. The IRS has conceded any costs related to non-PTIN activities including Circular 230 issues, work done on behalf of the Office of Professional Responsibility, and e-filing. *See* Dkt. No. 183-2, ¶¶ 8, 10. Plaintiffs' argument is unsupported by the facts.

Finally, Plaintiffs argue that Compliance department activities cannot be considered enforcement activities properly included in the PTIN user fee because the IRS chose not to delegate penalty authority to the RPO. *See* Ex. CO (Dkt. No. 186-20) at 59:10–61:25. As explained, the Compliance department activities center on identifying return preparers who do not comply with the PTIN requirement, processing complaints against return preparers, and identifying activities

for enforcement referrals against return preparers who misuse a PTIN. Dkt. No. 183 at 19. Compliance conducts the initial research of finding noncompliant return preparers failing to furnish valid identifying numbers and then supplies that information to other IRS business units outside the RPO authorized to assess penalties. Dkt. No. 173-2 at 8–10. The costs associated with this work are incurred by these non-RPO business units and are not part of the PTIN user fee. The IRS should not be penalized for making sound and reasonable business decisions that lessen the cost to the PTIN holders. In any event, even under the Plaintiffs' incorrect "necessary" standard, they fail to explain why it would not be "necessary" for the Compliance department to have the authority to assess penalties. The Court should find the $24 PTIN user fee for fiscal years 2016 and 2017 as reasonable.

B. The United States can rely upon the 2013 and 2019 Cost Models.

Plaintiffs argue that the IRS cannot rely on its 2013 Cost Model because it did not issue a new regulation. Plaintiffs are wrong. Biennial reviews are required under the IOAA. The IRS can rely on a biennial review whether or not it issues a new regulation. Plaintiffs also argue that the IRS cannot rely on its 2019 Cost Model because it allegedly prejudices them and violates an agreement between the parties. Dkt. No. 185 at 9. However, the Government may use cost models to convey the reasonable way it analyzed its concessions.

2013 Cost Model: When an agency enacts a user fee, OMB Circular A-25 requires that the agency conduct a biennial review of the user fee. This requirement establishes reviews of the user charges for agency programs to (1) ensure that existing charges are adjusted to reflect unanticipated changes in cost or market value; and (2) review all other agency programs to determine whether fees should be assessed for other Government goods or services. OMB Cir. A-25 at Sec. 8.e. If upon completion of the review the agency discovers an "unanticipated change in cost," then a new regulation noticing the public of the change in the fee would be required. The

2013 biennial review produced a cost model that reflected an upward adjustment from the inaugural 2011 PTIN user fee. The IRS decided not to increase the fees and kept the existing regulation in place. Dkt. No. 173-2, ¶¶ 84–85.

Plaintiffs argue that the IRS cannot rely on the 2013 Cost Model because it did not issue a no-change regulation. Dkt. No. 185 at 6–8. Plaintiffs' argument is void of support. First, the IRS did implement the PTIN user fee by regulation when it implemented the fee. There is no requirement to issue a regulation when there is no new fee enacted by the government. *See E.P.I.C. v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 5–6 (D.C. Cir. 2011) (notice and comment rulemaking are only required when an agency enacts a new substantive "legislative" rule) (citing 5 U.S.C. § 553). Plaintiffs mistakenly conflate OMB Circular A-25's requirement to periodically check to see if a fee adjustment is necessary, with a requirement that *all user fees* enacted by the government must be published in the Federal Register every two years. There is no legal support to justify such a burden on the government when it is remains in status quo.

Plaintiffs also claim the IRS's own internal policies require publishing a regulation every two years for a user fee to be valid. Dkt. No. 185 at 12. But the information they rely on says no such thing. The cited records merely acknowledge the IRS is required to promulgate a user fee by regulation and that it would need a "regulation changed *to change* the user fee." *Id*. (emphasis added). And that is precisely what happened: the IRS promulgated its PTIN user fee by regulation in 2010 and determined that it did not need to be changed until fiscal year 2016, when the results of the 2015 biennial review concluded that the fee should be reduced. 75 Fed. Reg. 60,316 (Sept. 30, 2010); 80 Fed. Reg. 66,792 (Oct. 30, 2015); Dkt. No. 173-2, ¶¶ 52, 84–85, 94.

2019 Cost Model: Government user fees do not exist in a vacuum. This is particularly true here where the scope of the program changed after the initial costing was conducted. While the

cost modeling process is a projection seeking to predict the reasonable costs to the agency for providing a service, OMB Circular A-25 requires them to be reviewed every two years. For these reasons, each cost model is learned from and brings necessary insight into the next cost model projections. Here, the IRS created the 2019 Cost Model allowing it to charge a PTIN user fee when the injunction was lifted. The 2019 Cost Model also serves as a guidepost for the IRS to review the fee charged in fiscal years 2011 through 2017 based on previous cost models created in 2010, 2013, and 2015. In other words, the IRS performed a retroactive review of previously charged fees using current information (post-*Loving*).

Plaintiffs object to the Government's use of the 2019 Cost Model to inform its concessions for earlier years. Plaintiffs are asking this Court and the IRS to pretend the 2019 Cost Model does not exist; to not draw on experience and knowledge of its operations; and to not consult all reliable information to concede costs in prior years. Not considering the information it has acquired over the last decade would be the very definition of arbitrary and capricious, and plainly unreasonable.

Plaintiffs argue that the IRS cannot use the 2019 Cost Model as a tool to consider the reasonableness of the past fees because it allegedly prejudices them and violates an agreement between the parties. Dkt. No. 185 at 9. Plaintiffs are wrong. For the very reasons stated above, the parties stipulated that information about current operations of the IRS Return Preparer Office is relevant to understanding the period 2010 through 2017. Dkt. No. 144, ¶ 4. The 2019 Cost Model was provided to Plaintiffs' counsel during discovery and "Plaintiffs thoroughly analyzed it." Dkt. No. 188-1 at 1–2; Dkt. No. 188-2 at 2–4. Nothing prevented the Plaintiffs from asking questions during their depositions about the 2019 Cost Model. They could have used the 2019 Cost Model just as the United States uses it now—to explain how a post-*Loving* cost model impacts how the prior models would have looked if the IRS had the benefit of hindsight. The United States is not

seeking prospective judgment for future PTIN user fees. It is simply conveying the reasonable way it analyzed its concessions—how the IRS would have charged the PTIN user fee from 2011 through 2017 if it had known then what it knows now. The IRS's retroactive review approach is consistent with the remand approach taken in cases where an agency cannot show the reasonableness of its fee and the Court remands the issue to the agency to further explain the basis of a fee retroactively. *Engine Mfrs. Ass'n*, 20 F.3d at 1184.

IV. The Accenture vendor fee portion of the PTIN user fee was properly promulgated by regulation.

The IRS contracted with Accenture to develop the TPPS database responsible for issuing PTINs to tax return preparers. Dkt. No. 173-2, ¶ 113. Accenture won a contract to provide the TPPS through a competitive bidding process. *Id.,* ¶ 114. The Plaintiffs' opening brief alleged that the Accenture vendor fee was excessive—they did not argue the vendor fee was not a direct or indirect cost of the PTIN Program. Dkt. No. 175 at 18–20. The basis for their argument was that after the Accenture vendor fee was established in 2010, additional releases and modified contracts between the IRS and Accenture added costs and capabilities beyond what is necessary for the PTIN Program. *Id.* However, this is simply factually inaccurate. The evidence shows that the vendor fee was determined based on the first release which includes only those limited capacity functions that the Plaintiffs' opening brief conceded were allowed. Dkt. No. 183 at 28–29; Dkt. No. 177-8 (Pl. Ex. Y). In any event, the fee is presumptively reasonable because the contract was awarded through the competitive bid process. Dkt. No. 183 at 27. And, the Accenture vendor fee was a part of the PTIN user fee promulgated by regulation. Dkt. No. 173-2 (D. SUMF), ¶ 112. Plaintiffs do not dispute this fact. Dkt. No. 175-2 (Pl. SUMF), ¶¶ 36–37. In their opening brief, Plaintiffs only challenged a small portion of the fee as unreasonable. Dkt. No. 175 at 22–24.

Now at the eleventh hour, Plaintiffs contradict their own motion for summary judgment

and argue that the Accenture vendor fee must be refunded entirely because it was not established by regulation. Dkt. No. 185 at 21–25. The Court should deny their argument because (1) it contradicts the holding in *Montrois*; (2) Plaintiffs failed to raise this issue in their amended complaint; and (3) the Accenture fee was noticed in the regulations.

Law-of-the-case doctrine ensures that "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). Both parties recognized that the PTIN user fee, which is collected as one lump sum, consists of the agency portion and the Accenture vendor fee portion. The *Montrois* Court has already held that the IRS has the statutory authority to charge a PTIN user fee, and the D.C. Circuit recognized that the PTIN user fee included the Accenture vendor fee portion. *Montrois*, 916 F.3d at 1059 (noting the PTIN user fee and Accenture vendor fee were charged to, among other things, "cover the cost of the development and maintenance of the IRS information technology system associated with PTINs."). The Plaintiffs have repeatedly asked this Court to confine the PTIN user fee to the costs of "issuing and maintaining a database of PTINs" under the *Montrois* holding. Dkt. No. 175 at 2, 17, 19, and 23; Dkt. No. 185 at 1, 2, 17, and 20. Now Plaintiffs argue that this Court should disregard the *Montrois* holding and determine that the IRS cannot recover costs associated with TPPS. Not only does Plaintiffs' argument strain credulity, but it also violates the law-of-the-case doctrine and must be rejected.

Plaintiffs' argument must also be rejected because this issue was not raised in their second amended complaint (Dkt. No. 148), and a party may not amend a complaint by sneaking in an extra theory of liability through an opposition brief. *Harris v. Tr. of Univ. of D.C.*, 567 F. Supp. 3d 131, 154 (D.D.C. Sept. 25, 2021) (denying plaintiff's attempt "to sneak in" another theory of liability through opposition briefing because "[i]t is axiomatic that a party may not amend [her]

complaint through an opposition brief") (quoting *Singh v. District of Columbia*, 55 F. Supp. 3d 55, 70 (D.D.C. 2014)).

In any event, the facts do not support the Plaintiffs' allegation. The IRS did, in fact, promulgate the vendor portion of the PTIN user fee when it promulgated the fee. In the IRS's July 23, 2010, Notice of Proposed Rulemaking NPRM), the IRS announced that it would be implementing a PTIN user fee that would include a reasonable vendor fee. 75 Fed. Reg. 43,110. The proposed rule noticed the public that as a part of the fee, the vendor will administer the PTIN application and renewal process and develop a database that the individuals will use to apply for and renew the PTIN. *Id*. The NPRM further stated the PTIN user fee recovers the costs the government incurs to administer the PTIN application and renewal process including noting that "[t]hese costs include the development and maintenance of the IRS information technology system that interfaces with the vendor and the development and maintenance of internal applications that will have the capacity to process and administer the anticipated increase in applications for a PTIN." *Id.* In its final rule, the IRS announced the amounts of both the agency and vendor portions of the PTIN user fee. 75 Fed. Reg. 60,316 (Sept. 30, 2010). And every regulation that has announced a change in the PTIN user fee since the 2010 innaugural PTIN user fee was determined has likewise referred to the vendor fee. *See* 80 Fed. Reg. 66,792 (Oct. 30, 2015); 85 Fed. Reg. 43,433 (July 17, 2020).

Plaintiffs take certain language from the regulations out of context. The IRS portion of the fee was based on the activity cost calculation and therefore open to notice and comment on reasonableness, while the vendor fee used processes that were created to generate a reasonable result as to the amount of the fee. 48 C.F.R. § 15.305 (a)(1); *Femme Comp Inc. v. United States*, 83 Fed. Cl. 704, 754 (2008). The vendor fee portion of the PTIN user fee is reasonable as a matter

of law because the federal procurement bidding process was followed and there was no challenge. The Court should uphold the vendor fee portion of the PTIN user fee for each of the years at issue.

V. **The United States is entitled to restitution for the PTIN user fees it was enjoined from collecting and the form of that restitution is an offset of the uncollected PTIN user fees against the total liability owed to the class.**

After the Court enjoined collection of the PTIN user fee, the United States moved for a stay of the injunction pending appeal. The Plaintiffs objected, arguing that the United States would not suffer irreparable harm because, if it prevailed on appeal, the United States could always make a claim against the PTIN holders. Dkt. No. 85 at 19. The Court agreed. Dkt. No. 95 ("First off, the Court is not convinced that the government will be unable to recoup uncollected fees should they ultimately prevail. While it might not be easy, the government is unable to say with absolute certainty that a restitution claim would not be viable."). The United States has now properly raised the restitution claim through offset as part of its Answer to the Plaintiffs' Amended Complaint. Dkt. No. 155 at 2. Plaintiffs object to the United States' offset claim. Dkt. No. 185 at 20–26.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . .." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee,* 156 U.S. 680, 689 (1895)). Judicial estoppel, therefore, "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Davis v. Dist. of Columbia*, 925 F.3d 1240, 1255 (D.C. Cir. 2019) (quoting *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010) and *New Hampshire*, 532 U.S at 749)). At the injunction stage, Plaintiffs successfully argued the United States could always make a claim against the PTIN holders. Dkt. No. 85 at 19; Dkt. No. 94. Thus, they are estopped from assuming a contrary position and opposing the United States' offset. *New Hampshire*, 532 U.S at 749; *Davis*, 925 F.3d at 1255.

Plaintiffs argue that the United States should have raised the offset claim as a counterclaim and not an affirmative defense. Dkt. No. 155 at 20. Plaintiffs are wrong. "Setoff is an affirmative defense under Federal Rule of Civil Procedure 8(c)." *Regency Commc'ns, Inc. v. Cleartel Commc'ns, Inc.*, 304 F. Supp. 2d 1, 6 (D.C.C. 2004) (Lamberth J.) (omitting citations). An affirmative defense, if proven, will reduce or eliminate a plaintiff's recovery. *F.D.I.C. v. Stovall*, 2014 WL 8251465, *2 (N.D. Ga. 2014) ("The major difference between affirmative defenses and counterclaims is that counterclaims are bases on which a jury can award damages while . . . affirmative defenses are merely ways in which [a] defendant can avoid liability.") (internal citations and quotations omitted). Even if the Plaintiffs are correct, when a defendant mistakenly pleads an affirmative defense as a counterclaim, or vice versa, the court will treat it as having been properly designated and pleaded. Fed. R. Civ. P. 8(c)(2); *see also Reiter v. Cooper*, 507 U.S. 258, 263 (1993) (setoff claim mistakenly designated as defense treated as counterclaim); *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 107 (D.C. Cir. 2016) (discussing rule but finding it inapplicable). Even if the offset were considered a counterclaim against the class (which it is not), Plaintiffs admit it would still be properly part of this case. Dkt. No. 185 at 25 (relying on *Allapattah Servs., Inc. v. Exxon Corp.,* 333 F.3d 1248 (11th Cir. 2003) ("[T]he appropriate time for a class action defendant to raise affirmative defenses and set-off is during the damages phase.").

Substantively, the United States is entitled to an offset because members of the class paid to obtain a PTIN for at least one year and members of the same class also obtained a PTIN for free during the time the IRS was enjoined from charging for a PTIN. Plaintiffs argue that their single class "consists of people who paid" PTIN user fees "between 2010 and 2017" and therefore that the PTIN registrations or renewals for later years (including the free PTIN transactions for 2018 through 2020) "involve[ ] a different set of transactions for a different group of people," and thus

those who received a PTIN during the injunction are not class members even though they paid for PTINs in other years. Dkt. No. 185 at 20.

But that is contradicted by the Second Amended Complaint, which alleges that return preparers who paid PTIN user fees "for the Period 2020 and thereafter" are class members even though they did not pay a PTIN user fee prior to the injunction. Dkt. No. 148 (2d Am. Compl., ¶¶ 55–59). Plaintiffs assert that at least 289,716 individuals are class members even though they had not paid for a PTIN at any time during 2011 through 2017, but had paid for a PTIN for the first time in 2020 or thereafter. Dkt. No. 168 at 2 (Pl. Mtn. Suppl. Class Notice).

As shown in the table below, each year about 100,000 return preparers who obtained a PTIN for the prior year do not renew that PTIN for the next year. But also, each year, about 100,000 other individuals register for a PTIN for the first time. As a result, the total number of PTIN holders has remained generally about the same, even though there is about a 100,000 person "churn" among PTIN holders annually:

PTIN Registrations and Renewals by Fiscal Year (Oct. 1 thru Sept. 30)[7]

	2011	2012	2013	2014	2015	2016	2017	2018
Registrations	739,318	124,805	93,053	91,295	103,137	102,376	92,715	124,830
Renewals	--	615,814[8]	621,467	622,037	632,511	646,764	660,896	682,857
Total	739,318	740,619	714,521	713,332	735,649	749,139	753,611	807,687

[7] Sources: Dkt. No. 174-47 (RPO Monthly Budget Update (Oct. 12. 2017) (PTIN counts for 2011 through 2017 at USA-0012614); Dkt. No. 143-25 (RPO Business Performance Review – FY2019 – Quarter 2 (May 23, 2019) (PTIN counts for 2018 and partial counts for 2019 at USA-0001440).

[8] For clarity, there were only PTIN registrations in FY2011 and no mandatory PTINs yet ripe for renewal in 2011, as shown in the "–" mark in the Renewals cell for 2011. For 2012, there are 124,805 registrations by new return preparers apart from the 739,318 return preparers who had registered in 2011. The Renewal total of 615,814 for 2012 shows that of the 739,318 registrants for the prior year, only 615,814 of those 2011 registrants renewed their PTIN for 2012. By simple subtraction that means that of that same 739,318 PTIN holders for 2011, the other 123,504 registrants did not renew their PTIN for 2012.

There is no support for Plaintiffs' class member by class member challenge to the offset defense. Despite the 100,000-person annual churn in PTIN holders, in their motion for class certification, Plaintiffs assured the Court that the legal and factual issues, specifically the question "Are the PTIN fees imposed by the IRS excessive?" are common to the class. Dkt. No. 46 at 4. Plaintiffs argued for a singular class, irrespective of how many returns each class member prepared or how many years each class member paid the PTIN user fee. *Id.*; *see also* Dkt. No. 53. Plaintiffs sought certification of a class of all individuals and entities who, at any time, paid an initial or renewal PTIN user fee. Dkt. No. 46 at 1. Again, Plaintiffs are estopped from changing course halfway through this litigation. *Davis*, 925 F.3d at 1255. Plaintiffs cannot argue now that there are a "different set of transactions" for a "different group of people" having succeeded at class certification based on common legal and factual issues for all class members. Dkt. No. 55. The United States is entitled to reduce its total liability to Plaintiffs' pleaded single class via its pleaded offset Affirmative Defense. *See In re Pharm. Ind. Ave. Wholesale Price Lit.,* 582 F.3d 156, 197 (1st Cir. 2009) ("[a]ggregate computation of class monetary relief is lawful and proper" and is "implied by the very existence of the class action mechanism itself"); *Hickory Sec. Ltd. v. Republic of Argentina,* 493 F. App'x 156, 159 (2d Cir. 2012) (while an aggregate monetary relief calculation that "bear[s] little or no relationship to the economic harm actually caused by defendant[ ]" is not valid, it will be sufficient if it "roughly reflect[s] the aggregate amount owed to class members").

At a later claims administration stage, Plaintiffs can then propose an uneven distribution to class members for the Court to consider. *Nat'l Veterans Legal Servs. Program v. United States*, 235 F. Supp. 3d 32, 44 (D.D.C. 2017) ("Calculating the amount of damages would be ministerial because it would be proportional to the fees that plaintiffs paid"); *see also* Dkt. No. 46 at 7

(Plaintiffs conceding that "And the sole individual issue—calculation of the amount of each class member's restitution, which depends on how many PTIN fees they have paid—is ministerial.").[9]

Even if "strict mutuality" and "valid debt" requirements apply on a class member by class member analysis, as Plaintiffs' claim, *see* Dkt. No. 185 at 21, the United States still has a substantial offset defense because many return preparers who paid for a PTIN in some year (thereby qualifying as a class member) also obtained a PTIN for free at least sometime during 2018, 2019, or 2020 (e.g., as shown by the table above, in 2018 alone, 682,857 class members who had previously paid for a PTIN then renewed that PTIN for free). Plaintiffs' "strict mutuality" requirement is thus met for those particular class members. And a "valid debt" is established by the restitution owed, which Plaintiffs already confessed to on behalf of the class when it sought the injunction. Dkt. No. 85 at 19; Dkt. No. 94.

VI. **Conclusion**

For the reasons stated above, the Court should find that the adjusted PTIN user fees for fiscal years 2011 through 2017 are reasonable. The Court should further order that any liability to the class must be offset by the United States' restitution claims.

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[9] Indeed, regardless of the United States' Affirmative Defense, Plaintiffs will have to propose an uneven distribution to class members for the court to consider. Although not specifically provided for, one cannot imagine that Plaintiffs intended for someone who paid for a PTIN in a single year to collect the same amount as someone who paid for a PTIN for seven years. Similarly, someone who availed themselves of a free PTIN should be required to offset their recovery by that fee. In both situations, it would require only simple math for the administrator to make these adjustments.

Dated: July 8, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY was filed with the Court's ECF system which system serves electronically all filed documents on the same day of filing to all counsel of record.

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