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,	)	Case No. 1:14-cv-1523-RCL
Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Everyone who prepares tax returns for compensation must obtain a preparer tax identification number ("PTIN") and pay an associated user fee ("PTIN User Fee"). *See* Treas. Reg. § 1.6109-2(d). Under the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701, Congress authorized federal agencies to charge a user fee for providing a "service or thing of value." The "service or thing of value" provided by a PTIN is the ability to prepare tax returns for compensation.

The named plaintiffs in this case are two certified public accountants ("CPAs") and one attorney. They seek to represent a proposed class of approximately 1.1 million[1] individuals who paid one or more user fees to obtain and/or renew a PTIN. The proposed class is comprised of CPAs, attorneys, enrolled agents ("EA"), and unlicensed tax return preparers.

Plaintiffs' complaint seeks prospective and retrospective relief under two separate legal theories. *First*, plaintiffs contend that the "IRS lacks legal authority to charge a fee for the issuance or renewal of a PTIN." (Doc. 41, ¶39.) They demand the return of all PTIN User Fees paid to date and an order that the IRS cannot charge such fees going forward. *Second*, plaintiffs contend that, even if the IRS has legal authority to charge the PTIN User Fee, the amount charged is excessive under 31 U.S.C. § 9701, because it "include[s] costs attributable to the public benefit and do[es] not reasonably

[1] Approximately 1.1 million people have paid at least the initial PTIN User Fee from 2011 through 2015. It is estimated that approximately 700,000 currently have PTIN.

reflect the value of the specific service for which they are charged." (Doc. 41, ¶46.) They demand the return of the excessive portion of the fees charged to date and an order that the Service can only charge a reduced amount going forward.

Plaintiffs' retrospective claims seek monetary relief on an individual basis. The Supreme Court has ruled that, in a class action, individual claims for monetary relief must be brought under Rule 23(b)(3). Plaintiffs' claims, however, cannot meet the requirements of Rule 23(b)(3) because individual issues predominate over class issues. Specifically, whether the fee is excessive under section 9701 requires an individualized inquiry into each prospective class member's individual circumstances.

Plaintiffs' prospective claims for injunctive relief can only be certified under Rule 23(b)(2). But no class can be certified under Rule 23(b)(2) because plaintiffs' claims impermissibly impair the rights of unnamed CPAs, attorneys, and EAs to seek relief or alternative theories not available to unlicensed return preparers.

Plaintiffs' motion for class certification must therefore be denied because the proposed class does not satisfy the requirements of Federal Rule of Civil Procedure 23.

STATEMENT OF THE CASE

A. History of the PTIN

The regulation of the ability to prepare tax returns for compensation is a natural byproduct of longstanding concerns regarding fraudulent tax preparation. In 1927, the Chairman of the Treasury Department's Committee on Enrollment and Disbarment explained:

> The growth of tax practice, with the large interests involved and enormous fees obtainable, attracted many incompetent and dishonest practitioners, and it became imperative that as a protection to the Government and to the public there should be a more careful investigation as to the character and qualifications of applicants for enrollment and that practitioners already enrolled be held to a higher standard of conduct.

S.R. Jacobs, Practice Before the Treasury Department, Int. Rev. News, Sept. 1927, at 6.

In general, a "Tax Return Preparer" is "any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed by this title or any claim for refund of tax imposed by this title." 26 U.S.C. § 7701(a)(36). Before, 1976, however, "it was difficult for the IRS to determine if a preparer or the taxpayer himself was responsible for a return. Moreover, if the IRS found an incorrect return prepared by a professional or commercial preparer, it was difficult to trace other returns prepared by the same preparer." *Goulding v. United States*, 957 F.2d 1420, 1424 (7th Cir. 1992). In 1976, Congress enacted legislation to help the IRS regulate tax return preparers as problems were increasing with the "substantial increase in the number of persons whose business is to prepare income tax returns for individuals and families of average income." H.R. Rep. No. 658, 94th Cong., 2d Sess. 274, reprinted in 1976 U.S.C.C.A.N. 2897, 3169.

Among other provisions, Congress passed 26 U.S.C. § 6109, which required tax return preparers to include an identifying number on the returns they prepare. *See* 26 U.S.C. § 6109(a)(4). Absent the required identifying number, a return preparer is not permitted to prepare and file tax returns for others for compensation. Section 6109(d) permits return preparers to use their social security number ("SSN") as their

identifying number "except as shall otherwise be specified under regulations of the Secretary." Until 1999, return preparers were required to place their SSN on the returns they prepared.

Responding to concerns of identity theft, and other apprehensions regarding the use of SSNs, the IRS authorized the use of an alternative to the SSN to identify tax return preparers. TD 8835; IRS News Release, IR-1999-72, IRS to Issue Alternative Identification Numbers for Tax Preparers (Aug. 24, 1999). That alternative was the PTIN; return preparers could now apply for a PTIN, and use that identifying number instead of their SSN.

The IRS launched a comprehensive review of tax return preparers in June 2009 with the "twin goals of increasing taxpayer compliance and ensuring uniform and high ethical standards of conduct for tax preparers." Press Release, "IRS Launches Tax Return Preparer Review," IR-200957 (June 4, 2009). To this end, the IRS urged stakeholders to come forward and comment on how best to achieve these targets; it reached out to a large and diverse community though public forums, solicitation of written comments, and meetings with advisory groups. Regulations Governing Practice Before the Internal Revenue Service, 76 FR 32286-01 (June 3, 2011). The Service published its findings and recommendations in Publication 4832, "Return Preparer Review," on January 4, 2010 (the "Report").

The Report recommended increased oversight of the tax return preparer industry through the issuance of regulations. To implement some of recommendations, Treasury promulgated the final rule requiring the use of a PTIN on prepared returns, *see* 75 Fed.

Reg. 60309 (TD 9501), and the final rule requiring PTIN User Fees, *see* 75 Fed. Reg. 60316 (TD 9503). For returns or claims for refund filed after December 31, 2010, the identifying number of a tax return preparer is "the individual's preparer tax identification number (PTIN) or such other number prescribed by the IRS in forms, instructions, or other appropriate guidance." 75 F.R. 60309 (TD 9501). The regulation streamlined the identifying number allowing only the use of the PTIN, and took away the option to use the SSN.

B. Authority under the IOAA and the *Brannen* Decision

Under 31 U.S.C. § 9701, agencies are permitted to promulgate regulations that establish a fee for a service or thing of value that the agency provides. Those fess are required to be: "(1) fair; and (2) based on—(A) the costs to the Government; (B) the value of the service or thing to the recipient; (C) public policy or interest served; and (D) other relevant facts." 31 U.S.C. § 9701(b). In interpreting the statute's predecessor, the Supreme Court held that agencies are permitted to levy fees based on services rendered, but not levy taxes, which is the exclusive domain of the legislature. *See National Cable Television Association, Inc. v. United States*, 415 U.S. 336 (1974). A user fee will be justified under the IOAA if there is a sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed. *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 182-83 (D.C. Cir. 1996).

In *Jesse E. Brannen, III, P.C. v. United States*, the Eleventh Circuit addressed whether the PTIN User Fee was justified under section 9701. *See* 682 F.3d 1316, 1317 (11th Cir. 2012). The Eleventh Circuit explained that "since 1976, the

Department has had the power to require tax return preparers to include an identifying number on the returns they prepare." *Id.* at 1318 (citing 26 U.S.C. § 6109(a)(4)). Section 6109(a)(4) provides:

> (a) Supplying of identifying numbers.—When required by regulations prescribed by the Secretary:
> ...
> (4) Furnishing identifying number of tax return preparer.—Any return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed.
>
> 26 U.S.C. § 6109(a)(4).

Before the 2010 regulations, tax return preparers were permitted by section 6109(d) to use either their social security numbers or obtain a PTIN; "however, in that same subsection, Congress expressly provided that the Secretary could by regulation require that a number other than the social security number be used." *Brannen*, 682 F.3d at 1318 (referring to the language that stated "except as shall otherwise be specified under regulations of the Secretary"). The court held that 31 U.S.C. § 9701 and 26 U.S.C. § 6109 provide statutory authority for PTIN User and User Fee regulations. *See id.*

The term "tax return preparer" is defined by 26 U.S.C. § 7701(a)(36) as meaning "any person who prepares tax returns for others for compensation." The requirement that any return prepared by a tax return preparer bear the preparer's assigned identifying number means that a tax return preparer cannot prepare tax returns for others for compensation without having the required identifying number. *Brannen*, 682 F.3d at 1318. Furthermore, because section 6109(a)(4) expressly authorizes the Secretary to assign such numbers, a person cannot prepare tax returns for another for

compensation unless that person obtains from the Secretary the required identifying number. When the Secretary assigns a PTIN, "the Secretary is conferring a special benefit upon the recipient, i.e., the privilege of preparing tax returns for others for compensation." *Brannen*, 682 F.3d at 1319. The Eleventh Circuit also noted there is nothing in the language of section 9701, "nor in logic," that prohibits an agency from implementing a fee for services that it had previously provided for free. *Id.* at 1320.

C. Plaintiffs' Complaint

Plaintiffs' complaint is comprised of two claims. *First*, plaintiffs argue that tax return preparers have been unlawfully required by the IRS to pay for the acquisition and renewal of a PTIN. Plaintiffs contend that there is no legal authority under 31 U.S.C. § 9701 (the "IOAA") "or any other statute" authorizing the fee. (Compl, ¶44 (Doc. 41). They further contend that tax return preparers receive no "specific" or "special benefit" or "thing of value" in registering and obtaining a PTIN. (*Id.*, ¶41.) Instead, they argue that the use of the PTIN is for the sole benefit of the IRS. (*Id.*, ¶40.) Thus, they argue charging a fee for the PTIN constitutes "unlawful agency action" under the Administrative Procedures Act ("APA"), 5 U.S.C § 706(2), and violates plaintiffs' due process rights by imposing and collecting fees that are not legally authorized. (*Id.*, ¶43.)

Second, plaintiffs alternatively argue that, if 31 U.S.C. § 9701 does authorize the IRS to charge a fee for the PTIN, the fees are excessive because they "include costs attributable to the public benefit and do not reasonably reflect the value of the specific service for which they are charged;" nor do they "reasonably reflect the cost of services

performed by the IRS." (*Id.*, ¶46.) Plaintiffs claim their due process rights have been violated because the Service has illegally exacted unauthorized PTIN fees from plaintiffs. (*Id.*, ¶48.)

D. Plaintiffs' Proposed Class

Plaintiffs purport to represent a class of individuals made up of EAs, CPAs, attorneys, and unlicensed tax return preparers, all of whom have paid for the initial issuance and/or renewal fee for a PTIN. EAs, CPAs, and attorneys all have broad representation rights. They are generally unlimited as to which taxpayers they may represent, what types of tax matters they handle, and before which offices they can represent clients. *See generally* Understanding Who You Pay to Prepare Your Tax Return, https://www.irs.gov/uac/Newsroom/Understanding-Who-You-Pay-to-Prepare-Your-Tax-Return (last accessed on Nov. 13, 2015). Unlicensed tax return preparers may represent taxpayers under limited circumstances; they may only represent clients whose returns they prepared and signed, and only before revenue agents, customer service representatives, and similar IRS employees. *Id.* They cannot represent clients whose returns they did not prepare and they cannot represent clients on issues involving appeals or collection even if they did prepare the return in question. *Id.* Beginning in 2016, only unlicensed preparers participating in the voluntary Annual Filing Season Program will be able to engage in limited representation. *Id.* All other unlicensed tax return preparers will not.

EAs are licensed by the IRS. *Id.* *See also* Treasury Department Circular 230, § 10.4 (discussing eligibility to become an enrolled agent). They may represent taxpayers

before the IRS by virtue of having passed a comprehensive three-part tax exam, or through experience as a former IRS employee. *Id.* To be an EA, (other than through experience as an IRS employee) an individual must apply, pay a nonrefundable application fee, have a valid PTIN, pass an examination, pass compliance and suitability checks, and remain up-to-date with continuing education requirements through an approved continuing education provider. This involves 72 credit hours every three years, with a minimum of 16 hours per year, including two hours specifically in ethics. The Enrolled Agent must renew his status every three years.

CPAs are licensed by boards of accountancy in their location of practice. They must pass the Uniform CPA Examination, complete a study in accounting at an accredited college or university, and satisfy experiential and good character requirements established by their respective boards of accountancy. *See* Understanding Who You Pay to Prepare Your Tax Return, https://www.irs.gov/uac/Newsroom/Understanding-Who-You-Pay-to-Prepare-Your-Tax-Return (last accessed on Nov. 13, 2015). In addition, CPAs must adhere to certain ethical requirements and complete continuing education courses to maintain an active license.

Attorneys are licensed by state courts, and by their respective state bars or the District of Columbia. They have earned a degree in law and have passed a bar exam. They have ongoing continuing education requirements and must continuously satisfy high professional character and ethical standards. *Id.*

Unlicensed tax return preparers are all return preparers who do not fall under one of the aforementioned categories. They are not required to have any educational

degree or particular professional certification. They do not face any continuing educational obligations or pay any professional dues. Other than applying and paying for a PTIN, they are not subject to any other requirements or restrictions to prepare tax returns, unless they are enjoined from preparation through suit in federal court.

ARGUMENT

Federal Rules of Civil Procedure 23 governs class certification. Plaintiffs bear the burden of proving that all of the requirements of Rule 23 have been met. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). The Supreme Court has stated that "Rule 23 does not set forth a mere pleading standard"; rather, "[a] party seeking class certification must affirmatively demonstrate [its] compliance with the Rule—that is, [it] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal–Mart Stores, Inc. v. Dukes*, –– U.S. ––, 131 S. Ct. 2541, 2551 (2011) (emphasis in original). In determining whether to certify a class, district courts may be required to "probe behind the pleadings" in order to examine the factual and legal issues relevant to the merits of the plaintiffs' causes of action to the extent they are enmeshed with the Rule 23 requirements. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982). But district courts should "refrain from making determinations on the merits that are unnecessary to resolving the class certification question." *Lightfoot v. District of Columbia*, 273 F.R.D. 314, 323 n. 6 (D.D.C. 2011). As one court put it, "[u]ltimately, the district court's determination must rest on a 'rigorous analysis' to ensure that all the requirements are satisfied, and '[a]ctual, not presumed, conformance'

with Rule 23 is indispensable." *See Daskalea v. Washington Humane Soc.*, 275 F.R.D. 346, 356 (D.D.C. 2011) (quoting *Falcon*, 457 U.S. at 160–61).

Rule 23 has two components. *First*, plaintiffs must establish that the four requirements of Rule 23(a) have been met: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006). For purposes of this motion, the United States does not challenge whether the proposed class satisfies the Rule 23(a) requirements. *Second*, the proposed class must satisfy one of the three categories of action enumerated in Rule 23(b). When class certification is sought in a case raising claims under different legal theories, district courts may determine that certification is appropriate as to less than all of the legal theories raised. *See Daskalea*, 275 F.R.D. at 357 (citing *Dukes*, 131 S. Ct. at 2551) (denying class certification as to claims unsupported by the factual record because plaintiff failed to carry his burden of establishing the requirement of Rule 23 as to those claims). Because plaintiffs' proposed class cannot satisfy the requirements of any of the Rule 23(b) categories, class certification must be denied.

I. PLAINTIFFS' CLAIMS FOR MONETARY RELIEF CANNOT BE CERTIFIED UNDER EITHER RULE 23(B)(1) OR RULE 23(B)(3)

The Supreme Court has unequivocally stated that a class claim for monetary relief that is not incidental to anything else must be certified under Rule 23(b)(3) because the absence of the notice and opt-out requirements of (b)(1) otherwise violates due process. *Dukes*, 131 S. Ct. at 2558; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812

(1985). However, where individual issues predominate over class issues, certification under (b)(3) is also foreclosed.

A. Rule 23(b)(1) Certification Is Unavailable Where Plaintiffs Seek Individualized Monetary Relief.

A class may be maintained under Rule 23(b)(1) if:

> prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent of varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

A Rule 23(b)(1) class is mandatory and does not permit class members to opt out. *Dukes*, 131 S. Ct. at 2558. Because (b)(1) does not contain the "procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out," individualized monetary relief is foreclosed because "the absence of notice and opt-out violates due process." *Id.* at 2559 (citing *Shutts*, 472 U.S. at 812). As a result, the Supreme Court has ruled that, "where . . . the monetary relief is not incidental" to the ultimate relief sought, individualized monetary claims must be brought under Rule 23(b)(3), rather than Rule 23(b)(1) or (b)(2). *Dukes*, 131 S. Ct. at 2557; *see Daskalea*, 275 F.R.D. at 363-64.

Here, plaintiffs' retrospective claim seeks individualized monetary relief: the return of all or a portion of the amount of PTIN User Fee paid by each of the purported 1.1 million members of the proposed class. The monetary relief sought is not incidental

to any other relief. And the relief sought is individualized and not a limited or common fund, which precludes certification under Rule 23(b)(1)(B). *See In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 877 (citing *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 842 (1999)). Finally, plaintiffs' prospective claim seeks injunctive relief, which, for reasons discussed below, must be certified under Rule 23(b)(2). Accordingly, the proposed class cannot be certified under Rule 23(b)(1).

B. Rule 23(b)(3) Certification Is Unwarranted Because Individual Issues Predominate Over Class-Wide Issues.

Rule 23(b)(3) requires that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In making that determination, courts consider "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action. *Bynum v. Dist. of Columbia*, 214 F.R.D. 27, 39 (D.D.C. 2003) (describing Rule 23(b)(3)).

As a general matter, "predominance will exist where issues that may be proven or disproven through 'generalized evidence' on a 'simultaneous, class-wide basis' overshadow issues that require examination of each class member's individualized circumstances." *Daskalea*, 275 F.R.D. at 368 (citing *In re Vitamins Antitrust Litig.*, 209

F.R.D. 251, 262 (D.D.C. 2002)). The showing required for predominance is "far more demanding" than the one required to satisfy the commonality requirement under Rule 23(a). *Amchem*, 521 U.S. at 624. The essential inquiry is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Id.* at 623.

Plaintiffs' monetary claims are predicated on their contention that the Service does not provide any "service or thing of value" to return preparers that would justify charging the PTIN User Fee under 31 U.S.C. § 9701. Plaintiffs claim that because the Service allegedly does not provide such a benefit, they are entitled to the return of the amount of PTIN User Fee already paid. In the alternative, plaintiffs claim that the amount of PTIN User Fee is excessive in comparison to the benefit provided and they seek the return of the excessive portion of the PTIN User Fee.

Under either theory, the question at the heart of this case is whether the Service provides a "service or thing of value" to the prospective class members for which some amount of user fee may be charged under section 9701. If the answer requires an examination of the individual circumstances of each and every return preparer, no class can be certified under Rule 23(b)(3) because individual issues will necessarily predominate over class issues.

The "service or thing of value" received with a PTIN is the ability to prepare tax returns for compensation. Plaintiffs believe that no benefit is conveyed because they take the position that the ability to prepare tax returns for compensation is a right that cannot be infringed by the United States. Plaintiffs allege that "[t]ax return preparers receive no specific or special benefit or thing of value in registering for and obtaining a

PTIN." (Doc. 41, ¶41.) The United States acknowledges that, as to whether some amount of benefit is conferred by the PTIN, a class can be certified under Rule 23(b)(3) because class issues will predominate over individual issues.[2]

However, plaintiffs also allege that "the fees charged exceed the amount that can be charged under 31 U.S.C. § 9701, as they include costs attributable to the public benefit and do not reasonably reflect the value of the specific service for which they are charged." (*Id.*, ¶46.) Under section 9701, determining whether the PTIN User Fee is excessive turns on whether the fee is "fair" and "the value of the service or thing to the recipient." 31 U.S.C. § 9701(b). A tax return preparer who prepares hundreds of returns derives more value than one who prepares no returns. Accordingly, as to whether the fee is excessive, no class can be certified because individual issues will necessarily predominate over class issues.

None of the named plaintiffs are similarly situated because each takes different advantage of the benefit provided by the Service. Thus, the ability to prepare tax returns for compensation has different value to each of them. Brittany Montrois is a CPA who spends over 40% of her time preparing returns for compensation (Montrois Dep. at 17:4-5; Economides Decl. ¶8, Ex. 105.) Each year, she prepares hundreds of returns for individual and corporate taxpayers. (*Id.* at 22:12-14.) She estimates that she

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[2] To the extent plaintiffs contend that the benefit is something other than the ability to prepare tax returns for compensation, the United States does not concede that a class is certifiable under Rule 23(b)(3) as to plaintiffs' first legal theory.

earns $200 for each individual return prepared and $700 for each corporate return she prepares. (*Id.* at 34:10-21.) Based on her estimation, she earns approximately $120,250 per year in fees from preparing tax returns for compensation.

By contrast, Adam Steele, who is also a CPA, prepares approximately 16 returns per year. He estimates that on average he charges $99.95 to $199.95 in fees for preparing returns. Based on his estimation, he earns less than $15,000 per year in fees from preparing tax returns for compensation. (Steele Dep. at 36:14-37:24; Economides Decl. ¶7, Ex. 104.)

Finally, Joseph Henchman, who is an attorney, only prepares a few returns a year. Return preparation accounts for only a small percentage of his yearly compensation. (*See* Henchman Dep. at 15:1-10; Economides Decl. ¶9, Ex. 106.) He stated that he only preparers returns for his friends and generally charges $30 per return. (*See id.* at 17:1-18:22.) He estimates that he prepared nine returns in 2014, which is about average for him. (*See* Henchman Dep. Exhibit 1.) He earns approximately $300 per year in fees from preparing tax returns for compensation. (*See id.* at 53:8-12.)

As with any other cost of doing business, preparers pass the cost of the PTIN User Fee on to their clients. *See id.* at 53:1-7. Based on Montrois' estimations, the PTIN User Fee accounts for approximately .0005% of the fee charged per return. Based on Steele's estimations, the PTIN User Fee accounts for 2% of the fee charged per return. And based on Henchman's estimations, the PTIN User Fee accounts for 18% of the fee charged to his clients.

This variation is exemplary of the likely variation amongst the class members. Some class members will derive substantial income from preparing tax returns. Others will make little to no income. Because the value of the benefit received is dependent on the individual circumstances of each of the 1.1 million purported class members, no class can be certified under Rule 23(b)(3).

II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF CANNOT BE CERTIFIED UNDER RULE 23(B)(2) BECAUSE THE RIGHTS OF ABSENT CLASS MEMBERS, WHO CANNOT OPT-OUT, ARE IMPERMISSIBLY AFFECTED.

Plaintiffs' prospective relief seeks a determination that the PTIN User Fee is unauthorized by law, or, in the alternative, is excessive, under either the APA or due process clause. Because plaintiffs seek to represent a class composed of all individuals who paid the PTIN User Fee, the proposed class includes CPAs, EAs, attorneys, and unlicensed return preparers. And certification under Rule 23(b)(2) means that no class members can opt-out of the injunctive relief sought. These two facts taken together prevent certification under Rule 23(b)(2). Specifically, plaintiffs' claims impermissibly compromise the rights of absent EAs, CPAs, and attorneys, because those class members are limited to challenges only available to unlicensed return preparers. In addition, Rule 23(b)(2) certification is inappropriate as to whether the fee is excessive because the United States has not acted on grounds generally applicable to the class.

A Rule 23(b)(2) class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979). To justify departure from that rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as

the class members.'" *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974)).

As this Court previously recognized, "[b]efore a class may be certified under Rule 23(b)(2), the plaintiffs must demonstrate that 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'" *Bynum*, 214 F.R.D. at 37 (quoting Fed. R. Civ. P. 23(b)(2)). Rule 23(b)(2) imposes two requirements: "(1) that defendant's actions or refusal to act are 'generally applicable to the class' and (2) that plaintiffs seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Bynum*, 214 F.R.D. at 37 (quoting Fed. R. Civ. P. 23(b)(2)).

Because Rule 23(b)(2) requires "'that the plaintiffs seek to redress a common injury,'" the rule "'operates under the presumption that the interests of the class members are cohesive.'" *Lightfoot*, 273 F.R.D. at 329 (quoting *Lemon v. Int'l Union of Operating Engr's', Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000)). Plaintiffs must therefore "establish that the putative class is sufficiently cohesive to warrant class treatment" under Rule 23(b)(2). *Lightfoot*, 273 F.R.D. at 329.

Brittany Montrois and Adam Steele are CPAs. Joseph Henchman is an attorney. As CPAs and attorneys, they each have substantial educational, testing, and training requirements, and pay fees and dues to state oversight bodies on a regular basis, in order to become and remain licensed professionals. Similarly, EAs are subject to rigorous testing by the Internal Revenue Service in order to obtain that status, and must

renew that status every three years. In addition, CPAs and attorneys are subject to the ethics and professional requirements of their respective licensing organizations (*i.e.*, state bars or CPA organizations), which if violated could lead to the loss of their professional certification.

Unlicensed tax return preparers, by contrast, are only required to pay the PTIN User Fee in order to prepare returns for compensation. While an unlicensed tax return preparer may be highly competent, there are no requirements placed on such preparers that would provide any demonstration of their ability. When asked about the relative tax preparation competence of each of these groups, Adam Steele testified that the EAs were the most competent because the enrolled agents' test "is way tougher on tax than the tax part of the CPA examination," followed by CPAs, attorneys, and finally unlicensed return preparers. (Steele Dep. At 44:22-47:24; Economides Decl. ¶ 7, Ex.104.) As Mr. Steele put it when asked about unlicensed return preparers,

> some of them may be extremely, you know, diligent . . . but there's a full gamut. There are some butchers out there, too, you know, and so with an uncredentialed tax practitioner, you've really got to know – the client has to know, you know, what that practitioner is all about in tax and – and there's no guarantee. There's no -- in other words, assurance of competence by a testing agency.

(*Id.* at 47:7-16.)

Mr. Steele attached an explanation to his Form 843 refund request for the PTIN fees he paid in 2013, stating he was demanding a refund because "as applied to C.P.A.s and Enrolled Agents" the fees are unreasonable for three reasons. (*See* Economides Decl., ¶4, Ex. 101.) First, because C.P.A.s and Enrolled Agents "derive no benefit from

the PTIN program or from paying said fees." Second, because the "PTIN program duplicates the oversight and regulation already provided, in the case of C.P.A.s by their state boards of accountancy . . . and, in the case of Enrolled Agents, by the IRS itself." And third, because the fees and paperwork required for annual renewal "are unreasonably burdensome and oppressive" in light of the "periodic renewal forms, as well as annual 'firm permit' renewals" imposed by state boards of accountancy. *See id*.

On June 2, 2014, Mr. Steele emailed Stan Reed, a fellow CPA, informing him of his retention of an attorney and the nature of suit challenging the PTIN. He stated:

> [I] have retained an attorney to bring a suit challenging the new IRS PTIN fees (the $63 a year), particularly as they apply to CPAs and EAs, who already have the training, competency examination, CPEs, and oversight . . . who don't need another form to file and another $63 to pay. It's a class action suit that I wanted to have limited to CPAs and EAs, but the lawyer insisted on bringing it on behalf of everybody who had paid the fees.

(*See* Economides Decl., ¶5, Ex. 102.) Two days after filing the Complaint, on September 10, 2014, Mr. Steele again emailed Stan Reed. He stated:

> The federal suit . . . is mainly to exempt us CPAs and EAs, who are **already** regulated (and in Minnesota, strictly). I think we have the strongest case; although my attorney wanted to include everyone else that paid the fees. The Court, may, however, draw the distinction. As far as the unregulated practitioners go, I don't really have a dog in that fight.

(*See* Economides Decl., ¶6, Ex. 103.)

During their deposition, both Brittany Montrois and Adam Steele asserted that, because of education, testing, and fee requirements, EAs, CPAs, and attorneys have

additional arguments to challenge the validity of the PTIN User Fee that are unavailable to unlicensed tax return preparers. If the class was limited to EAs, CPAs, and attorneys, plaintiffs could challenge the PTIN User Fee on the grounds that *as to EAs, CPAs, and attorneys*: (1) it is not authorized because those individuals are already subject to stringent professional requirements, and (2) it is excessive because those individuals already pay professional and other fees to prepare returns. Had plaintiffs brought that limited case, the United States would defend itself as to the merits of such challenges.

Plaintiffs, however, cannot raise those arguments because unlicensed tax return preparers are part of the proposed class and such arguments are unavailable to them. If plaintiffs had included such arguments, the proposed class would not be cohesive as required by Rule 23(b)(2). The named plaintiffs can choose to not raise those arguments for themselves in a non-class context. But because they do not just seek to represent themselves, they cannot restrict hundreds of thousands of absent EAs, CPAs, and attorneys, who will be bound by the result of this case because they cannot opt out of the class. Plaintiffs cannot make the choice to bind the absent EAs, CPAs, and attorneys through their narrow theory of the case. Consequently, this conflict between the arguments available to some but not all of the class members prevents certification under Rule 23(b)(2) because the proposed class is not cohesive.

In addition, the class is not cohesive as to whether the PTIN User Fee is excessive for the same reasons that preclude certification of that issue under Rule 23(b)(3). (*See infra* at 15-17.) Specifically, determining whether the amount charged is excessive requires an individualized inquiry into the factual circumstances of each purported

class member. Accordingly, certification under 23(b)(2) is not warranted because the United States has not "acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2).

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion for class certification.

Dated: November 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION was filed with the Court's ECF system on November 13, 2015, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

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