IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DISTRICT OF COLUMBIA

ADAM STEELE, et al.,	)	
	)	Case No. 1:14-cv-1523
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' RESPONSE TO
PLAINTIFFS' MOTION FOR RECONSIDERATION

On February 9, 2016, the Court issued its opinion and order regarding the propriety of class certification in this case. (*See* Docs. 54, 55.) The Court held that class certification was appropriate under Federal Rule of Civil Procedure 23(b)(2) as to plaintiffs' claims for declaratory relief. (*See* Doc. 55 at 1.) However, the Court denied class certification under Rule 23(b)(3) as to plaintiffs' claims for monetary relief because it questioned whether it had subject matter jurisdiction over such claims. (*See id.* at 18.)

Plaintiffs have moved for reconsideration of the Court's order on the grounds that the Court has subject matter jurisdiction over plaintiffs' monetary claims under either the Administrative Procedures Act, 5 U.S.C. § 702, or the Little Tucker Act, 28 U.S.C. § 1346(a)(2). (*See* Doc. 56 at 2.) Plaintiffs argue that jurisdiction exists under the APA because their monetary claims seek specific relief and not money damages. (*See id.* at 3.) In the alternative, plaintiffs argue that the Court has subject matter jurisdiction under the Little Tucker Act because they have individually asserted

monetary claims against the United States of less than $10,000, based on an alleged non-tort violation of law, specifically, an illegal exaction. (*See* Doc. 56 at 5.)

Plaintiffs' monetary claims "seek restitution or return of the PTIN fees collected by the IRS, or alternatively" the excessive amount based on their allegations that they have been provided no "service or thing of value" or that the amount charged exceeds the cost for providing a "service or thing of value." (Doc. 55 at 3 (discussing Am. Compl, ¶¶39-50 and prayer for relief).) In essence, plaintiffs allege that they have been injured by paying the PTIN User Fee. The requested remedy for that injury is repayment of the amount determined to be illegal.

Under any interpretation, the remedy sought is money damages, and the APA cannot provide subject matter jurisdiction over such relief. *See* 5 U.S.C. § 702 (permitting suits seeking relief other than money damages related to agency action or inaction). However, to the extent that plaintiffs' monetary claims seek money damages under an illegal exaction theory, the Court may have subject matter jurisdiction.

ARGUMENT

I. THE APA DOES NOT GRANT SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' MONETARY CLAIMS

To establish subject matter jurisdiction over their monetary claims, plaintiffs must demonstrate that the government has consented to suit by waiving its sovereign immunity and that there is a substantive legal basis for their claims. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Absent such consent, "sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer*,

510 U.S. 471, 475 (1994) (citing *Loeffler v. Frank*, 486 U.S. 549, 554 (1988), *Fed. Housing Admin. v. Burr*, 309 U.S. 242, 244 (1940)). If the United States has not waived its sovereign immunity over a claim or action, the court lacks subject matter jurisdiction to hear that particular claim or action, and dismissal is required. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.").

Plaintiffs allege that the PTIN User Fee "constitutes unlawful agency action," under the APA. (Am. Compl., ¶42.) In its class opinion, the Court stated that the APA "does not constitute a waiver of sovereign immunity for money damages and therefore fails to independently establish jurisdiction over the restitution piece of plaintiffs' claims." (Doc. 55 at 21.) Although "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages,'" *Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988), the relief sought by plaintiffs is both explicitly and in essence money damages. Accordingly, the APA does not grant this Court subject matter jurisdiction over plaintiffs' monetary claims.

A. The Intersection Between Tucker Act And APA Jurisdiction

If a claim seeks money damages, the Tucker Act controls. The primary purpose of the Tucker Act is "to ensure that a central judicial body adjudicates most claims against the United States Treasury." *Kidwell v. Dep't of Army, Bd. For Correction of Military Records*, 56 F.3d 279, 284 (D.C. Cir. 1995) (citations omitted). This is true even if a claim is brought under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), because the Federal Circuit has appellate jurisdiction over such cases wherever they are filed. *See* 28

U.S.C. § 1295(a)(2).[1] Accordingly, "'[j]urisdiction under the Tucker Act cannot be avoided by . . . disguising a money claim' as a claim requesting a form of equitable relief." *Id.* (quoting *Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n.11 (D.C. Cir. 1985)). In determining subject matter jurisdiction, this Court must look beyond the plain language of the complaint to examine *the substance* of plaintiffs' claims. *Kidwell* 56 F.3d at 284.

In *Bowen*, the Supreme Court discussed the scope of the sovereign immunity waiver contained in the APA over actions "seeking relief other than money damages." 487 U.S. at 891-901. *Bowen* involved payments for future expenses paid in advance by the Centers for Medicare & Medicaid Services ("CMS") to Massachusetts. Massachusetts alleged that CMS' decision to not reimburse certain expenses related to care provided by Massachusetts for mentally disabled individuals was unauthorized by law. Massachusetts sought declaratory and injunctive relief ordering CMS to reimburse Massachusetts for such expenses on a prospective and retrospective basis.

The Court drew a distinction between claims for money damages, which must be brought under the Tucker Act, and claims for specific relief, which may be brought under the APA. Because section 702 of the APA "authorize[s] a district court to grant

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[1] If a district court's jurisdiction is based "in whole or in part" on the Little Tucker Act, appeal of the entire case must be taken to the Federal Circuit rather than the regional circuit court. *See United States v. Hohri*, 482 U.S. 64, 75-76 (1987) ("We hold that a mixed case, presenting both a nontax Little Tucker Act claim and an FTCA claim, may be appealed only to the Federal Circuit," because "Congress intended for centralized determination of nontax Little Tucker Act claims to predominate over regional adjudication of FTCA claims").

monetary relief – *other than traditional 'money damages'* – as an *incident to the complete relief* that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court." *Bowen*, 487 U.S. at 910 n. 48 (emphasis added). Under this analysis, "[e]ven where a monetary claim may be waiting on the sidelines," districts courts can have jurisdiction over cases seeking non-monetary relief "that has 'considerable value' independent of any future potential for monetary relief." *Kidwell*, 56 F.3d at 284 (citation omitted). The non-monetary relief has "considerable value" as long as the "sole remedy requested is declaratory or injunctive relief that is not 'negligible in comparison' with the potential monetary recovery." *Kidwell*, 56 F.3d at 284 (quoting *Hahn v. United States*, 757 F.2d 581, 598 (3d Cir. 1985)).

B. Plaintiffs' Monetary Claims Are For Damages Not Specific Relief

Plaintiffs argue that they "are seeking the return of money that was taken from them in violation of a federal statute," rather than money in compensation for losses. (Doc. 56 at 4.) Plaintiffs' argument relies upon *Bowen* and the D.C. Circuit's decision in *America's Community Bankers v. FDIC*, 200 F.3d 822, 829 (D.C. Cir. 2000). Plaintiffs argue that the APA's "use of the term 'money damages' refers to 'a sum of money used as compensatory relief'—that is, 'to substitute for a suffered loss'—'whereas specific [equitable] remedies' of the kind permitted by the APA 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" (*See* Doc. 56 at 3 (quoting *Bowen*, 487 U.S. at 893 (quoting *Md. Dep't of Human Resources v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)); *see also Am.'s Cmty. Bankers*,

200 F.3d at 829 ("Where the plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages").

Bowen and *Bankers* are examples of a narrow exception to the general rule that a claim seeking monetary relief is a claim for damages. Unlike the disputes at issue in those cases, which involved "adjustments" to an ongoing relationship, plaintiffs are challenging the taking of their money without statutory authority. (*See infra,* 10-12 (discussing plaintiffs' illegal exaction claims).) Moreover, unlike the relief sought in those cases, which was purely injunctive, plaintiffs explicitly seek money damages. Both of these distinctions preclude jurisdiction under the APA.

In *Bowen*, the Court found that Massachusetts did not seek a judgment for *money damages* even though a decision in its favor would result in the payment of money. 487 U.S. at 900. The Court distinguished money damages from the relief sought and concluded that the Medicaid statute "directs the Secretary to pay money to the State, not as compensation for a past wrong, but to subsidize future state expenditures." *Id.* at 905 n.42. Under the Court's view, "[n]either a disallowance decision, nor the reversal of a disallowance decision, is properly characterized as an award of 'damages.'" *Id.* at 893. Rather, "[e]ither decision is an *adjustment*—and, indeed, usually a relatively minor one—in the size of the federal grant to the State that is payable in huge quarterly installments." *Id.* (emphasis added). The Court held that district court's jurisdiction was not foreclosed by the Tucker Act, because the "quarterly payments of federal money are actually advances against expenses that have not yet been incurred by the State" and "a dispute concerning the status of the open account is not one in which the

States can claim an entitlement to a specific sum of money that the Federal Government owes to it." *Id.* at 907.

In *America's Community Bankers*, a banking trade association brought suit challenging Federal Deposit and Insurance Corporation ("FDIC") rulemaking denying refund of a particular quarterly assessment made against its member banks. Bankers sought "a declaratory judgment that its members are statutorily entitled to a refund" of a portion of the amount paid. *Id.* at 826. The FDIC challenged the court's jurisdiction under the APA because Banker's claim amounted to one for money damages. *Id.* at 829. In finding jurisdiction, the D.C. Circuit explained the issue as follows:

> Bankers maintains that the statutory scheme, as it was for the fourth quarter of 1996, required the FDIC to provide for a FICO assessment refund in the revised assessment schedules promulgated in December 1996. If Bankers is correct that the FDIC violated its statutory obligation by adopting revised assessment schedules which permitted an overcharge, then under established and binding precedent, Bankers's claim represents specific relief within the scope of 5 U.S.C. § 702, not consequential damages compensating for an injury.

Am.'s Comm'y Bankers, 200 F.3d at 829-30.

Likewise, in *Kidwell*, a retired army serviceman requested a change in his military files to indicate a "medical" rather than "general" discharge. 56 F.3d at 281. When the Army refused to make the change, Kidwell sued under the APA requesting his record be changed. *Id.* If successful, the change in his military record would result in retroactive disability benefits that could exceed $50,000. *Id.* at 283. The United States argued that the APA did not grant subject matter jurisdiction over Kidwell's claims because they sought money damages. The D.C. Circuit disagreed because "the plain

terms of his complaint do not mention monetary relief" and "granting the relief requested would offer a direct non-monetary benefit to the plaintiff." *Id.* at 285-86.

These decisions represent a subset of claims that are not for money damages, even though they may result in the payment of money. Each case involves "adjustments" to an ongoing relationship between the claimant and the United States based on a statutory scheme. *Bowen* involved which expenses are reimbursable under Medicare. *Bankers* involved the calculation of reserve amounts in the savings and loan industry. *Kidwell* involved a correction to a discharge record. The monetary benefits that may flow from such cases "would not come from the district court's jurisdiction, but from the structure of statutory and regulatory requirements" at issue. *Kidwell*, 56 F.3d at 287-86. In other words, the monetary relief is ancillary to the specific relief sought through an APA claim.

Moreover, these cases do not stand for the proposition that in all instances a request for "an award of funds to which it claims entitlement under a statute," is specific relief and not damages. *Am.'s Cmty. Bankers*, 200 F.3d at 829. For example, a claim brought under a money-mandating source of law is a claim for money damages that is governed by Tucker Act jurisdiction, even though the basis for such a claim is entitlement to funds under a statute. *See, e.g., ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 22 (2011) (stating that a statute is money-mandating "when the government has an absolute duty to make payments to any person who meets the specified requirements set forth in the statute" and has no discretion to deny payment).) Rather,

it is the specific facts and circumstances at issue in *Bowen*, *Bankers*, and *Kidwell* that lead to the decisions in those cases; facts and circumstances that are not present here.

By contrast, as the Court correctly noted in its class opinion, claims seeking restitution typically are for money damages and not specific relief. (*See* Doc. 55 at 22.) A suit "seeking to recover a past due sum of money that does no more than compensate a plaintiff's loss is a suit for damages, not specific relief." *Bowen*, 487 U.S. at 918 (Scalia, J., dissenting). Here, plaintiffs have specifically requested "restitution or return of all [or the excess amount of] PTIN fees collected by Treasury or the IRS." (Am. Compl. at 15.) As the D.C. Circuit has noted, "it is an extremely rare plaintiff who has trouble asking for money, if that is what he wants." *Wolfe v. Marsh*, 846 F.2d 782, 783 (D.C. Cir. 1988). Plaintiffs' monetary claims do not ask this Court to direct the United States to change a statutory relationship; their claims ask this Court for money. Such relief is fundamentally different than the relief sought in *Bowen*, *Bankers*, and *Kidwell*, and is not cognizable under the APA.

II. THE COURT MAY HAVE SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' MONETARY CLAIMS TO THE EXTENT THEY RAISE AN ILLEGAL EXACTION CLAIM UNDER 31 U.S.C. § 9701

In the alternative, plaintiffs argue that 28 U.S.C. § 1346(a)(2) provides subject matter jurisdiction over their monetary claims. (*See* Doc. 56 at 5.) The Tucker Act, both as it applies in the district courts, 28 U.S.C. § 1346, and the Court of Federal Claims, 28 U.S.C. § 1491, is a jurisdictional statute that operates to waive sovereign immunity over certain cases filed against the United States. It does not by itself "create any substantive right enforceable against the United States for money damages." *United States v. Testan*,

424 U.S. 392, 398 (1976). Section 1346(a)(2) waives sovereign immunity over non-tortious claims for *money damages* against the United States of no more than $10,000.[2]

To bring suit under section 1346(a)(2), a plaintiff must rely upon a substantive source of law that "creates a right to money damages." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). Not every claim "involving or invoking the Constitution, a federal statute, or a regulation" is cognizable under the Tucker Act; rather, "[t]he claim must, of course, be for money." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967).[3] Non-contract claims for money damages against the United States fall

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[2] In a footnote, plaintiffs posit that jurisdiction may exist under 28 U.S.C. § 1346(a)(1), which permits suits against the United States in the District Courts to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." (*See* Doc. 56 at 5, n.2.) The PTIN User Fee is collected under 31 U.S.C. § 9701, not the internal revenue laws. To recover any amount under the internal revenue laws, an individual must first make a refund request to the Internal Revenue Service before she may bring suit in district court. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 14 (2008). Thus, if it is determined that the PTIN User Fee was "any sum" collected under the internal revenue laws and section 1346(a)(1) provides jurisdiction in this Court, certification under Rule 23(b)(3) would be impracticable because individual issues would predominate over class issues (*i.e.*, did each of the 700,000 to 1 million class members make a refund request?). It is for this reason that certification of refund class actions is exceedingly difficult and rarely, if ever, granted. *See, e.g., Fisher v. United States*, 69 Fed. Cl. 193, 202-03 (2006).

[3] Plaintiffs incorrectly argue that the Little Tucker Act is not limited to actions for money damages. (*See* Doc. 56 at 5.) In support, they cite *Bowen*'s statement that Court of Federal Claims jurisdiction under 28 U.S.C. § 1491 is not expressly limited to actions for money damages. *See Bowen*, 487 U.S. at 900 n. 31). Similarly, they rely upon a D.C. Circuit case discussing the use of the term "money damages" in 5 U.S.C. § 702:

> It is possible that the use of the term "money damages" in section 702 was influenced by historic practice under the Tucker Act, which seems to have drawn a line between monetary relief . . . and

(continued...)

into two broad categories: (1) those where money has not been paid but the claimant asserts entitlement to payment under a money-mandating source of law; and (2) those where the claimant has directly or in effect paid over money to the government and requests the return of all or part of the amount. *See id.*

Plaintiffs assert a claim under the second category, which alleges "that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Id.* Plaintiffs state "[t]he Federal Circuit has long recognized that plaintiffs seeking 'to recover an illegal exaction by government officials' may bring suit under the Little Tucker Act 'when the exaction is based on an asserted statutory power'—regardless of whether the statute itself creates an express cause of action." (Doc. 56 at 6 (citing *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-74 (Fed. Cir. 1996) and *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005)).) In essence, an illegal exaction has occurred where "the government has the citizen's money in its pocket," without constitutional, statutory, or regulatory authority. *Clapp v. United States*, 117 F. Supp. 576, 580 (Ct. Cl. 1954).

(… continued)

> nonmonetary relief, rather than following the more traditional common law distinction between money damages and specific relief . . . . *See United States v. Jones*, 131 U.S. 1, 18 (1889) (Tucker Act jurisdiction does not extend to claims for . . . equitable relief but does "include claims for money arising out of equitable as well as maritime and legal demands") . . .

Md. Dep't of Human Resources, 763 F.2d at 1447. Neither of these cases supports plaintiffs' argument.

However, not all orders to a citizen to assume an expense constitute exactions under the Tucker Act. An exaction is limited to circumstances where the "government must order assumption of a government obligation." *Aerolineas*, 77 F.3d at 1579 (Nies, J. concurring). By contrast, there is no exaction "where the government itself had no financial obligation in the matter and receives no direct financial benefit." *Id.*

Aerolineas involved illegal exaction claims brought by two airlines to recover money that the Immigration and Naturalization Service ("INS") required the airlines to pay to house, sustain, and guard transit-without-visa aliens who sought political asylum in the United States. 77 F.3d at 1568. The airlines argued that, under the enactment of the 1986 Immigration User Fee Statute and the repeal of 8 U.S.C. § 1223, INS, and not the airlines, was required to pay those amounts. 77 F.3d at 1568. The Federal Circuit explained the airlines' illegal exaction claim as follows:

> The plaintiff airlines state that by misinterpreting or misapplying 8 C.F.R. § 235.3(d) and the Form I–426 agreements, the Service compelled the airlines to bear certain costs that by statute in 1986 were removed from the airlines and imposed upon the United States. If [the airlines] made payments that by law the Service was obliged to make, the government has "in its pocket" money corresponding to the payments that were the government's statutory obligation.

77 F.3d at 1573. The Federal Circuit found that it had subject matter jurisdiction over the airlines' claims because "[s]uit can be maintained under the Tucker Act for recovery of money illegally required to be paid on behalf of the government." 77 F.3d at 1573-74.

The asserted statutory power at issue in *Aerolineas* was the enactment of the 1986 Immigration User Fee Statute and the repeal of 8 U.S.C. § 1223. Although neither of

those statutes provided for an express cause of action, the Federal Circuit held that the airlines had a money damages claim for the return of the amounts improperly paid under the repealed statute.

Here, plaintiffs have not stated the asserted statutory power giving rise to their illegal exaction claim. The United States assumes that plaintiffs intend to rely upon 31 U.S.C. § 9701 as the statutory basis for their illegal exaction claims. If that is the case, this Court may have subject matter jurisdiction under the Little Tucker Act over plaintiffs' monetary claims based solely on that jurisdictional hook. And, if the Court determines it has subject matter jurisdiction under the Little Tucker Act, plaintiffs' monetary claims are necessarily for money damages, which would preclude jurisdiction under the APA. To the extent plaintiffs assert that their illegal exaction claim arises under any other source of law, including the internal revenue laws, the United States reserves its ability to challenge whether the Court has subject matter jurisdiction over such a claim. (*See supra*, 10 n.1.)

III. THE COURT CAN AND SHOULD DETERMINE THE EXACT SCOPE OF ITS POTENTIAL SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' MONETARY CLAIMS

The Court has previously noted that it "may not certify a class action where it lacks jurisdiction over the claims of putative class members." (Doc. 55 at 19.) In addition, the United States' waiver of its sovereign immunity must be explicitly established and strictly construed in favor of the government. *Lane v. Pena*, 518 U.S. 187, 192 (1996). "[T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Despite these requirements, plaintiffs incorrectly state that the Court need not determine which basis for jurisdiction is more appropriate as long as it finds jurisdiction under either of their proffered bases. (*See* Doc. 56 at 2.) Plaintiffs take the position that the Court need not determine if the APA provides a basis for jurisdiction as long as it finds a basis through the illegal exaction route. In support, plaintiffs cite a case involving appellate procedure jurisdiction and a case finding jurisdiction under *both* the APA and the Little Tucker Act as to separate claims. (*See id.* (citing *United States v. Green*, 499 F.2d 538 (D.C. Cir. 1974) and *Oliver v. U.S. Dep't of the Army*, No. 14-4114, 2015 WL 4561157, at *8 (D.N.J. July 28, 2015) respectively).) There is no basis for plaintiffs' extraordinary interpretation of jurisdiction and it should be rejected.

The United States respectfully requests that this Court determine the exact scope of and statutory authority for any possible subject matter jurisdiction over plaintiffs' claims for monetary relief. As discussed, if the matter proceeds under the Little Tucker Act, appeal lies in the Federal Circuit, not the D.C. Circuit. *See Hohri*, 482 U.S. at 75-76. If the matter proceeds under 28 U.S.C. § 1346(a)(1), two important limitations apply. *First*, each class member must demonstrate compliance with the jurisdictional prerequisites to suit, including filing of an administrative claim for refund and waiting for denial or the passage of six months before filing suit. *See Clintwood Elkhorn Mining Co.*, 553 U.S. at 14. *Second*, recovery is limited to amounts paid within two years of filing the claim and not the six year statute of limitations for Little Tucker Act claims. *Id.*

CONCLUSION

For the foregoing reasons, this Court should determine whether, and under what specific statute, it has subject matter jurisdiction over plaintiffs' monetary claims. The United States respectfully submits it should find that the APA does not provide subject matter jurisdiction over plaintiffs' monetary claims.

Dated: March 4, 2016

Respectfully submitted,

CHANNING D. PHILLIPS
United States Attorney

CAROLINE D. CIRAOLO
Acting Assistant Attorney General,
Tax Division

By: /s/ Christopher J. Williamson
CHRISTOPHER J. WILLIAMSON
VASSILIKI E. ECONOMIDES
JOSEPH E. HUNSADER
Trial Attorneys
U.S. Department of Justice, Tax Division
Ben Franklin Station, P.O. Box 227
Washington, D.C. 20044
Telephone: (202) 307-2250
Facsimile: (202) 514-6866
christopher.j.williamson@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing UNITED STATES' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION was filed with the Court's ECF system on March 4, 2016, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

Allen Buckley
The Law Office of Allen Buckley LLC
2802 Paces Ferry Road
Suite 100-C
Atlanta, GA 30339

William H. Narwold
MOTLEY RICE LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103

Nathan D. Finch
Elizabeth Smith
MOTLEY RICE LLC
3333 K Street NW, Suite 450
Washington, DC 20007

Deepak Gupta
Jonathan E. Taylor
Peter Conti-Brown
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009

Christopher S. Rizek
Caplin & Drysdale, Chartered
One Thomas Circle, NW, Suite 1100
Washington, DC 20005

/s/Christopher J. Williamson
Christopher J. Williamson
Trial Attorney