IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR STAY

Pursuant to Federal Rule of Civil Procedure 62, the United States respectfully moves for a stay of the Court's order enjoining the Internal Revenue Service from charging any fee to issue or renew a Preparer Tax Identification Number ("PTIN"). (*See* Doc. 79.) The United States seeks a stay pending its decision regarding whether to appeal the final judgment and during the pendency of any such appeal.[1] If a stay is not granted and the United States prevails on appeal, the United States will be irreparably harmed because: (1) unless this Court grants the United States restitution, there is no after-the-fact recourse to recover the likely tens of millions of dollars of fees that would

[1] The Solicitor General has final authority on whether the United States will appeal, and he has not yet made that decision. There is no requirement that the United States file a Notice of Appeal prior to seeking relief under Rule 62. *See, e.g., Common Cause v. Judicial Ethics Committee*, 473 F. Supp. 1251, 1254 (D.D.C. 1979) (citing WRIGHT & MILLER, 11 Fed. Prac. & Proc. § 2904, at 324 (1973)) ("As Professors Wright and Miller explain, the rule permits the issuance of an injunction whenever there is reason to believe that an appeal will be taken, even before the actual notice of appeal has been filed.").

be uncollected from PTIN holders during the pendency of its appeal; and (2) funds appropriated for other programs would have to be re-directed and thus would be unavailable to provide other taxpayer services. By contrast, if a stay is granted and the United States does not prevail on appeal, plaintiffs can be made whole through a refund of the $50 paid per year by each class member during the pendency of the appeal. Given the serious and difficult legal questions presented by this case, the balance of equities weighs in favor of a stay pending appeal.

BACKGROUND

On June 1, 2017, the Court issued its opinion and order on the parties' cross-motions for summary judgment. *See Steele v. United States*, No. 14-cv-1523, 2017 WL 2392425 (D.D.C. June 1, 2017). The Court determined that the Service has the authority to require the use of a PTIN on all tax returns and refund claims prepared for others for compensation. *See id.* at *1, 7. The Court found that Congress specifically authorized the Secretary of the Treasury to require tax return preparers to use an identifying number other than a social security number. *See id.* at *7 (citing 26 U.S.C. § 6109(d)).

The Court also determined that "the decision to require the use of PTINs was not arbitrary or capricious." *Steele*, 2017 WL 2392425, at *7. The Court noted that the Service explained in the regulations requiring the use of the PTIN that the Service needed to "identify tax return preparers in order to maintain oversight [over tax administration], and stated that the use of a single identifying number was critical to such effective oversight." *Id.* (citing Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 60310, 60313). Further, "the IRS stated that the use of a single

number would 'enable the IRS to accurately identify tax return preparers, match preparers with the tax returns and claims for refund they prepare, and better administer the tax laws with respect to tax return preparers and their clients.'" *Steele*, 2017 WL 2392425, at *7 (quoting 75 Fed. Reg. at 60313). Finally, the Court noted "[o]ther courts to consider this issue also have found that the PTIN requirement is authorized by law." *Steele*, 2017 WL 2392425, at *7 (citing *Brannen v. United States*, 682 F.3d 1316 (11th Cir. 2012); *Brannen v. United States*, No. 4:11-CV-0135, 2011 WL 8245026, at *1 (N.D. Ga. Aug. 26, 2011); *Buckley v. United States*, No. 1:13-CV-1701, 2013 WL 7121182, at *1 (N.D. Ga. Dec. 4, 2013)).

Despite holding that the Service has the authority to require tax return preparers to obtain PTINs, the Court enjoined the Service from charging a user fee for PTIN registrations and renewals because it held that the Service "does not have the authority to charge fees for issuing PTINs." *Id.* at *1. The Court's decision was primarily based on its determination that "the registered tax return preparer ["RTRP"] regulations regarding testing and eligibility requirements [struck down in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014)] and the PTIN regulations" are interrelated. *Id.* at *8. The Court noted that the RTRP and PTIN regulations "were issued separately and at different times." *Id.* Nevertheless, "the overarching objectives named in the PTIN regulations indicate a connection to the RTRP regulations." *Id.* Based on this perceived interconnection, the Court held that "[a]lthough the IRS may require the use of PTINs, it may not charge fees for PTINs because this would be equivalent to imposing a

regulatory licensing scheme and the IRS does not have such regulatory authority," based on the D.C. Circuit's decision in *Loving*. *Id.*

In addition, the Court reasoned that cases finding that a fee is permissible under the IOAA generally concern valid regulatory schemes, "as opposed to the situation here where the regulatory scheme was struck down." *Id.* at 9. The Court stated it was "unaware of similar cases in which an agency has been allowed to charge fees under the IOAA for issuing some sort of identifier when that agency is not allowed to regulate those to whom the identifier is issued." *Id.* at 10. The Court acknowledged that courts in the Eleventh Circuit have found that the PTIN fees are permissible under the IOAA. *See Brannen*, 682 F.3d at 1319; *Brannen*, 2011 WL 8245026, at *5–6; *Buckley*, 2013 WL 7121182, at *2. The Court distinguished the *Brannen* decisions because they were made prior to D.C. Circuit's *Loving* decision, *i.e.*, prior to the finding that the IRS lacks the authority to regulate tax return preparers as representatives practicing before the Service and the striking down of the regulations that attempted to do so. The Court also rejected the decision in *Buckley*, disagreeing with the *Buckley* court's finding that *Loving* (a district court opinion at the time) was entirely inapplicable because, although the PTIN scheme was authorized by a different statutory authority, it is, as explained above, interrelated with the RTRP scheme. *Steele*, 2017 WL 2392425, at *9.

Finally, the Court discounted the Service's stated rationale that the use of PTINs provided a benefit to tax return preparers by protecting their social security numbers from disclosure. *Steele*, 2017 WL 2392425, at *10. The Court stated that although the benefit of protecting SSNs from disclosure was mentioned in the PTIN regulation, it

was not mentioned in the user fee regulation. The Court noted "[i]t is not at all clear that requiring PTINs was necessary [to protect SSNs, and] . . . [t]here is no stated evidence in the administrative record that permitted the IRS to make such a determination." *Id*. at *10.

ARGUMENT

In determining whether to grant a stay, the Court must evaluate: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *see also Nken v. Holder*, 556 U.S. 418, 433-35 (2009); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 n. 1 (D.C. Cir. 1977). Each of these factors weighs in favor of granting a stay.

I. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS.

The United States can establish a likelihood of success by raising "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911-12 (D.C. Cir. 2008) (internal quotations omitted). The Court is not required to "determine that it erred and will likely be reversed—an acknowledgment one would expect few courts to make." *Loving v. IRS*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013). "Probability of success is inversely proportional to the degree of irreparable injury evidenced." *Cuomo*, 772 F.2d at 974.

This case "raises serious and difficult legal questions," which weigh in favor of the United States on the likelihood-of-success requirement. *See Loving*, 920 F. Supp. 2d at 110. As the Court acknowledges, its decision conflicts with the *Brannen* and *Buckley* decisions in the Eleventh Circuit and Northern District of Georgia. Further, the D.C. Circuit may well agree with the United States that the PTIN and RTRP regulations are sufficiently independent from each other to justify not only the PTIN requirement but also the PTIN user fee. Finally, the Court's narrow reading of the IOAA is unsupported by the statute itself and the relevant regulations. The United States briefly discusses each of these issues in turn.

A. The Court's decision is at odds with *Brannen* and *Buckley.*

The Court's determination that the PTIN and RTRP regulations are interconnected conflicts with both the *Brannen* and *Buckley* decisions. In *Brannen*, the Northern District of Georgia and the Eleventh Circuit both concluded that the PTIN User Fee was lawful under both the IOAA and 26 U.S.C. § 6109(a)(4). *See* 2011 WL 8245026, at *1 *aff'd* 682 F.3d at 1320. The District Court held that the PTIN regulations were authorized under 26 U.S.C. § 6109 and 31 U.S.C. § 9701. *See Brannen*, 2011 WL 8245026, at *5-6. It held that PTINs provide a dual benefit to tax return preparers. *First*, "[t]he provision of a PTIN confers a special benefit on tax return preparers, who otherwise would not be permitted to prepare tax returns and refund claims on behalf of others for compensation." *Id.* at *6. *Second*, the PTIN requirement protects the confidentiality of tax return preparers' social security numbers. *See id*. at *6 n. 7 ("Given the likelihood of human error by preparers, who may not always redact their Social

Security numbers from returns provided to clients, coupled with the very real threat of identity theft, the Court cannot conclude that the Secretary's determination that the use of PTINs will protect confidentiality of Social Security numbers is unreasonable").

The Eleventh Circuit affirmed the District Court's decision. *See Brannen*, 682 F.3d at 1316. It held that "31 U.S.C. § 9701 and 26 U.S.C. § 6109 provide statutory authority for the 2010 regulations" requiring the use of a PTIN and the payment of the PTIN User Fee. *Brannen*, 682 F. 3d at 1319. Section 6109(a)(4) "does two things." *Brannen*, 682 F.3d at 1318. *First*, "it expressly grants authority to the Secretary to prescribe by regulation the particular identifying number required." *Id*. *Second*, the requirement "that any return prepared by a tax return preparer bear his/her assigned identifying number" means that "a tax return preparer cannot prepare tax returns for others for compensation without having the required identifying number." *Id*. at 1319.

The Eleventh Circuit thus concluded that "[f]or this reason, 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." *Id*. Further, this benefit "is the kind of 'special benefit' that qualifies under *New England Power*," because it is not a benefit "received by the general public." *Id.* The fact that the Service did not previously charge a fee for the PTIN is irrelevant. There is nothing in the language or logic of section 9701 that requires a user fee to be charged "at the first moment that Congress confers the authority," or prohibits an agency from implementing a fee for services that it had previously provided for free. *Brannen*, 682 F.3d at 1319-20.

In *Buckley*, the District Court held that the initial fee for obtaining a PTIN as well as the subsequent renewal fees are lawful. *See* 2013 WL 7121182 at *1. In so ruling, the District Court primarily relied upon the Eleventh Circuit's decision in *Brannen*. The District Court held that "the renewal fee, like the [initial] fee, confers a special benefit upon tax return preparers, i.e., the ability to file tax returns on behalf of others for compensation." *Id.* at *2.

The District Court rejected Buckley's argument that the D.C. District Court's decision in *Loving v. IRS* called into question the validity of the *Brannen* decision. The District Court concluded *Loving* was inapplicable, because the D.C. District Court "specifically held that Congress authorized the PTIN scheme via a different statutory authority than the testing and competency requirements for registered tax return preparers, which were at issue in the *Loving* case." *See Buckley*, 2013 WL 7121182, at *2; *see also Steele v. United States*, 159 F. Supp. 3d 73, 78 (D.D.C. 2016) ("Although the D.C. Circuit [in *Loving*] invalidated the IRS' more wide-ranging attempts to regulate non-credentialed tax return preparers, the regulations requiring that all compensated tax return preparers – credentialed and non-credentialed alike – obtain and pay for a PTIN are still in effect.").

If the United States appeals, the D.C. Circuit will have to address the conflict between these decisions. As discussed below, the *Loving* decision does not resolve the conflict because the PTIN regulations were not at issue in that case. This issue alone is sufficient to establish the likelihood-of-success requirement.

B. The PTIN regulations are independent from the RTRP regulations struck down in *Loving*.

The Court held that the user fee was not authorized because the PTIN regulations were interconnected with the RTRP regulations. *See Steele*, 2017 WL 2392425, at *8. The Court reasoned that because the D.C. Circuit invalidated the RTRP regulations, the Service could not regulate tax return preparers through the PTIN user fee. *Id.* In reaching this conclusion, the Court disregards significant differences between the PTIN and RTRP regulations.

As a primary matter, the PTIN and RTRP regulations were predicated on different statutory authority and serve different purposes. The preambles to the PTIN regulations provide justifications for both the PTIN requirement and the user fee that are independent from the RTRP regulations. While the PTIN regulations apply to all individuals who prepare tax returns for others for compensation (*i.e.*, attorneys, CPAs, Enrolled Agents, and uncredentialed tax return preparers), the RTRP regulations only applied to uncredentialed tax return preparers.[2] (*See* Campbell Decl., ¶24.) In addition, new PTIN user fee regulations were promulgated after the D.C. Circuit invalidated the RTRP regulations. *See* Preparer Tax Identification Number (PTIN) User Fee Update, 81 Fed. Reg. 52766-01 (Aug. 10, 2016); (*see also* Campbell Decl., ¶24; Doc. 66-2, ¶12)). The proposed rule, by cross reference to corresponding temporary regulations, made clear

[2] The PTIN regulations were issued on September 30, 2010 *before* the RTRP regulations were issued on June 3, 2011.

that the PTIN still provided a service or thing of value to all tax return preparers, separate from the RTRP regulations. *See* Preparer Tax Identification Number (PTIN) User Fee Update, 80 Fed. Reg. 66851-01, 66853 (Oct. 30, 2005) ("The ability to prepare or assist in preparing all or substantially all of a tax return or claim for refund for compensation is a special benefit."). Thus, the current user fee is not dependent on, or inextricably intertwined with, the holding in *Loving*. This Court's opinion does not mention the subsequent regulations.

Moreover, the D.C. Circuit held only that 31 U.S.C. § 330 did not grant statutory authority to the Service to require *uncredentialed tax return preparers* to submit to mandatory testing and continuing education. *See* Loving, 742 F.3d 1013, 1015 (D.C. Cir. 2014) ("We agree with the District Court that the IRS's statutory authority under Section 330 cannot be stretched so broadly as to encompass authority to regulate tax-return preparers."). It did not preclude the Service from issuing regulations pertaining to *tax return preparers generally* based on different statutory authority. In fact, the *Loving* district court made clear that the PTIN regulations were unaffected by its decision invalidating the RTRP regulations. *Loving*, 920 F. Supp. 2d at 109 (stating that the PTIN regulations "do[] not fall within the scope of the injunction and may proceed as promulgated"). Because this decision regarding the PTIN regulations was not challenged on appeal, the D.C. Circuit has not had the opportunity to consider whether the PTIN provides a special benefit.

C. The PTIN User Fee is justified under the IOAA.

As the Court notes, the IOAA permits agencies to "impose fees for bestowing special benefits on individuals not shared by the general public." *Steele*, 2017 WL 2392425, at *6 (citing *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340-41 (1974); *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 350-51 (1974); *Engine Mfrs. Ass'n v. E.P.A.*, 20 F.3d 1177, 1180 (D.C. Cir. 1994)). The Court held that the ability to prepare tax returns for others for compensation was not a "service or thing of value" under the IOAA because the Service is not permitted to regulate tax return preparers generally. *See Steele*, 2017 WL 2392425, at *9-10. This conclusion ignores the fact that without a PTIN, no person, credentialed or not, can prepare returns for compensation. In fact, anyone who prepares a return or refund claim for compensation without a PTIN is subject to a $50 fine per instance up to a maximum of $25,000 per calendar year. *See* 26 U.S.C. § 6695(c). Every court to consider the validity of the PTIN requirement regulation has upheld it. This regulation, rather than the RTRP regulations, forms the basis for the PTIN user fee and applies to *all* tax return preparers. The Court is therefore incorrect that the underlying regulatory scheme has been invalidated.

Further, the Court notes that because "after *Loving* . . . it is no longer the case that only a subset of the general public may obtain a PTIN and prepare tax returns for others for compensation," there is "no special benefit for certain individuals not available to the general public." *Steele*, 2017 WL 2392425, at *10. The IOAA is not so narrow. *See Ayuda, Inc. v. Attorney* General, 848 F.2d 1297, 1300 (D.C. Cir. 1988) ("the [IOAA] by its express terms sweeps with considerable breadth"). The fact that anyone *may* seek to

take advantage of the special benefit provided by having a PTIN does not mean that everyone *does* take advantage of the benefit. *See, e.g.*, OMB Circular A-25 (User Charges) § 6(a)(1)(c) (listing a passport as an example of a special benefit under the IOAA).[3] As the D.C. Circuit explained, the IOAA focuses "on identifiable recipients of a government service for which charges are being assessed, without regard to whether the services are perceived by the recipient to be personally beneficial." *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 184–85 (D.C. Cir. 1996) (discussing *Nat'l Cable*, 415 U.S. at 343, *New England Power*, 415 U.S. at 349-51). Here, the identifiable recipients are those individuals who wish to prepare tax returns and refund claims for compensation. Those individuals who have a PTIN receive a special benefit that the general public does not. *See, e.g., Nat'l Cable*, 415 U.S. at 340 ("A fee . . . is incident to a voluntary act.'); *New England Power*, 415 U.S. at 350 ("the 'fee' presupposes an application."); (*see also* Campbell Decl., ¶9.)[4] Accordingly, the associated expense should be borne only by individuals who request a PTIN and not by the general public.

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[3] The OMB Circular lists receiving a passport of an example of a service that "[i]s performed at the request of or for the convenience of the recipient, and is beyond the services regularly received by other members of the same industry or group or by the general public." OMB Circular A-25 (User Charges) § 6(a)(1)(c).

[4] There are many user fees charged by the federal government under the IOAA for services generally available to anyone who wants to take advantage of the service. *See, e.g.*, 7 C.F.R. § 504.2 (Department of Agriculture fee for deposit and requisition of microbial cultures); 15 C.F.R. § 400.29 (Department of Commerce application fees related to Foreign-Trade Zones); 16 C.F.R. § 4.8 (Federal Trade Commission fees for obtaining records).

Finally, the Court discounts the fact that the PTIN helps prevent disclosure of SSNs, which is another service or thing of value to tax return preparers. Congress amended Section 6109 to authorize the Secretary of the Treasury to prescribe an alternative identifying number for tax return preparers out of "concern [] that inappropriate use might be made out of a preparer's social security number." S. Rep. 105-174. The Court ignores the fact that the PTIN was first created in 1999 in response to these concerns regarding identity theft and the use of SSNs. *See* TD 8835; IRS News Release, IR-1999-72, IRS to Issue Alternative Identification Numbers for Tax Preparers (Aug. 24, 1999). Thus, far from being merely a brief justification for the PTIN, the protection of SSNs has always been a key component of the PTIN regulations.

II. THE UNITED STATES AND THE TAXPAYING PUBLIC WILL BE IRREPARABLY HARMED ABSENT A STAY.

A party is not entitled to a stay pending appeal unless it can show it would be irreparably harmed absent the requested stay. As the Supreme Court has recognized, "[t]he basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974). To establish irreparable harm, a party must show that the injury is: (1) "certain and great;" (2) "actual and not theoretical;" and (3) "'likely' to occur." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations omitted).

The United States would be irreparably harmed if a stay of the Court's injunction is not granted. In connection with its motion, the United States is submitting the declarations of Carol A. Campbell, Director of the Service's Return Preparer Office, and

Jeffery V. Zottola, the Service's Associate Chief Financial Officer for Corporate Budget. These declarations establish both the nature and certainty of the harm that will occur absent a stay.

The Service must continue to allow tax return preparers to obtain and renew PTINs during the pendency of any appeal because a PTIN is required to be a tax return preparer and applicants continue to seek that status. (*See* Campbell Decl., ¶25.) PTINs must be issued and renewed on a regular basis to permit the Service to accurately identify return preparers and associate them with the returns they prepare. (*See id.*, ¶7.) In addition, the Service needs to know which PTINs are in active use to reduce the risk of misuse. (*See id.*) And, most importantly, the PTIN is critical in enabling the Service to identify return preparers who have engaged in conduct subject to penalty or an injunction under the Internal Revenue Code. *See Loving v. United States*, 917 F. Supp. 2d 67, 69 (D.D.C. 2013) (stating that the Service has authority to penalize tax return preparers for improper and erroneous returns (26 U.S.C. §§ 6694, 6695) and to seek to enjoin such conduct in the future (26 U.S.C. §§ 7404, 7408)).

Absent a stay, the United States will bear the cost associated with the use of PTINs without recovering user fees from tax return preparers. (*See* Campbell Decl., ¶¶16, 22, 25, 27.) If the United States is ultimately successful on appeal, the United States may not have any legal or practical method to recover the millions of dollars of fees that would go uncollected during the appeal process.

Given that the resolution of any appeal in this case will likely not occur until 2018 at the earliest, the United States faces the prospect that it will not recover an entire

years' worth of fees and maybe more. In 2016, for example, 740,956 PTIN holders paid $25,016,999 in user fees to the Service and $12,596,248 in vendor fees, for a total amount of $37,613,247. (*See* Zottola Decl., ¶5.) Using 2016 as a benchmark, the Service expects the economic loss associated with the injunction to exceed $37.6 million for the next fiscal year. (*See id.*, ¶8.) The amount of uncollected fees will continue to grow the longer the appeal lasts.

If the United States cannot recover this economic loss at a later date, it will be irreparably harmed. As the D.C. Circuit explained:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Virginia Petroleum Jobbers Ass'n v. PFC, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis in original). Where no method exists to recover an economic loss after a successful appeal, economic loss can constitute an irreparable harm. *See Philip Morris USA Inc. v. Scott*, -- U.S. –-, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers, granting stay pending Supreme Court review) ("If expenditures cannot be recouped, the resulting loss may be irreparable."); *Sterling Commercial Credit – Mich., LLC v. Phx. Indus. I, LLC*, 762 F. Supp. 2d 8, 16 (D.D.C. 2011) ("[C]ourts have also held, under some circumstances, that economic harm may qualify as irreparable where a plaintiff's alleged damages are unrecoverable." (internal quotation marks omitted)).

The United States is aware of only a single possible avenue for recovery, namely a restitution claim against each PTIN holder. A court may order restitution to restore a party to what it lost as a result of the court's process. *See Arkadelphia Milling Co. v. St. Louis S.W. Ry Co.*, 249 U.S. 134, 145 (1919). Restitution is not a right but may be granted at the court's discretion. *Atlantic Coast Line Ry. Co. v. Florida*, 295 U.S. 301, 310 (1935).

In *Atlanta Journal and Constitution v. City of Atlanta Dept. of Aviation*, the Eleventh Circuit upheld a restitution order in favor of Atlanta's airport authority to recover user fees that were uncollected during the pendency of its appeal of an order enjoining their collection. *See* 442 F.3d 1283 (11th Cir. 2006). Several newspapers had challenged a user fee related to the placement of newspaper kiosks throughout the airport. *See id.* at 1284. After the district court issued an injunction preventing the collection of the user fees, the airport authority appealed to the Eleventh Circuit, which reversed the district court's decision. The airport authority then sought restitution in the district court of all user fees that it was unable to collect during the pendency of the improper injunction. *See id.* The district court granted restitution and the Eleventh Circuit affirmed the order. *See id.* at 1287-89. The United States, however, has found no case where a court granted restitution to the federal government in a case involving the injunction of a user fee.

In addition, even if the United States is entitled to restitution, numerous procedural and collection issues call into question whether the unpaid amounts would be collected. As a primary matter, it is unclear whether the United States could assert a restitution claim on remand or whether it would have to separately bring suit against all 700,000+ PTIN holders. *C.f., Atlanta Journal and Constitution v. City of Atlanta Dept. of*

Aviation, 347 F. Supp. 2d 1310 (N.D. Ga. 2004) (allowing restitution claim on remand). If a separate suit is required against each PTIN holder, the costs of collection would exceed the amount to be recovered.

Even if the Court permitted restitution on remand, the United States would face several hurdles in the way of collection. For example, it is unclear whether the Court can order the restitution be set off against any potential excess amount of fees.[5] The United States has been unable to locate any federal case in which the availability of setoff in this context was litigated. In any event, setoff would still not make the United States whole. For instance, some individuals who obtain or renew a PTIN during the injunction period may have opted out of the class, and therefore would not be covered by the restitution order. In addition, some members of the class may not have applied for a PTIN during the injunction period, and thus would not properly be subject to the restitution order; any reduction in their award of any excessive fees would therefore be inappropriate. These and other practical problems show that restitution is unlikely to compensate the United States for its economic loss during the pendency of the appeal.[6]

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[5] The United States does not admit that the PTIN user fees were excessive. If there were no excessive fees owed to the class members, then there would be nothing against which restitution could be set off.

[6] Conversely, if a stay is granted and the Court of Appeals affirms this Court's decision, the United States would include any fees collected during the pendency of the appeal in the total amount paid to plaintiffs' claims agent for distribution.

But even if the United States is able to completely recover the amount of fees uncollected during the period of the injunction, it will still be irreparably harmed. If the United States is not permitted to recover the cost of the PTIN through a user fee, it will have to use funds appropriated for other programs and services. (*See* Zottola Decl., ¶11.) There is no method to restore the timely provision of services aimed at helping taxpayers understand and meet their responsibilities under the Internal Revenue Code for example. (*See id.*) That alone is sufficient to establish irreparable harm.

Because absent a stay there are no adequate legal remedies available after the fact to restore the United States, the economic loss faced by the United States and the reduction in services it will be able to provide to the public constitute irreparable harm.

III. PLAINTIFFS WILL NOT BE SUBSTANTIALLY INJURED BY A STAY.

In contrast to the irreparable injuries that will be incurred by the Service and the public if the District Court's injunction remains in effect during the pendency of an appeal, plaintiffs face no substantial harm if the injunction is stayed. While a stay would require each PTIN holder to continue to pay a $50 user fee per year during the pendency of any appeal, they would be entitled to a refund if the United States does not appeal or if an appeal is unsuccessful. Their injury can be remedied after the fact, which weighs in favor of granting a stay.

IV. THE PUBLIC INTEREST WILL BE BEST SERVED BY A STAY PENDING APPEAL.

The law is well-settled that where the United States, or an agency thereof, seeks a stay, the requirements that the movant demonstrate that it will suffer irreparable injury in the absence of a stay and that the public interest will be served by a stay are

essentially one and the same. *See Nken*, 556 U.S. at 435 (showing of harm to public interest merges with the Government's own showing of harm when the Government is a party); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011). Accordingly, the United States' demonstration herein that it will suffer irreparable injury in the absence of a stay satisfies the requirement that the granting of a stay is in the public interest. In any event, as demonstrated above, the taxpaying public also will be irreparably harmed by the denial of a stay in this case, and thus a stay is in the public interest.

CONCLUSION

For the foregoing reasons, the Court should stay its injunction during the pendency of any appeal in this case.

Dated: July 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR STAY was filed with the Court's ECF system on July 24, 2017, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

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