IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This case is a quintessential class action. The class representatives are three people who prepare tax returns on behalf of others for compensation. Like all tax-return preparers, each representative has paid fees to the Internal Revenue Service to obtain what is known as a preparer tax identification number (or PTIN).

This case challenges the legality of those fees on two grounds. The first is that the IRS has no authority to charge any PTIN fees because tax-return preparers receive no special "service or thing of value" in return for them, but only an identifying number. 31 U.S.C. § 9701(a). The second is that, even if the IRS is authorized to charge a PTIN fee, it charges more than is permissible because the fees far exceed any cost the IRS incurs.

Because these questions are ideally suited for class treatment, the plaintiffs move to certify the case as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class: "All individuals and entities who have paid an initial and/or renewal fee for a PTIN, excluding Allen Buckley, Allen Buckley LLC, and Christopher Rizek."

BACKGROUND

Before 2010, anyone could file a tax return on behalf of someone else for compensation. In the five preceding years, there had been multiple failed attempts in Congress—supported by the IRS—to give the federal government the authority to regulate tax-return preparers.[1] Frustrated with Congress's inaction, the IRS took it upon itself to regulate tax-return preparers in 2010—the first attempt to do so in American history.

As part of this unprecedented regulatory effort, the IRS began imposing a range of new requirements on tax-return preparers, including competency testing and continuing education demands applicable to certain preparers. *See* 31 C.F.R. §§ 10.3(f)(2), 10.4(c), 10.5(b), 10.6(d)(6), (e). The IRS also began requiring all preparers to pay an initial $64.25 fee to obtain a PTIN, and an annual $63 PTIN renewal fee thereafter. *See* 26 C.F.R. § 300.13; User Fees Relating to Enrollment and Preparer Tax Identification Nos., 75 Fed. Reg. 60,316, 60,319 (Sept. 30, 2010). To date, approximately 1.1 million people have paid at least one PTIN fee.

Last year, the D.C. Circuit held that the IRS's asserted statutory basis for this scheme—31 U.S.C. § 330, which permits the IRS to "regulate the practice of representatives of persons before the Department of the Treasury"—does not give the IRS authority to regulate tax-return preparers in this manner. *Loving v. Internal Revenue Serv.*, 742 F.3d 1014 (D.C. Cir. 2014). As a result, anyone may once again prepare tax returns for others. Despite this decision, the IRS continues to charge tax-return preparers the fees that were intended to fund its failed regulatory regime—fees that it did not charge before that regime took effect.

[1] *See* The Taxpayer Protection and Assistance Act of 2005, S. 832, 109th Cong. (2005); The Taxpayer Protection and Assistance Act of 2007, S. 1219 (110th Cong.); The Taxpayer Bill of Rights Act of 2008, H.R. 5716, 110th Cong. § 4(a) (2008); The Taxpayer Bill of Rights Act of 2010, H.R. 5047, 111th Cong., § 202(a) (2010).

ARGUMENT

Class certification is appropriate where, as here, the plaintiffs can satisfy the requirements of both Rule 23(a) and (b). Rule 23(a) requires a showing that (1) the class is sufficiently numerous to make joinder of all class members impracticable, (2) there are common factual or legal issues, (3) the named plaintiffs' claims are typical of the class, and (4) the named plaintiffs will fairly and adequately protect the interests of the class.

Rule 23(b) requires one of three things. *First*, under (b)(1), the plaintiffs may show that prosecuting separate actions would create a risk of inconsistent results, such as where the defendant is "obliged by law to treat the members of the class alike" (as with "a government imposing a tax"). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). *Second*, under (b)(2), the plaintiffs may show that the defendant "has acted or refused to act on grounds that apply generally to the class," such that declaratory or injunctive relief is appropriate. *Third*, under (b)(3), the plaintiffs may show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." In this case, all three requirements are met.

I. This case meets Rule 23(a)'s requirements.

A. The class is sufficiently numerous.

As an initial matter, this case satisfies Rule 23(a)(1)'s requirement that the class be "so numerous that joinder of all members is impracticable." Courts have found that "a proposed class consisting of at least forty members will satisfy the impracticability requirement," and "a plaintiff need not provide the exact number of potential class members in order to satisfy the requirement." *Bynum v. District of Columbia*, 214 F.R.D. 27, 32–33 (D.D.C. 2003) (Lamberth, *J.*); *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 305–06 (D.D.C. 2007)

(certifying class of 30 people). The plaintiffs here estimate that the class contains between 700,000 and 1.2 million members. Am. Compl. ¶ 32. And the IRS reports on its website that as of September 1, 2015, it has issued PTINs to 1,144,409 people since September 28, 2010 (the date that it began imposing fees). That amount is more than enough to satisfy Rule 23(a)(1).

B. The legal and factual issues are common to the class.

This case likewise easily satisfies Rule 23(a)(2)'s requirement of "questions of law or fact common to the class." This requirement is met if "a single aspect or feature of the claim is common to all proposed class members," *Bynum*, 214 F.R.D. at 33, and "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As this Court already recognized in consolidating this case with *Dickson v. United States*, No.14-cv-2221, another putative class action brought by tax-return preparers, "[t]hese cases involve common questions of both law and fact." ECF No. 37, at 4. Indeed, the two key questions at the heart of the case are common: (1) Does the IRS lack the legal authority to impose a fee for issuing or renewing a PTIN? (2) Are the PTIN fees imposed by the IRS excessive? *See* Am. Compl. ¶ 33. These questions will generate common answers that will "drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551. If the answer to both questions is no, the government will win this case. If the answer to either question is yes, the government will be liable to every class member.

C. The named plaintiffs' claims are typical of the class.

This case also meets Rule 23(a)(3)'s requirement that the named plaintiffs' claims be typical of the class's claims, a requirement that this Court has "liberally construed." *Bynum*, 214 F.R.D. at 34. When "the named plaintiffs' claims are based on the same legal theory as the claims of the other class members, it will suffice to show that the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Id.* at 35.

That is the case here. The named plaintiffs' claims are typical of the class because they arise from the same course of conduct by the United States (charging all tax-return preparers a PTIN fee) and are based on the same legal theory (challenging those fees as unauthorized and excessive). *See* Am. Compl. ¶ 34.

D. The named plaintiffs are adequate representatives.

Rule 23(a)(4)'s requirement that the plaintiffs "will fairly and adequately protect the interests of the class" has two elements: "(1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and (2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997). Because the plaintiffs have paid fees for the issuance and renewal of PTINs, they have the same interests as the unnamed class members. Am. Compl. ¶ 35. And this Court has already determined that the named plaintiffs are represented by counsel who will fairly and adequately represent the interests of the class, as explained in this Court's opinion appointing the Motley Rice firm as interim lead class counsel. *See* ECF No. 37, at 7–9.[2]

II. This case meets Rule 23(b)'s requirements.

A. This case satisfies Rule 23(b)(1).

Rule 23(b)(1) permits class certification if prosecuting separate actions by individual class members would risk "inconsistent or varying adjudications" establishing "incompatible standards of conduct" for the defendant. Fed. R. Civ. P. 23(b)(1)(A). Because this case seeks

[2] This Court has also indicated that a class seeking monetary relief must be "adequately defined" and "clearly ascertainable." *DL v. District of Columbia*, 302 F.R.D. 1, 16–18 (D.D.C. 2013) (Lamberth, *J.*). Both requirements are met here: The class definition provides a clear and objective test for determining class membership, and the identity of all class members will be ascertained from the IRS's records. *See* IRS, *Return Preparer PTIN Listing* (last visited Sept. 9, 2015), http://1.usa.gov/1iwUP8r (listing the information the IRS collects from every person issued a PTIN).

equitable relief in addition to return of the unlawful PTIN fees already paid, the risk of inconsistent results is acute. If there were separate actions for equitable relief, the IRS could be "forced into a 'conflicted position,'" Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 388 (1967), potentially subjecting it to "incompatible court orders." 2 William B. Rubenstein, *Newberg on Class Actions* § 4.2 (5th ed. 2015). That makes this case the rare one in which a class action is "not only preferable but essential." Rubenstein, *Newberg on Class Actions* § 4.2; *see also* Fed. R. Civ. P. 23(b)(1), 1966 advisory committee note (listing as examples cases against the government "to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment"). Under these circumstances, Rule 23(b)(1) is satisfied.

B. This case satisfies Rule 23(b)(2).

"Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.'" *Amchem*, 521 U.S. at 614. "The key to the (b)(2) class," the Supreme Court has explained, "is the indivisible nature of the injunctive or declaratory remedy warranted." *Wal-Mart*, 131 S. Ct. at 2557. Where "a single injunction or declaratory judgment would provide relief to each member of the class," the class may be certified under (b)(2). *Id.*

This case challenges a uniform governmental practice that affects all putative class members: charging a PTIN fee to every tax-return preparer every year. And the complaint seeks equitable relief that would prohibit the IRS from imposing PTIN fees in the future. *See* Am. Compl. 15. Thus, "certification of a (b)(2) class in this case is appropriate because the [IRS's] conduct is 'such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *DL*, 302 F.R.D. at 16 (quoting *Wal-Mart*, 131 S. Ct. at 2557).

C. This case satisfies Rule 23(b)(3).

Because this case also seeks the return of all unlawful PTIN fees that have been paid to the IRS, Rule 23(b)(3) is an appropriate basis for certification as well. Indeed, this Court may wish to "adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including the right to opt out to class members at the monetary relief stage." *Bynum*, 214 F.R.D. at 38 (quoting *Eubanks v. Billington*, 110 F.3d 87, 96 (D.C. Cir. 1997)).

Rule 23(b)(3) contains two requirements, both of which are met here. "The first requirement is that common factual and legal issues predominate over any such issues that affect only individual class members." *Id.* at 39. As already explained, the plaintiffs allege that the IRS lacks the authority to charge any PTIN fees, and that, even if the fees are authorized, they are excessive. Those are the common predominant legal questions in this case. And the sole individual issue—calculation of the amount of each class member's restitution, which depends on how many PTIN fees they have paid—is ministerial. "Here, the damages are fixed in that the [defendant's] own records . . . reflect the monetary amount that each plaintiff lost. Even assuming interest were to apply to those sums, the calculation of [the monetary] claims in this case would clearly be a mechanical task." *Hardy v. District of Columbia*, 283 F.R.D. 20, 28 (D.D.C. 2012).

"The second requirement of Rule 23(b)(3) is that the Court find that maintaining the present action as a class action will be superior to other available methods of adjudication." *Bynum*, 214 F.R.D. at 40. As the Court has observed, class treatment is most appropriate in cases like this one, "in which the individual claims of many of the putative class members are so small that it would not be economically efficient for them to maintain individual suits." *Id.* Each class member here "stand[s] to recover only a small amount of damages" (likely no more than a few

hundred dollars), which is not enough to "entice many attorneys into filing such separate actions." *Id.* Nor are there any concerns that "potential difficulties in identifying the class members and sending them notice will make the class unmanageable." *Id.* To the contrary, this class is manageable because the government itself has all the information needed to identify and notify every class member, including their names and email addresses. Class counsel can send notice to the email addresses the IRS has on file for all PTIN recipients.

CONCLUSION

The plaintiffs' motion for class certification should be granted.

Respectfully submitted,

/s/ William H. Narwold

MOTLEY RICE LLC

William H. Narwold
bnarwold@motleyrice.com
DC Bar No. 502352
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
Telephone: (860) 882-1676
Facsimile: (860) 882-1682

Nathan D. Finch
nfinch@motleyrice.com
Elizabeth Smith
esmith@motleyrice.com
3333 K Street NW, Suite 450
Washington, DC 20007
Telephone: (202) 232-5504
Facsimile: (202) 232-5513

GUPTA WESSLER PLLC

Deepak Gupta
deepak@guptawessler.com
Jonathan E. Taylor
jon@guptawessler.com

Peter Conti-Brown
peter@guptawessler.com
1735 20th Street, NW
Washington, DC 20009
Telephone: (202) 888-1741
Facsimile: (202) 888-7792

CAPLIN & DRYSDALE, CHARTERED

Christopher S. Rizek
crizek@capdale.com
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
Telephone: (202) 862-8852
Facsimile: (202) 429-3301

LAW OFFICE OF ALLEN BUCKLEY LLC

Allen Buckley
ab@allenbuckleylaw.com
2802 Paces Ferry Road, Suite 100-C
Atlanta, GA 30339
Telephone: (404) 610-1936
Facsimile: (770) 319-0110

September 9, 2015

Counsel for Plaintiffs Adam Steele, Brittany Montrois, Joseph Henchman, and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2015, I electronically filed this class-certification motion through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ William H. Narwold

William H. Narwold