IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

CONTINENTAL SERVICE GROUP, INC., and PIONEER CREDIT RECOVERY, INC., Plaintiffs, and COLLECTION TECHNOLOGY, INC., PROGRESSIVE FINANCIAL SERVICES, INC., and ALLTRAN EDUCATION, INC., Intervenor-Plaintiffs, v. THE UNITED STATES, Defendant, and THE CBE GROUP, INC., PREMIERE CREDIT OF NORTH AMERICA, LLC, GC SERVICES LIMITED PARTNERSHIP, FINANCIAL MANAGEMENT SYSTEMS, INC., VALUE RECOVERY HOLDINGS, LLC, and WINDHAM PROFESSIONALS, INC., Intervenor-Defendants.	Nos. 17-449, 17-499 Chief Judge Braden

MOTION FOR STAY PENDING APPEAL

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MOTION FOR STAY PENDING APPEAL

Pursuant to Rule 62(c) of the Rules of this Court, Alltran Education, Inc. ("Alltran") hereby moves for a stay (in part) of the May 31, 2017 preliminary injunction (ECF 143) entered in the above-captioned action (as well as of the identical injunctions issued in case Nos. 17-493, 17-517, 17-558, 17-578, and 17-633[1]), pending the resolution of Alltran's appeal of that injunction. Specifically, Alltran requests that the Court stay the portion of the injunction currently prohibiting the Department of Education ("ED") from "transferring work" to Alltran's

[1] Alltran has moved to intervene in each of the cases in which a copy of the May 31 injunction has been issued. Upon the granting of Alltran's outstanding motions for intervention, Alltran will file a notice of appeal in each case, along with a copy of this motion.

award-term extension ("ATE") contract (*i.e.*, Task Order No. ED-FSA-17-O-0007 under Contract No. GS-23F-0291K).[2]

As explained herein, Alltran's ATE contract was a valid contract award,[3] and neither the various cases before this Court nor the Court's cited bases for the current injunction justify enjoining Alltran's ATE contract. Thus, Alltran is likely to prevail on its appeal, and is entitled to a stay of the current injunction. Moreover, and as also discussed herein, the equities strongly favor a stay pending appeal. Alltran's ATE contract is essentially a bridge contract designed to last only until ED completes its current corrective action under Solicitation No. ED-FSA-16-R-0009 (the "large business solicitation") and work begins on the contracts awarded thereunder. Alltran's ATE contract has already been unnecessarily delayed for over two years due to ED's irrational actions that were the subject of the litigation of *Coast Professional* (No. 15-207). And now, even though Alltran has finally been awarded the ATE contract that it deserved all along, ***if the May 31 injunction remains in place*** throughout the corrective action—which appears likely absent a stay of the injunction by either this Court or the Federal Circuit—then ***Alltran's entire ATE contract will be lost***. That is the very definition of irreparable harm, and greatly outweighs the non-existent harms to the other parties that might desire an injunction.

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[2] Alternatively, should this Court determine to lift the May 31 injunction in its entirety or to simplify modify the May 31 injunction to exclude the prohibition against ED's use of Alltran's ATE contract, Alltran would not object. Either such action would both grant Alltran the relief requested herein as well as moot Alltran's appeal.

[3] Indeed, this Court expressly encouraged ED to award Alltran its ATE contract as part of the corrective action in the *Coast Professional* matter. *See* No. 15-207, ECF 230, April 5, 2017 Hearing Transcript 19:25-20:3 ("THE COURT [to counsel for an intervenor]: . . . I want to get this -- you guys have a contract. They [including Alltran] are going to get their contracts. You all go off and do your business. That's what I want to see have happen here.").

Accordingly, for each of these reasons, as well as those discussed further below, Alltran respectfully requests that the Court stay the May 31 injunction, at least as applied to Alltran's ATE contract, pending the resolution of Alltran's appeal. ***Moreover, given the urgency of this issue, Alltran requests that this Court stay the injunction by Wednesday June 14, 2017***. If this Court does not stay the injunction by that time, then Alltran intends to file an Emergency Motion with the Federal Circuit requesting a stay pending the resolution of Alltran's appeal.

ARGUMENT

When faced with a request for a stay pending appeal, the Court considers the following factors: (1) whether the movant has made a strong showing that it is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether a stay will substantially injure other interested parties; and (4) where the public interest lies. *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum*, 835 F.2d 277, 278 (Fed. Cir. 1987)). Each factor is not necessarily entitled to equal weight. *Id.* Rather, the Court's flexible consideration of the four factors allows for a stay pending appeal when the movant "'establishes that it has a strong likelihood of success on appeal, or where, failing that, it can nonetheless demonstrate a substantial case on the merits,' provided the other factors militate in movant's favor." *Id.* at 513 (quoting *Hilton*, 481 U.S. at 778); *see also id.* at 512 ("When harm to applicant is great enough, a court will not require 'a strong showing' that applicant is 'likely to succeed on the merits.'" (quoting *Hilton*, 481 U.S. at 776)). Put another way, a plaintiff is entitled to a stay where it has a "substantial case on the merits" and where "the balance of hardships tips decidedly toward plaintiff." *Id.* at 513 (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973)). Moreover, "if the equities weigh heavily in favor of maintaining

the status quo, the court may grant [or stay] an injunction under RCFC 62(c) when the question raised is novel or close, especially when the case will be returned to the trial court should the movant prevail on appeal." *Acrow Corp. of Am. v. United States*, 97 Fed. Cl. 182, 184-85 (2011) (citing *Standard Havens*, 897 F.2d at 513).

Here, as discussed in greater detail in the following sections, Alltran is likely to prevail on the merits of its appeal *and* the equities significantly favor Alltran. Accordingly, Alltran is entitled to a stay pending appeal.

I. ALLTRAN IS LIKELY TO PREVAIL ON THE MERITS OF ITS APPEAL

The merits of Alltran's appeal concern whether this Court erred in issuing the May 31, 2017 injunction prohibiting ED from "transferring work" to Alltran's ATE contract. Thus, the Federal Circuit will review whether this Court considered and properly applied the four traditional injunctive relief factors: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer immediate and irreparable injury absent injunctive relief; (3) whether the potential harm to the movant outweighs the harm to other parties should an injunction be issued; and (4) the public interest. *See, e.g.*, *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993); *see also Altana Pharma AG v. Teva Pharm. USA, Inc.*, 566 F.3d 999, 1005 (Fed. Cir. 2009) ("Although the factors are not applied mechanically, a movant must establish the existence of both of the first two factors to be entitled to a preliminary injunction."). As the Federal Circuit has recognized, an appellant carries a lighter burden where, as here, it seeks to reverse the grant of a preliminary injunction, as opposed to seeking to reverse the denial of an injunction. *See Altana Pharma AG*, 566 F.3d at 1005 (citing *New England Braiding Co., Inc. v. A.W. Chesterton Co.*, 970 F.2d 878, 882 (Fed. Cir. 1992)).

The analysis in this case is somewhat unusual, given that the Court issued the May 31 injunction not in response to any particular party motion or argument, but rather in an effort to "preserve the *status quo*" in light of recent news articles regarding political developments potentially impacting ED's debt collection contracts. *See* ECF 143 at 2 (citing *Litton Sys., Inc. v. Sundstrand Corp.*, 750 F.2d 952, 961 (Fed. Cir. 1984) ("The function of preliminary injunctive relief is to preserve the *status quo* pending a determination of the action on the merits.")). However, as a threshold matter, the Court's conclusion that an injunction would preserve the status quo was factually incorrect. As made clear in the Federal Circuit decision cited by the Court, "The status quo to be preserved is *that state of affairs existing immediately before the filing of the litigation*, the last uncontested status which preceded the pending controversy." *Litton Sys.*, 750 F.2d at 961 (emphasis added; citation omitted). Here, immediately before the filing of the current litigation (*i.e.*, Continental Service's ("ConServe") March 28, 2017 Complaint in No. 17-449), there was ***no injunction*** in place as to any of ED's small business and/or ATE contracts.[4] Thus, an injunction of Alltran's ATE contract is *not* the status quo in this instance. For that reason alone, Alltran is likely to prevail on its appeal, and the injunction should be stayed.

Additionally, Federal Circuit precedent is clear that, prior to issuing a preliminary injunction, the Court "must balance each of [the four injunctive relief] factors against the others and against the magnitude of the relief requested to determine whether a preliminary injunction should be granted or denied." *Filmtec Corp. v. Allied-Signal Inc.*, 939 F.2d 1568, 1571 (Fed.

[4] ConServe's March 28 Complaint primarily challenged ED's large business awards in December 2016, which awards were also the subject of multiple protests before the Government Accountability Office ("GAO"). Those large business awards—and *only those large business awards*—were stayed during the pendency of the GAO protests, pursuant to the Competition in Contracting Act, 31 U.S.C. § 3553(d)(3).

Cir. 1991) (vacating preliminary injunction where lower court made insufficient factual finding as to movant's likelihood of success); *see also, e.g.*, *Celgard, LLC v. LG Chem, Ltd.*, 624 F. App'x 748, 752 (Fed. Cir. 2015) (reversing preliminary injunction where lower court failed to address its jurisdiction over movant's claim and offered only a single, conclusory sentence in support of its finding of likelihood of success on the merits); *Pretty Punch Shoppettes, Inc. v. Hauk*, 844 F.2d 782, 784 (Fed. Cir. 1988) (vacating order on request for preliminary injunction because trial court failed to make sufficient findings of fact). Here, however, the May 31 injunction did not address, and did not make any findings of fact regarding, *any* of the four injunctive relief factors. For that reason, as well, Alltran is likely to succeed on its appeal, and the injunction should be stayed.

Finally, even assuming, *arguendo*, that the Federal Circuit would consider the Court's references to recent news articles as findings of fact, or that the Circuit would look to the Court's prior injunctions in this action for potential justifications for the May 31 injunction, the May 31 injunction would still fail as a matter of law. As will be further explained in the following sections, (1) the referenced news articles do not address the four injunctive relief factors, and cannot rationally justify the May 31 injunction of Alltran's ATE contract; and (2) the stated bases for the prior injunctions in this action have either been expressly abandoned by this Court or otherwise do not warrant an injunction of Alltran's ATE contract. Accordingly, for these reasons, as well, the May 31 injunction as to ED's use of Alltran's ATE contract fails as a matter of law and should be stayed pending the resolution of Alltran's appeal.

A. The News Articles Referenced in the May 31 Injunction Do Not Address the Four Injunctive Relief Factors, and Cannot Rationally Justify the May 31 Injunction of Alltran's ATE Contract

The May 31 injunction references and attaches three news articles that the Court notes were not previously brought to the Court's attention by the parties.[5] After describing those three articles, the injunction states: "For these reasons, the preliminary injunction will remain in place to preserve the *status quo* until the viability of the debt collection contracts at issue is resolved." ECF 143 at 2. Regardless of whether the articles were brought to the Court's attention, the substance of the articles neither addresses the four injunctive relief factors nor provides a rational basis for the injunction of Alltran's ATE contract.

- The first article, from www.politico.com, the website of a politically focused magazine, merely reports on a supposed dispute between Congress, ED, and James Runcie, the former head of ED's Federal Student Aid ("FSA") division. *See* Court Exhibit A. Nowhere does the article implicate Alltran's ATE contract or address the merits or respective harms to the parties in the current litigation. Nor does the article address, at any level of specificity, the extent to which the parties', the Government's, or the public's interests would be affected by the specific injunction of Alltran's ATE contract.

- The second article, from www.thehill.com, is merely an *opinion* piece authored by an individual who is neither a party to this litigation nor a representative of the United States Government. *See* Court Exhibit B. Moreover, that opinion piece does not address anything about the specifics of this case or whether the Court should enjoin Alltran's ATE contract. To the contrary, it is simply a high-level expression of the author's personal opinion that ED should discontinue its use of private collection agency contracts. Even if such a discontinuation were under consideration—which it is *not* in this litigation—that is a programmatic policy decision that must be left to the Government in the first instance, and cannot be unilaterally imposed by this Court *against the Government's express wishes*. *See, e.g.*, ECF 126 (Government Motion to Vacate the Injunction).

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[5] The May 31 injunction also states that the Government had not yet updated the Court as to the progress of negotiations with certain contractors about a potential solution to their "prior accounts" issue. The "prior accounts" issue is discussed below in § I.B.2. For the reasons addressed in that section, regardless of whether the Government had yet updated the Court on that issue, the issue itself was and is unrelated to Alltran's ATE contract, and thus cannot rationally support the May 31 injunction of Alltran's ATE contract.

- The third article, from the website of the New York Times, does not address this specific litigation, either. *See* Court Exhibit C. Rather, the article states, based on supposed quotes from Mr. Runcie's resignation memo, that the Trump administration is *considering* moving ED's student loan portfolio to the Treasury Department. Yet, such a transfer of responsibility has not happened, and there is no definitive indication that such a move will happen at any point in the future, let alone anytime soon. Indeed, as the article also notes, "[s]crapping or shrinking the Education Department has long been a popular Republican goal, dating from the Reagan administration." There is no basis to upset the status quo and impose an injunction now based on potential events that are in no way, shape, or form certain to occur. Moreover, to the extent the Court is attempting to effect a broad programmatic change, that is well beyond both the scope of this litigation and the Court's authority, and cannot rationally serve as the basis for the May 31 injunction of Alltran's ATE contract.

In sum, none of the articles referenced in the May 31 injunction address the four injunctive relief factors or rationally justify the Court's injunction of Alltran's ATE contract. Accordingly, for this reason, as well, Alltran is likely to succeed on its appeal, and the Court should stay the injunction, at least as to Alltran, pending the resolution of that appeal.

B. The Stated Bases for the Prior Injunctions in This Action Have Either Been Expressly Abandoned by This Court or Otherwise Do Not Warrant an Injunction of Alltran's ATE Contract

The three news articles discussed above are the primary stated basis for the May 31 injunction. However, even if the Federal Circuit were to view the May 31 injunction as merely a continuation of the prior injunctions in this case, and thus to consider whether the May 31 injunction was potentially supported by the factual findings in those prior injunctions, that, too, would fail. Not only has this Court expressly disavowed the rationale supporting the initial injunctions in this case, but the remaining rationales have nothing to do with and thus cannot rationally support the injunction of Alltran's ATE contract.

1. This Court Has Already Abandoned the Primary Basis for the Original Injunctions—ConServe's Flawed "Dilution" Theory

The first injunction issued in this case was a temporary restraining order ("TRO") issued on March 9, 2017. *See* ECF 9. In that TRO, the Court expressed concern, based solely on ConServe's initial pleadings and argument, that ED might be transferring work to other contract vehicles to moot ConServe's bid protest. *Id.* at 2 ("Continental Services advised the court that ED has been undermining the GAO automatic stay by transferring work to be performed under the stayed contracts to other contractors to circumvent or moot this pending bid protest."). ConServe's allegations in this regard stemmed from Count VII of its Complaint, and pertained to supposed improper transfers of accounts to small business contracts (as opposed to transfers to ConServe's own ATE contract). *See* ECF 1, ConServe Complaint, Count VII.

The second injunction in this case was issued on May 2, following a hearing that day. *See* ECF 87. At the May 2 hearing, the majority of argument in favor of an injunction was presented by counsel for ConServe, who claimed that allowing any contracts to go forward—*i.e.*, including the small business contracts or the ATE contracts—would supposedly "dilute" the work "destined" for the ultimate large business contracts. *See, e.g.*, ECF 96, May 2, 017 Transcript 19:12-20 ("So, it does not matter to ConServe whether the 7 awardees do the work or the 11 small businesses or the 2 [ATE] contractors subject to corrective action. We don't believe any contractor should be performing the work that is destined for the contract, and we believe, as we stated about a month ago, that it is diluting the available work, the pie is getting smaller, and as well it's also deincentivizing the Department of Education from reaching any global resolution in this matter."). In the May 2 Order, the Court dismissed Count VII of ConServe's Complaint (ECF 87 at 2). Nonetheless, the Court made conclusory findings regarding the four injunctive relief factors and continued the initial injunction, including the prohibition on account

transfers to Alltran's ATE contract. Of the Court's findings, only the finding on irreparable harm even remotely addressed why the Court was enjoining Alltran's ATE contract; once again, that supposed harm was based on the "dilution" theory advanced by ConServe. *See id.* at 2 ("Regarding the first factor, the court has determined that Plaintiffs and Intervenor-Plaintiffs will be immediately and irreparably injured, if the ED allows continued performance on Task Orders issued under Solicitation No. ED-FSA-16-R-0009, *or otherwise transfers work to another contracting vehicle to circumvent or moot this bid protest*." (emphasis added)). The Court's remaining findings focused only on the propriety of staying the initial 2016 large business awards, which all parties (other than those initial awardees) agreed should be stayed pending the corrective action for the still-ongoing large business procurement. *See id.* at 2-3.

After the second injunction, the parties next convened for a hearing on May 22. At that hearing, the Court repeatedly indicated that it was inclined to lift the injunction. *See generally* ECF 138, May 22 Hearing Transcript. Moreover, the Court explained that it had been made aware of new information that undermined the "dilution" theory advanced by ConServe; thus, the Court explained that it was "past that argument" and "won't . . . keep the injunction for that purpose":

> [MR. CANNI, ConServe Counsel:] . . . But, again, the key issue really is is you lift the preliminary injunction, the Department of Education is going to dilute the work that's subject to this protest by sending it to the 11 small businesses --
>
> THE COURT: Well, yeah, here's the way it's been clarified to me, at least my law clerk has tried to help me understand this. That is true. But there is other work -- every month, there are new accounts that come up because people are in default. So there's new work that will be coming down the road. And I think ***that kind of --***
>
> MR. CANNI: That is --
>
> THE COURT: ***-- offsets the concern about the dilution business***. The Government -- the Government never made that argument to me, or at

> least if they did I certainly missed it because I was looking at these things as being the universe of business, and that's not true. This is the universe of business as of today. There will be other work in the future. If you have one of these -- if you've qualified under the IDIQ, they can issue a task order or a contract or whatever they want to call it for future work down the road. So in terms of that, that -- ***I'm past that argument now***, although it's one that no one ever made to me. But my law clerk explained that to me. And so that clarified that for me. So, ***I won't --***
>
> MR. CANNI: Well, Your Honor --
>
> THE COURT: -- ***keep the injunction for that purpose***. And you can argue all you want.

Id. 58:5-59:8 (emphasis added); *see also* ECF 128 (Alltran filing explaining fundamental flaws in "dilution" theory and ConServe's inherently inconsistent positions before this Court).[6]

Consistent with the Court's statements during the May 22 hearing, although the Court ultimately continued the injunction on May 22 (ECF 132) and again on May 31 (ECF 143), the Court has *not* cited the "dilution" theory or any concerns about transferring work to Alltran's ATE contract as a basis for the continued injunction. Thus, it is clear that that rationale was

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[6] In addition to the fact that this Court has already expressly rejected the "dilution" theory, Alltran maintains that the "dilution" theory cannot rationally support an injunction of Alltran's ATE contract in this action. *See generally* ECF 128. Simply put, there is no "dilution." First, the only work required by law to be awarded under the large business contracts is the $1,000 minimum guarantee set forth in the Solicitation, and (1) ED has expressly committed to providing that minimum guarantee to all awarded large business contracts, and (2) no party, not even ConServe, has challenged that minimum guarantee or alleged that it would not be available. *Id.* at 3; *see also id.* n.2 (further explaining that any such future challenge would be a Contract Disputes Act challenge, not a bid protest). Second, ConServe's concept of dilution assumes that there is some finite pool of defaulted accounts that will be irreversibly drained if assigned to other contract vehicles during the corrective action, but that is not the case. *See id.* at 3-4 (explaining that there were 234,000 defaulted accounts available for placement in April and May 2017 alone, "most of them newly-defaulted," and that such new defaults show no signs of slowing down). Finally, it is beyond the scope of this litigation—which ostensibly challenges the ongoing large business procurement and corrective action—for the Court to enjoin other lawfully awarded contract vehicles such as the small business contracts and Alltran's ATE contract. For any and all of these reasons, the "dilution" argument fails and thus cannot rationally support an injunction of Alltran's ATE contract.

never valid, and that the Federal Circuit would not view that rationale as supporting the continuing injunction of Alltran's ATE contract. Accordingly, for this reason, as well, Alltran is likely to prevail on the merits of its appeal, and this Court should enter a stay of the injunction pending resolution of Alltran's appeal.

2. The Issues Related to ED's Recall of Certain Contractors' "Prior Accounts" Has Nothing to Do With Alltran's ATE Contract, and Thus Cannot Rationally Support the Continued Injunction of Alltran's ATE Contract

On May 22, 2017, the Court issued the third injunction in this case. *See* ECF 132. Given the Court's express rejection of the prior "dilution" theory, as discussed above, the basis for the third injunction was entirely different from the prior injunctions. This time, the Court's concern was that ED may treat certain companies unfairly vis-à-vis others with regard to the recall of their "prior accounts" (*i.e.*, accounts remaining from their prior 2009 contracts, which expired on April 21, 2017):

> After hearing the parties' positions, the court indicated that it was inclined to lift the May 2, 2017 Preliminary Injunction, but it was concerned that the ED would transfer accounts that had been serviced by Progressive Financial, Inc., Collection Technology, Inc., Performant Recovery, Inc. and Van Ru Credit Corporation under United States General Services Administration ("GSA") Schedule Nos. GS-23F-0239K, GS-23F-0227N, GS-23F-0286K, GS-23F-0204K (collectively the "prior accounts"), because those contracts expired on April 21, 2017. This would appear unfair, because the GAO sustained challenges to Solicitation No. ED-FSA-16-R-009 brought by those contractors. In other words, the GAO determined that but-for the ED's alleged errors during the procurement process, Progressive Financial, Inc., Collection Technology, Inc., Performant Recovery, Inc. and Van Ru Credit Corporation might have received contracts on December 9, 2016, under which they could continue to service their prior accounts.

Id. at 2-3.

To proactively address this concern, the Court had attempted during the May 22 hearing to find a solution whereby ED would allow those contractors to service their "prior accounts" pending the ongoing large business corrective action; however, ED's Head of Contracting Activity had been unable to come up with a solution.

> Therefore, the court asked the Government whether it could allow Progressive Financial, Inc., Collection Technology, Inc., Performant Recovery, Inc. and Van Ru Credit Corporation to continue servicing prior accounts until the ED completes the proposed corrective action. The Government informed the court that it could not make that representation, without conferring with Dr. Patrick Bradfield, Head of Contracting at Federal Student Aid. Dr. Bradfield responded, by telephone from his home, that Progressive Financial, Inc., Collection Technology, Inc., Performant Recovery, Inc. and Van Ru Credit Corporation could not continue servicing their prior accounts, because they did not have existing contracts with the ED, but he did not know if there was a legal means for the ED to enter into a temporary contractual relationship with those parties and would have to consult with the ED's attorneys before making that determination. Dr. Bradfield informed the court that he would not be able to consult with counsel until, at least, May 23, 2017.

Id. at 3.

Thus, the Court ultimately continued an injunction for the limited purpose of allowing ED time to resolve this "prior accounts" issue:

> For these reasons, the court has determined to continue the May 2, 2017 Preliminary Injunction until June 1, 2017, *to afford Dr. Bradfield an opportunity to determine whether the ED can enter into a temporary contractual relationship* with Progressive Financial, Inc., Collection Technology, Inc., Performant Recovery, Inc. and Van Ru Credit Corporation that will allow those companies to continue to service their prior accounts until the ED completes the proposed corrective action.

Id. (emphasis added).

Notably, in the May 22 injunction, the Court made no findings of fact as to whether or how this limited "prior accounts" issue affected any of the four injunctive relief factors, or whether it was related, in any way, to whether Alltran should be allowed to perform under its

ATE contract.[7] In fact, there is ***no relationship***: whether or not Alltran performs its ATE contract will have no impact on other contractors' "prior accounts." Accordingly, not only is Alltran's ATE contract unrelated to the merits of those issues, but the balance of harms and public interest on those issues must favor Alltran, as Alltran is irreparably harmed by an injunction of its ATE contract, whereas the "prior accounts" contractors are not harmed in any way by allowing Alltran to perform its ATE contract.

Ultimately, Alltran appreciates that the Court was attempting in the May 22 injunction to ensure that all companies were treated fairly, even those with only minor, peripheral issues in this action. However, it was reversible error for the Court to enjoin the unrelated Alltran ATE contract in furtherance of that goal. Accordingly, for this reason, as well, the "prior accounts" issues cannot rationally support the May 31 injunction of Alltran's ATE contract, and Alltran is likely to succeed on the merits of its appeal.

II. THE EQUITIES SIGNIFICANTLY FAVOR ALLTRAN, WHICH WILL LOSE THE ENTIRETY OF ITS AWARD-TERM EXTENSION CONTRACT IF THE MAY 31 INJUNCTION IS NOT STAYED

For each and all of the reasons discussed above, Alltran is likely to prevail on the merits of its appeal: it was legal error and otherwise arbitrary and capricious for this Court to enjoin Alltran's ATE contract on May 31. Given Alltran's high likelihood of success on appeal, Alltran

[7] As argued by counsel for the Government at the May 22 hearing, the Court also did not consider whether the Court properly has jurisdiction over the "prior accounts" issues, given that those issues are purely issues of contract administration, which are subject to the Contract Disputes Act. *See, e.g.*, ECF 138, May 22 Hearing Transcript 24:16-26:1 (Government Counsel explaining "the Government's position that the claims that are raised by those three Plaintiffs are effectively CDA claims, and so they must first exhaust that process, which they've not made any attempt to do.). This Court's failure to consider its jurisdiction over the pending cases prior to issuing the May 31 injunction provides a further basis on which Alltran is likely to succeed on the merits of its appeal. *See, e.g.*, *Celgard, LLC v. LG Chem, Ltd.*, 624 F. App'x 748, 751-52 (Fed. Cir. 2015) (finding legal error and vacating injunction because lower court failed to make findings with respect to its jurisdiction prior to issuing injunction).

need not even make a particularly strong showing on the balance of harms in this case. *See, e.g.*, *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa.*"). Nevertheless, the equities in this case also greatly favor Alltran.

First and foremost, if the May 31 injunction is not stayed, then Alltran will suffer irreparable harm in that its entire ATE contract will be lost. As noted above, and as the Court is aware both from this litigation as well as that in *Coast Professional* (No. 15-207), the ATE contracts were intended to serve as bridge contracts in between the end of ED's 2009 contracts and the beginning of the new large business contracts that are currently in corrective action. As a result of ED's arbitrary and capricious actions back in 2015, when ED determined not to award Alltran (then known as Enterprise Recovery Systems, Inc. ("ERS")), an ATE contract, Alltran was forced to endure two-plus years of litigation in the *Coast Professional* matter, to lay off a substantial number of hard-working employees, and even to close an entire office that had previously serviced Alltran's ED accounts. *See* ECF 128 at 7. On May 1, 2017, Alltran finally received some relief, in the form of ED's corrective action in *Coast Professional*: Alltran was finally awarded the ATE contract it rightfully deserved. However, the very next day, the May 2 injunction in this case—which was continued on May 22 and again on May 31—had the effect of enjoining the very same Alltran ATE that this Court had persuaded ED to finally award. Thus, once again, Alltran has been denied any meaningful relief, and will forever lose the benefits of its ATE contract if the May 31 injunction continues.

By contrast, none of the other parties to this case will suffer any harm if the injunction against Alltran's ATE is stayed. Indeed, as noted by this Court in the May 22 injunction, a *majority* of the parties in this case—including the Government—*oppose* an injunction. *See* ECF 132 at 2 (identifying the Government, CBE Group, Premiere Credit of North America, GC Services Limited Partnership, Financial Management Systems, Value Recovery Holdings, Windham Professionals, and Pioneer Credit Recovery as opposing the current broad injunction). Meanwhile, the only parties that want an injunction to continue are those that are either (1) relying on the rejected "dilution" theory (ConServe and Account Control Technology); or (2) challenging the "prior accounts" issue (Progressive Financial Services, Collection Technology, Inc., Performant Recovery, and Van Ru Credit Corporation). As discussed above, however, the "dilution" theory was never valid and has been rejected by this Court, thus demonstrating that neither ConServe nor Account Control Technology would suffer harm if Alltran's ATE contract were allowed to proceed. *See supra* § I.B.1.[8] And the "prior accounts" issue has nothing to do with Alltran's ATE contract, and thus cannot rationally justify an injunction of Alltran's ATE contract. *See supra* § I.B.2. Accordingly, there is no harm at all to any other party from staying the injunction, and certainly no harm that would even remotely compare to the irreparable harm that will be suffered by Alltran if the injunction is not stayed.

[8] Moreover, it bears repeating that ConServe and Account Control Technology, the two proponents of the "dilution" theory in this case, never once argued "dilution" when they themselves held ATE contracts. *See* ECF 128 at 4-6. To the contrary, ConServe and Account Control Technology willingly accepted over 600,000 accounts apiece under their ATE contracts, without ever refusing any accounts for fear of diluting the amount of accounts that they could potentially receive under future large business contracts. For this reason, as well, their inconsistent and self-serving arguments in this case should be soundly rejected. *See, e.g.*, *Trustees in Bankr. N. Am. Rubber Thread Co., Inc. v. United States*, 593 F.3d 1346, 1353-58 (Fed. Cir. 2010) (applying judicial estoppel to prohibit party from taking a position contrary to that in a prior proceeding).

Finally, the only remaining consideration as to whether to issue a stay pending Alltran's appeal is the public interest. For the reasons previously addressed by both Alltran and the Government, Alltran maintains that the public interest favors a stay of the May 31 injunction. As a result of the injunctions in this case, at least 234,000 defaulted student loan borrowers have already been denied services on their defaulted accounts worth $4.6 billion, and the Government has failed to collect roughly $2.4 million. *See* ECF 126 (Government Motion to Vacate Injunction) at 9; ECF 128 (Alltran Opposition to a Further Injunction) at 7. These harms will only continue should the injunction not be stayed. Alltran understands that the Court may be skeptical of where the public interest lies in light of the news articles discussed above calling into question the general efficacy of ED's and its private contactors' roles in student loan debt collection. *See* ECF 143 at 2. However, as discussed above, any such general skepticism is not cause for this Court to issue an injunction of Alltran's ATE contract; rather, the proper nature and extent of ED's and contractors' roles in student loan debt collection are programmatic and policy decisions to be made in the first instance by the legislative and executive branches, not by this Court through ad hoc injunctions. Moreover, to the extent the public interest is at all an open question in the Court's view, then the proper course it still to stay the injunction, given that both the merits and equities favor Alltran. Indeed, by staying the injunction, the Court would actually be restoring the status quo, which was the Court's ultimate goal in the first instance.

CONCLUSION

For each of the foregoing reasons, the merits as well as the equities each overwhelmingly favor Alltran. Accordingly, Alltran respectfully requests that the Court stay the May 31 injunction and allow Alltran to perform under its ATE contract. A proposed order effecting Alltran's requested relief is attached to this motion.

June 9, 2017

Respectfully submitted,

s/ Daniel R. Forman

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS
Bid Protest

CONTINENTAL SERVICE GROUP, INC., and PIONEER CREDIT RECOVERY, INC., Plaintiffs, and COLLECTION TECHNOLOGY, INC., PROGRESSIVE FINANCIAL SERVICES, INC., and ALLTRAN EDUCATION, INC., Intervenor-Plaintiffs, v. THE UNITED STATES, Defendant, and THE CBE GROUP, INC., PREMIERE CREDIT OF NORTH AMERICA, LLC, GC SERVICES LIMITED PARTNERSHIP, FINANCIAL MANAGEMENT SYSTEMS, INC., VALUE RECOVERY HOLDINGS, LLC, and WINDHAM PROFESSIONALS, INC., Intervenor-Defendants.	Nos. 17-449, 17-499 Chief Judge Braden

[PROPOSED] ORDER GRANTING MOTION FOR STAY PENDING APPEAL

On June 9, 2017, Alltran Education, Inc. ("Alltran") filed a Motion for Stay Pending Appeal (ECF __) requesting that this Court stay that aspect of the May 31, 2017 Injunction (ECF 143) prohibiting the United States Department of Education ("ED") from transferring work to Alltran's award-term extension ("ATE") contract (*i.e.*, Task Order No. ED-FSA-17-O-0007 under Contract No. GS-23F-0291K). For the reasons addressed in Alltran's Motion, the Court hereby GRANTS Alltran's Motion. Accordingly, notwithstanding the terms of the May 31, 2017 injunction (or the terms in the identical May 31 injunctions entered in case Nos. 17-493, 17-517,

17-558, 17-578, and 17-633), ED may transfer work to Alltran and otherwise allow Alltran to fully perform its ATE contract pending the resolution of Alltran's appeal of ECF 143.

IT IS SO ORDERED.

SUSAN G. BRADEN
Chief Judge