UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, BRITTANY MONTROIS, and a Class of More Than 700,000 Similarly Situated Individuals and Businesses, Plaintiffs	)	
v.	)	CIVIL ACTION
	)	FILE NO. 1-14-cv-01523-TSC
UNITED STATES OF AMERICA Defendant.	)	

MOTION FOR SCHEDULING, BIFURCATION OF ISSUES AND DISCOVERY ORDER

Plaintiffs hereby move the Court for a scheduling order and determinations with respect to: (a) bifurcation of the primary issue and the alternative argument issue; and (b) limited discovery. A draft order and related brief are enclosed.

As explained in the brief, Plaintiffs filed a motion for class certification and related brief on October 2, 2014. Defendant has not filed a response. On November 24, 2014, in a phone conversation, counsel for Plaintiffs notified

counsel for Defendant of the filing. Counsel for Defendant stated it was unaware of the filing, but it would take action relating thereto. In a phone conversation held on December 22, 2014, Defendant stated it wished to have the class certification issue considered before any of the merits are considered.

On November 24, 2014 and since that date, counsel for Plaintiffs and counsel for Defendant have conferred regarding various matters. Certain things have been agreed upon and certain things are disputed.

The two primary disagreements relate to bifurcation of the issues and discovery. Regarding bifurcation of issues, Plaintiffs wish for the Court to initially consider only the primary argument of whether it is lawful to charge fees and not consider the alternative argument relating to excessiveness of fees, because there would be no need to consider the alternative argument if the primary argument is decided in Plaintiffs' favor and substantial time and expense would be incurred relating to the alternative argument. Defendant has tentatively declined to bifurcate, although it stated on December 22, 2014 that it may reconsider.

The second primary argument relates to discovery. Defendant has taken the position that the case is an Administrative Procedure Act (APA) case and, with one exception, it need not (and is unwilling to) let Plaintiffs conduct discovery. Plaintiffs agree that the case is based on the APA, but believe that a limited amount

of discovery, almost all of which would relate to the alternative argument, is necessary for Plaintiffs to effectively present their case. Thus, although Plaintiffs had requested a conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, Defendant conferred but declined to discuss issues outlined in LCvR 16.3(c) or FRCP 26(f), taking the position that the case is an exempted case under LCvR 16.3(b)(1) and FRCP 26(a)(1)(B)(i) for review on an administrative record.

Concerning discovery, Plaintiffs have stated to Defendant that they would be willing to motion for summary judgment with respect to the primary issue of whether it is lawful to charge annual fees for PTINs using only the administrative record if Defendant would agree to stipulate as to two matters and provide clarification with respect to two matters. The stipulations were: (1) an IRS publication regarding the number of PTINs issued and the number of "active" PTINs being accurate; and (2) the hire date and role of Mark Ernst in the IRS Publication 4832 and related regulations projects. The two matters with respect to which clarification was sought were: (1) legal authority for a statement in 2010 regulations that issuance of a PTIN confers the right to prepare tax returns; and (2) a denial in the Defendant's Answer with respect to the following statement of the Complaint (¶41): "Once issued, a PTIN does not change." Defendant had been admitted this statement in a separate action with respect to PTIN fees. In a phone

conversation held on December 22, 2014, Defendant stated that it would *only* clarify its answer regarding Paragraph 41 of the Complaint.[1]

As more specifically provided in the enclosed Order, Plaintiffs motion to the Court to: (a) schedule briefing relating to the class certification issue with Defendant being required to respond by January 16, 2015 or be deemed to have chosen not to respond; (b) issue an order providing for bifurcation of the issues, so that the alternative argument is considered only if the primary argument is not determined in Plaintiffs' favor; and (c) permit Plaintiffs to conduct a limited amount of discovery as necessary to prove their case.

Respectfully submitted on December 29, 2014,

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[1] In a phone conversation held on December 22, 2014, Defendant stated that no PTIN that has been issued has ever changed, but it is possible that a PTIN could change in the future.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, BRITTANY MONTROIS, and a Class of More Than 700,000 Similarly Situated Individuals and Businesses,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION
	)	FILE NO. 1-14-cv-01523-TSC
UNITED STATES OF AMERICA	)	
Defendant	)	

ORDER

It is ORDERED in the above-captioned case:

Defendant will file its response to Plaintiffs' motion for class certification no later than January 16, 2015 or be deemed to have chosen not to file a response. Thereafter, Plaintiffs shall file any reply to Defendant's brief (if a brief is filed) no later than February 13, 2015.

Regardless of how the Court rules with respect to class certification, within fifteen (15) days of the date the Court rules with respect to class certification, Defendant will provide the following information or material requested of Plaintiffs with respect to the issue of whether it is lawful for the U.S. Treasury Department to charge annual fees to issue and renew a Preparer Tax Identification Number (PTIN): (a) legal authority relied upon in the preamble to proposed and final regulations issued in 2010 that provide that issuance of a PTIN confers the right to prepare tax returns; (b) a statement agreement or disagreement with an IRS publication "Return Preparer Office Federal Tax Return Preparer Statistics" that is enclosed with Plaintiffs' Memorandum in Support of Motion for Scheduling, Bifurcation of Issues and Discovery Order; and

(c) the hire date of Mark Ernst and specification of his involvement in IRS Publication 4832.

Within fifteen (15) days of the date the Defendant provides the information specified in the immediately preceding paragraph, Plaintiff or Defendant may file a motion for summary judgment and related brief with respect to the primary issue of whether it is lawful for annual fees to be charged with respect to issuance and renewal of PTINs. Following such a filing, the opposing party shall have thirty (30) days to file a response brief. Thereafter, the party filing the motion shall have twenty (20) days to file a reply brief. The parties shall await action by the Court with respect to the primary issue before the case proceeds further.

In the event the Court rules in favor of the Defendant with respect to the primary issue of whether annual fees can be charged for issuance and renewal of a PTIN, then a conference will be held within thirty (30) days of the Court's ruling in favor of the Defendant with respect to the primary issue concerning discovery to take place regarding the Plaintiffs' alternative argument that fees are excessive.

This ___ day of _____, 201__.

_____
TANYA S. CHUTKAN, U.S. District Court Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, BRITTANY MONTROIS, and a Class of More Than 700,000 Similarly Situated Individuals and Businesses,	)	
Plaintiffs	)	
v.	)	CIVIL ACTION
	)	FILE NO. 1-14-cv-01523-TSC
UNITED STATES OF AMERICA	)	
Defendant	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SCHEDULING, BIFURCATION OF ISSUES AND DISCOVERY ORDER

Plaintiffs submit this brief in support of their Motion for Scheduling, Bifurcation of Issues and Discovery Order.

Pertinent Facts. The Defendant was served with the complaint on September 8, 2014. The Defendant filed its answer on November 11, 2014.

Plaintiffs filed a motion for class certification and related brief on October 2, 2014. Defendant has not filed a response. At least since November 24, 2014,

counsel for Defendant has been aware of the class certification filing. Defendant has stated it wished to have the class certification issue considered before the merits are considered. Plaintiffs have no reservations regarding having class certification determined before the merits of the case are considered.

Plaintiffs' primary argument in the case is that it is unlawful for user fees to be charged to issue or renew a PTIN. Plaintiffs make an alternative argument that if PTIN fees can be (lawfully) charged, the fees that have been charged are excessive (and unlawful to the extent excessive). Because there would be no need to consider the alternative argument if the primary argument is decided in Plaintiffs' favor and substantial time and expense would be incurred by both parties with respect to the alternative argument, Plaintiffs believe it would be prudent for the primary argument to be considered before the alternative argument is considered. If only the primary argument is initially considered by the Court, then only discovery relating to the primary argument will be initially necessary.

The fees in issue were charged pursuant to a federal regulation. Although now late, Defendant has agreed to disclose the Administrative Record with respect to the regulation in issue.

In order for Plaintiffs to prove their case with respect to the primary issue of lawfulness of charging of PTIN fees, in addition of disclosure of the

Administrative Record, Plaintiffs recently requested that Defendant agree to stipulate as to two matters and provide clarification with respect to two matters. The requested stipulations were: (1) a recent IRS publication regarding the number of PTINs issued and the number of "active" PTINs being accurate; and (d) the hire date of Mark Ernst and the role of Mark Ernst in the IRS Publication 4832 and related regulations projects. The two matters with respect to which clarification was sought were: (1) legal authority for a statements in the preambles to 2010 proposed and final PTIN regulations that issuance of a PTIN confers the right to prepare tax returns; and (2) a denial in the Defendant's Answer of the following statement of the Complaint (¶41): "Once issued, a PTIN does not change." Defendant had admitted this statement in an answer in a separate legal action with respect to PTIN fees. Concerning these four things, in a phone conversation held on December 22, 2014, Defendant stated that it would only clarify its answer regarding Paragraph 41 of the Complaint.[1] The letter in which the four things were covered (with its attachments) is attached as Exhibit A.

Defendant has declined to stipulate as to the two matters with respect to which stipulation was requested and declined to provide the legal authority

[1] In the phone conversation held on December 22, 2014, Defendant stated that no PTIN that has been issued has ever changed, but it is possible that a PTIN could change in the future.

allegedly providing that issuance of a PTIN confers a right to prepare tax returns. The basis for the decline was that the case is an Administrative Procedure Act (APA) case and, as such, Defendant need only disclose the Administrative Record with respect to the fees in issue. Plaintiffs agree that the case is based on the APA, but believe that a limited amount of discovery, almost all of which relates to the alternative argument, is necessary for Plaintiffs to effectively present their case.

Plaintiffs requested a conference pursuant to Rule 26(f) of the Federal Rules of Civil Procedure. In response to Plaintiffs' request, Defendant conferred with Plaintiffs on December 15, 2014, but declined to discuss issues outlined in or FRCP 26(f), taking the position that the case is exempted from Rule 26(f) under Rule 26(a)(1)(B)(i) as a review of an administrative record. For the same reason, Defendant declined to discuss issues outlined in LCvR 16.3(c), citing LCvR 16.3(b)(1) . Defendant took the position that there was no FRCP 26(f) meeting and no LCvR 16.3 conference. Thus, there is no joint Rule 26(f) report, and the matters outlined in LCvR 16.3 have not been covered. Defendant suggested, based on a past experience, Plaintiffs file a submission with the Court by the ordinary Rule 26(f) deadline, covering matters Plaintiffs wished to be covered by a scheduling order.

Argument. Plaintiffs assert that the Court has the power to do the things specified in the Motion for Scheduling, Bifurcation of Issues and Discovery Order.

Scheduling and Bifurcation. Under FRCP 16(b)(2), a court adjudicating a matter must issue a scheduling order as soon as practicable, but in any event within the earlier of 120 days after the defendant has been served with the complaint or 90 days after the defendant appeared. Here, the Defendant was served with the complaint on September 8, 2014. The Defendant filed its answer on November 11, 2014. Thus, it appears a scheduling order is due in January 2015.

Under FRCP 16(b)(3), the scheduling order described in the preceding paragraph must, *inter alia*, limit the time to amend pleadings, complete discovery and file motions. The scheduling order *may* do other things, including modify the extent of discovery and include other appropriate matters. Plaintiffs submit that the Court has the authority to set deadlines for filing of briefs, to bifurcate the primary argument and the alternative argument, and to defer discovery to the extent the Court deems efficient or appropriate. Plaintiffs also submit that the Court has the power to permit discovery to the extent it deems appropriate.

Discovery. Under FRCP 16(b)(1), the court adjudicating a dispute is required to issue a scheduling order after receiving the parties' report under FRCP 26(f) or after consulting with the parties' attorneys and any unrepresented parties at

a scheduling conference or by telephone, mail or other means. Under FRCP 26(f), except for a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when a court orders otherwise, the parties must confer as soon as practicable, and in any event at least 21 days before a scheduling order is due under Rule 16(b). Under FRCP 26(a)(1)(B), an action for review on an administrative record is exempt from the initial disclosures requirement.

LCvR 16.3 provides that counsel must confer in accordance with it and FRCP 26(f) within 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), to discuss the matters outlined in LCvR 16.3(c), make or arrange for initial disclosures and develop a discovery plan that indicates the parties' views and proposals. Exempted from LCvR 16.3 requirement is, *inter alia*, an action for review on an administrative record.

Plaintiffs believe that the case challenges lawfulness of a regulation, and agree that the action is based on the administrative record. However, Plaintiffs believe that certain additional information is necessary to present their case. *Virtually all of the information relates to the alternative argument of Plaintiffs that fees, if lawful, are excessive.* The only information request outside the administrative record with respect to the primary argument of unlawfulness of fee charges is the list of four things specified *supra*. Defendant has agreed to stipulate

as to one of those three things. Plaintiffs desire for them to respond with respect to the other three things.

Concerning the alternative argument (with respect to which Plaintiffs have asked for discovery to be deferred and to be undertaken only if Defendant prevails on the primary argument), Plaintiffs believe that case law permits discovery outside the administrative record when information outside the administrative record is necessary for effective judicial review. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). *See also* Stewart v. Potts, 126 F. Supp. 428, 435 (S.D. Tex. 2000)(" . . . the decision whether to allow such extra record investigation rests within the sound discretion of the district court.")

Here, with respect to the alternative argument, Plaintiffs will want to know things such as: What has been done with the fees that have been collected? In this regard, as noted in paragraph 69 of the Complaint, through 2012, the IRS had collected approximately $105,000,000 in PTIN and competency testing fees through 2012. Plaintiffs believe they need to know the breakdown of the fees collected, and such information will not exist in the administrative record. Also, the preamble to the "Circular 230" final regulations that were struck down in Loving v. Internal Revenue Service, 742 F.3d 1013 (2014), listed three things with respect to which the annual $50 fee collected by the IRS would be used. The

administrative record will not specify what the collected fees have been expended upon. Under the discovery rules, Plaintiffs believe they have a right to know what happened to the fees collected. Other such information might be necessary.

CONCLUSION

For the reasons specified, Plaintiffs request that the Motion for Scheduling, Bifurcation of Issues and Discovery be granted.

Respectfully submitted on December 29, 2014,

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December 16, 2014

Via Email
Mr. Christopher Williamson and Mr. Joseph Hunsader
U.S. Department of Justice, Tax Division
P.O. Box 227
Washington, DC 20044

Re: Summary of Conference Call Held on December 15, 2014

Dear Chris and Joe:

This letter attempts to summarize the substance of our discussions yesterday.

I suggested we bifurcate the case and first handle the issue of whether it is lawful for user fees to be charged, and thereafter consider the alternative arguments of fees being in excess of what can lawfully be charged only if plaintiffs are unsuccessful with respect to the first argument. If plaintiffs prevail on the first argument, there would be no need to consider the alternative arguments relating to whether the fees are more than what can lawfully be charged. An adverse finding for the plaintiffs or defendant could be appealed to the D.C. Court of Appeals and, if lost there by either plaintiffs or defendant, appealed to the U.S. Supreme Court. Only if the defendant prevails as to the first issue would the alternative arguments be considered. My thought was handling things this way would save time and expense for all. I believe you stated that you liked the idea but would need to talk to your supervisor and see if she agreed.

Regarding the class certification motion, we all understand that it was filed in October. You stated that, due to workload considerations on your end, you wish for only this motion or the main issue of lawfulness of fees to be considered at one time, with the other issue being deferred until the first issue is resolved. I stated that I would need to get back to you regarding whether I was agreeable to such a proposition. I did not waive any possible argument regarding untimeliness on the part of the government.

You stated that you understand that you are late in providing the administrative record, but also stated you have not yet received it from the IRS. You said you expect to receive it by the end of this week. You stated that you will need to

review it and then redact confidential information. Following redaction, you will supply the administrative record (exclusive of things redacted). You stated that you would supply a list of all things redacted. While you could not supply a definitive date by which you will provide it, you stated you would do it as soon as reasonably possible.

You took the position that you believe the administrative record is all that needs to be disclosed in discovery, but are open to the idea of making additional disclosures as necessary to supply facts necessary with respect to the alternative arguments at a later point in time under the bifurcated approach above (if the alternative arguments need to be considered). I stated that certain additional disclosures will be needed for the alternative arguments. Also, you said that you would consider a list of things I wish to know with respect to the issue of whether it is lawful to charge fees. I said I would provide a list. The list is enclosed with this letter. I need to know whether you will provide this information with the administrative record.

We discussed having a January 31st deadline with respect to the filing of motions for summary judgment with respect to the issue of whether it is lawful to charge fees. The thought was the administrative record should be produced by mid-January at the latest, and two weeks would be sufficient time to assemble necessary briefs. I now suggest (although not suggested in our call) that we set the deadline for the summary judgment motion(s) and related initial brief(s) to be 21 days following the disclosures by defendant outlined above. For example, if the disclosures were made on January 7, 2015, the due date for a summary judgment motion would be January 28, 2015.

We briefly discussed the withdrawal motion made by Stuart Bassin earlier in the day, and the fact that I was continuing to seek to engage a class action law firm to serve as co-counsel. I stated my goal is to have such a firm in place within the next week or so.

You declined to discuss matters outlined in LR 16.3 and Rule 26(f) of the FRCP. However, we then agreed that our discussion would serve as our agreement with respect to matters discussed, to the extent final and agreeable to the Judge. We stated that we could list any disagreement in a joint report to the Court that we will prepare and file with the Court on or before December 29, 2014.

We agreed to talk again next week to discuss what was resolved from the open issues that exist above. Please let me know if you disagree with anything set out above or in the enclosures herewith.

Sincerely,

Allen Buckley

Allen Buckley

List of Information Requested with respect to the Lawfulness of User Fees Issue:

This list relates to the letter of December 16, 2014

1. Paragraph 41 of the Answer states that a PTIN changes following issuance. Please advise when a PTIN changes following issuance. In this regard, as I mentioned on the phone, I believe I was told in a separate action (via the answer to the complaint) that a PTIN does not change following issuance. (See enclosed documents.)
2. If not supplied in the administrative record, please supply legal authority that provides that issuance of a PTIN grants a right to prepare tax returns for compensation.
3. Stipulate, based on the enclosed IRS disclosure, as to the number of PTINs issued under the Publication 4832 regulations regime and the number of currently "active" PTINs.
4. Stipulate when Mark Ernst was hired by the U.S. Treasury Department and specify his role in the Publication 4832 project and the regulations issued in 2010 and 2011 to implement some of the recommendations of IRS Publication 4832.

IRS

Return Preparer Office Federal Tax Return Preparer Statistics

Data current as of 11/3/2014

Number of Individuals with Current Preparer Tax Identification Numbers (PTINs) for 2014†	700,461
Professional Credentials‡	
Attorneys	**31,443**
Certified Public Accountants	**215,766**
Enrolled Actuaries	**430**
Enrolled Agents	**50,089**
Enrolled Retirement Plan Agents	**717**

† Cumulative number of individuals issued PTINs since 9/28/2010: **1,049,899**

‡ Some preparers have multiple professional credentials.

Return to the Return Preparer Requirements Homepage

Page Last Reviewed or Updated: 13-Nov-2014

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

CHATTANOOGA DIVISION

ALLEN BUCKLEY and ALLEN BUCKLEY LLC	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION
	)	FILE NO._____
UNITED STATES OF AMERICA	)	
Defendant.	)	COMPLAINT

COMPLAINT FOR EQUITABLE RELIEF

INTRODUCTORY STATEMENT

COME NOW Plaintiffs and file this complaint against Defendant, UNITED STATES OF AMERICA, to prevent and cause a refund of charges delineated as user fees to receive and renew an identification number required to be placed on tax returns prepared for others for compensation.

In 2010, without Congressional approval, the U.S. Treasury Department ("Treasury") issued regulations designed to carry out recommendations of the Internal Revenue Service (IRS) that were set forth in IRS Publication 4832. The recommendations called for regulation of the

tax return preparation industry and charging of substantial recurring fees in connection therewith. One of the fees relates to acquisition of a "preparer tax identification number" ("PTIN"), which is an identifying number the IRS can require tax return preparers to obtain and place on tax returns prepared by them. In 1976, Congress permitted the IRS to require return preparers to obtain a PTIN and place it on prepared returns, so as to make it easier for the IRS to determine and locate wrongdoers. Regulations issued in 2010 provide for fees to issue a PTIN and annual renewal fees thereafter. Because anyone can file tax returns for others for compensation and the PTIN requirement is merely a requirement that must be satisfied to avoid IRS penalties, charging of these fees is unlawful.

PERTINENT FACTS

1.

Plaintiff Allen Buckley is a U.S. citizen and an attorney/CPA licensed to practice in Georgia. Allen Buckley LLC is a Georgia limited liability company that is wholly-owned by Allen Buckley.

2.

Pursuant to regulations issued in 2010 and 2011, Treasury requires tax return preparers to file, pay, receive and (thereafter) annually renew and pay annual renewal fees, for a PTIN in order to prepare tax returns for compensation.

3.

In 2010, Allen Buckley paid Treasury $64.25 as a PTIN issuance fee. In 2011, as required by Treasury (according to Treasury) to continue to be able to prepare tax returns for compensation, Allen Buckley LLC paid Treasury a fee of $63 for renewal of the PTIN issued to Allen Buckley.

4.

Once issued, similar to a Social Security Number ("SSN"), an individual's PTIN does not change. Allen Buckley's PTIN did not change upon renewal in 2011.

5.

On August 31, 2011, Allen Buckley filed for a refund of the $64.25 PTIN issuance fee paid in 2010.

6.

Allen Buckley never received a rejection or approval of his refund claim with respect to his initial PTIN issuance fee payment of $64.25.

7.

On June 11, 2012, Allen Buckley LLC filed for a refund of the $63 PTIN renewal fee paid in 2011.

8.

Allen Buckley LLC never received a rejection or approval of his refund claim with respect to his PTIN renewal fee payment of $63.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA

ALLEN BUCKLEY and ALLEN BUCKLEY LLC,	)	
Plaintiffs,	)	
v.	)	No. 13-1701
UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' ANSWER

The United States of America responds to the allegations of the plaintiffs' complaint as follows:

Plaintiffs' introductory paragraph contains a statement of their cause of action to which no response is required. With respect to plaintiffs' second paragraph, the United States admits that the Secretary of Treasury issued regulations in 2010 regarding the regulation of the tax return preparation industry, including the issuance of guidance on the preparer tax identification number ("PTIN") and related user fees, but denies the remaining allegations of this paragraph.

1. The United States lacks sufficient information to admit or deny the allegations contained in this paragraph.

2. Admitted.

3. Admitted that Allen Buckley paid Treasury $64.25 as a PTIN user fee in 2010 and that the $63 renewal fee was paid in 2011. The remaining allegations of this paragraph are denied.

4. Admitted.

5. Denied.

6. Admitted, but it is denied that plaintiff filed a refund claim.

7. Denied.

8. Admitted, but it is denied that plaintiff filed a refund claim.

9. Admitted.

10. Denied.

11. Admitted.

12. Admitted that the quoted sentence was correct upon the date of issuance of Publication 4832, but the remaining allegations of the paragraph are denied.

13. Denied.

14. To the extent that plaintiffs provide characterizations and paraphrases of the contents of Publication 4832, the United States denies their characterizations. The United States avers that Publication 4832 speaks for