

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.)
_____)

Civil Action No.: 1:14-cv-01523-RCL

CONSENT MOTION FOR APPROVAL OF LATE OPT-OUT REQUEST

The United States moves this Court for an order approving the late request of one individual with the Internal Revenue Service, who has paid a fee to obtain or renew a Preparer Tax Identification Number (“PTIN”), to opt-out of the certified class in this case. Approval of this late opt-out requests is necessary to avoid any potential conflict of interest. In support of its motion, the United States avers as follows:

1. On August 8, 2016, this Court certified a class of “[a]ll individuals and entities who have paid an initial and/or renewal fee for a PTIN, excluding Allen Buckley, Allen Buckley LLC, and Christopher Rizek.” (Dkt. 63.)
2. On September 9, 2016, the Court entered an order approving a plan of class notice for all individuals who obtained their PTINs on or before August 20, 2016. (Dkt. 68.)
3. Those class members received notice as ordered by the Court and had until December 7, 2016 to opt-out of the class. (Dkt. 65-1, 65-2, 65-3.)

4. On January 5, 2018, the Court entered an order approving a plan of supplemental class notice to those who obtained their PTINs after August 20, 2016. (Dkt. 97.)

5. The January 5, 2018 order provided that the opt-out period for individuals who obtained their PTINs after August 20, 2016 would expire on April 13, 2018. (Dkt. 97 at 3.)

6. On March 8, 2022, the Court entered an order approving a plan of supplemental class notice to those who paid a PTIN fee for the first time on or after August 17, 2020. (Dkt. 170 at 2.)

7. The March 8, 2022 order provided that the opt-out period for individuals who paid a PTIN fee for the first time on or after August 17, 2020 would expire on June 3, 2022. (Dkt. 170 at 2.)

8. This Court has granted similar relief before:

a. In November 2019 counsel for the United States became aware that several individuals currently with the Internal Revenue Service, including certain senior executives, have paid a PTIN User Fee, which would make them part of the class in this case. (Dkt 108 at 3.)

b. To avoid potential conflicts of interest the United States filed a consent motion – much like this one – seeking the late opt-out of four IRS appointees or senior executives. (Dkt 108 at 3.)

c. These individuals had joined the IRS or became involved with this case after the initial opt-out period. Yet they needed to opt-out of the

class because they were directly involved in issues related to this case on behalf of the United States; thus, a potential conflict of interest existed if they remain members of the class. (Dkt 108 at 3.)

d. Later, this Court granted the United States' consent motion. (Dkt 111.)

9. Now, counsel for the United States recently became aware that another individual, David P. Borden, currently with the Internal Revenue Service, has paid a PTIN User Fee, which would make him part of the class in this case.

10. Mr. Borden serves as Counselor to the Commissioner and joined the IRS on April 11, 2022.

11. Mr. Borden is likely to be involved in decision-making regarding this case as well as the policies and operations of the programs at issue, including the Return Preparer Office and the PTIN User Fee.

12. Mr. Borden had a PTIN before August 20, 2016, which means he was required to opt-out if he so desired by December 7, 2016.

13. He was not involved in the defense of this litigation, or with the policies or operations of the programs at issue, when the initial opt-out period ended on December 7, 2016, or when the supplemental opt-out period ended on April 13, 2018.

14. The most recent opt-out period does not apply to Mr. Borden because he had a PTIN before August 17, 2020.

15. Given that Mr. Borden is directly involved in issues related to this case on behalf of the United States, a potential conflict of interest exists if he remains a member of the class.

16. To avoid such a conflict, Mr. Borden has disclaimed any interest in the class.

17. Mr. Borden therefore seeks to opt-out of and be excluded from the class.

18. Although this opt-out request is being made after the close of the opt-out period, good cause supports excluding this individual from the class, to avoid any potential conflict of interest that did not exist at the time the opt-out periods closed.

19. Counsel for the United States discussed this motion with plaintiffs' counsel and was informed that plaintiffs' consent to excluding this individual from the certified class.

WHEREFORE, the United States respectfully requests that its motion be granted, and that David P. Borden be excluded from the certified class.

Dated: June 15, 2022

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