UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| ADAM STEELE and BRITTANY MONTROIS, | ) | |
| Plaintiffs, | ) | No. 1:14-cv-1523-TSC |
| v. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

**UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR SCHEDULING, BIFURCATION, AND DISCOVERY ORDER**

Plaintiffs, Adam Steele and Brittany Montrois, have brought a multipart motion for scheduling, bifurcation of issues, and the entry of a discovery order. The United States opposes the requested relief because it will likely multiply proceedings, thereby wasting the Court's and the parties' scarce resources.

Adam Steele and Brittany Montrois are not the only commercial tax return preparers to bring suit challenging the federal user fees they pay each year. Wallace Dickson filed with this Court another class action on behalf of the same set of return preparers seeking essentially the same relief. (*See Dickson v. United States* (No. 1:14-cv-2221-TSC).) Mr. Dickson also filed a motion to consolidate the two purported class actions has been filed.

The Court should not enter a scheduling order in the *Steele* action, and, in particular, should not set a briefing schedule for any class certification motion, until Dickson's motion for consolidation has been resolved. Nor should the Court grant

Steele and Montrois' unsupported motion for discovery. Their claim is brought under the Administrative Procedure Act ("APA"), which typically means discovery beyond the administrative record is impermissible in this district. Plaintiffs have not made the strong showing that is required in order to allow discovery in an APA case. Finally, their request to bifurcate issues will not further judicial economy.

## ARGUMENT

### I. The *Steele* class action complaint, the *Dickson* class action complaint, and the *Dickson* motion for consolidation

The Court should not determine plaintiffs' motion to set a Schedule, to Bifurcate Issues, and to Order Discovery, until the Court has resolved the motion for consolidation in the related case of *Dickson v. United States* (No. 1:14-cv-2221-TSC).

Adam Steele and Brittany Montrois are commercial tax return preparers. (Compl., ¶¶ 3, 5, 8, 10.) They challenge Department of Treasury regulations that require tax return preparers to obtain a Preparer Tax Identification Number ("PTIN") and require them to pay an annual PTIN fee ($64.25 initially and $63.00 upon renewal). (*Id.*, ¶¶ 15-19, 33.) Steele and Montrois contend that requiring payment of any PTIN fee is not authorized by statute and therefore unlawful under the APA. (*Id.*, ¶¶ 97-98, 102.) Alternatively, they allege that the actual fees charged are excessive, thereby violating the APA. (*Id.*, ¶¶ 100-101.) Steele and Montrois purport to represent a class consisting of the 700,000 to 1.2 million preparers who have paid PTIN fees. (*Id.*, ¶¶ 13, 106.) They seek monetary relief of the over $130 million in PTIN fees paid by class members and request equitable relief, too. (*Id.*, ¶ 206, Requested Relief.)

On December 21, 2014, Wallace Dickson, another commercial tax return preparer, filed a second class action complaint challenging the PTIN fees in the District of Columbia. (*See Dickson v. United States* (No. 1:14-cv-2221-TSC).) Dickson claims that the Government's imposition of any PTIN fee upon him violates his Due Process rights thereby constituting an "illegal exaction" of his property. (*Dickson*, Compl., ¶¶ 33, 54.) As in the *Steele* action, he alternatively alleges that the actual fees charges are excessive and therefore illegal. (*Id.*, ¶¶ 26-28, 56-59.) Dickson purports to represent the class of over 1,000,000 preparers who have paid PTIN fees since 2010. (*Id.*, ¶¶ 42, 43.) He seeks recovery of the over $200 million of PTIN fees that class members have paid, presumably under 28 U.S.C. §1346(a), known as the Little Tucker Act. (*Id.*, ¶¶ 9, 15, Prayer for Relief.) Plaintiff also seeks injunctive relief. (*Id.*)

On January 8, 2015, Dickson filed a motion, to consolidate his case with the *Steele* action, and to appoint his counsel as interim lead counsel for the purported class. (*See Dickson v. United States* (No. 1:14-cv-2221-TSC), Dkt. No. 7, Jan. 8, 2015.) Dickson served his motion on counsel for *Steele*; the *Steele* plaintiffs have not yet agreed to or opposed consolidation.

The United States urges that this Court not determine Steele and Montrois' motion to set a Schedule, to Bifurcate Issues, and to Order Discovery until the Court has determined Dickson's motion for consolidation. If the cases are consolidated, judicial efficiency will be served by entering one combined scheduling order that covers briefing regarding class certification, any discovery that may be appropriate, and the deadline for dispositive motions. Even if consolidation delays the *Steele* action to some

degree, plaintiffs in that case will not be prejudiced. Because the 2014 tax year filing season is already underway and this litigation – even if not consolidated with *Dickson* -- will not likely be resolved before April 15, 2015, a short delay in this litigation will not affect the requirement for preparers to have a PTIN for this income tax filing season.

**II. Steele and Montrois never served their motion for class certification**

The United States has attempted to work out a mutually agreeable pretrial schedule with Steele and Montrois, including a briefing schedule for class certification. But they complain that the United States has not responded to their motion for class certification and demand, without foundation, that the United States respond by January 16, 2015.[1] (Dkt. No. 19 at 4.)

The United States continues to be willing to work out a reasonable class certification briefing schedule. The United States urges coordination of any class certification proceedings in this action with those in *Dickson.*

//

//

[1] The United States is under no formal obligation to respond because plaintiffs never served their class certification motion upon it. Steele and Montrois filed their class certification motion on October 2, 2014. (Dkt. No. 10.) But, as of that date, the United States had neither answered nor otherwise appeared. The United States did not appear until over a month later (*i.e.,* on November 10, 2014). (Dkt. No. 14.) Therefore, the United States did not receive any service of the class certification motion under the Court's ECF system. Nor did they serve their motion by some other method. The motion for class certification lacks a proof of service, thereby violating Federal Rule of Civil Procedure 5(d)(1).

## III. Steele and Montrois are not entitled to discovery

Steele and Montrois seek limited discovery with respect to their claim that any PTIN fee, no matter how small, violates the APA. They seek far more extensive discovery regarding their subsidiary claim that the PTIN fees are excessive. (Dkt. No. 19-2 at 3, 7.) But APA cases are to be determined by review of the administrative record that was before the agency at the time of its decision or action. Discovery is appropriate in an APA action only in the rare circumstances where there has been a "strong showing of bad faith" or when "the record is so bare that it prevents effective judicial review." *Caez v. United States,* 815 F. Supp. 2d 184, 189 n.5 (D.D.C. 2011); *A.T.A. v. Nat'l Mediation Bd.,* 663 F.3d 476, 479, 487-88 (D.C. Cir. 2011). Steele and Montrois do not claim any bad faith by the United States. Moreover, the United States has not yet provided the administrative record, so they cannot claim that it is so "bare" as to preclude judicial review. The United States will present the extensive administrative record that is more than adequate for judicial review.

## IV. The United States has followed the Federal and Local Rules with respect to Steele and Montrois' APA action

Plaintiffs' Memorandum criticizes the United States for not conferring with respect to discovery. But "Plaintiffs agree that [their] case is based on the APA." (Dkt. No. 19 at 2.) As stated above, APA cases are decided upon review of the administrative record, 5 U.S.C. § 706, and therefore are exempt from Rule 26(a)(1) initial disclosures requirement, and also from Rule 26(f)'s requirements that the parties confer and

develop a discovery plan. *See* Fed. R. Civ. P. 26(a)(1)(B)(i), 26(f)(1). In addition, the Local Rule 16.3(b) states:

> The requirement of this Rule, of LCvR 16.3 of these Rules, and Rules 16(b) and 26(f), Federal Rules of Civil Procedure, shall not apply in the following categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), F.R.Civ.P., or when otherwise ordered. The following categories of proceedings are exempted from both initial disclosure under Rule 26(a)(1)(E), F.R.Civ.P., and the Rule 26(f) conference, F.R.Civ.P.:
>
> (1) an action for review on an administrative record. . . .

LcvR 16.3(b)(1). The United States' refusal to develop a discovery plan for this APA action is entirely appropriate under both the Federal and Local Rules.

**V. Bifurcation is not appropriate**

Finally, the United States opposes Steele and Montrois' motion to bifurcate proceedings in order to first consider their claim that any PTIN fee, no matter how small, violates the APA. The United States contends that discovery is not appropriate on either of their claims. Moreover, it is more efficient to brief summary judgment once, as opposed to potentially having to brief summary judgment twice. Judicial economy is also fostered by having the Court address summary judgment on only one occasion.

//

//

//

//

//

//

## CONCLUSION

For the foregoing reasons, the United States requests that plaintiffs' motion be denied.

Dated: January 15, 2015

CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General

/s/ Christopher J. Williamson
CHRISTOPHER J. WILLIAMSON
JOSEPH E. HUNSADER
Trial Attorneys
U.S. Department of Justice, Tax Division
Post Office Box 227
Ben Franklin Station
Washington, D.C. 20044
Tel: (202) 307-2250
Facsimile: (202) 514-6866

OF COUNSEL:
RONALD C. MACHEN, JR.
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that the foregoing UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR SCHEDULING, BIFURCATION, AND DISCOVERY ORDER was filed with the Court's ECF system on January 15, 2015, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

Allen Buckley
Ivy Walk Shopping Center, Suite 408
1675 Cumberland Parkway
Smyrna, GA 30080

/s/Christopher J. Williamson
Christopher J. Williamson
Trial Attorney