IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DISTRICT OF COLUMBIA

ADAM STEELE, et al.,	)	
	)	
Plaintiff,	)	Case No. 1:14-cv-1523
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

REPLY IN SUPPORT OF
THE UNITED STATES' MOTION FOR STAY

The United States seeks a stay pursuant to Federal Rule of Civil Procedure 62(c) pending appeal of the Court's permanent injunction barring it from collecting the PTIN user fee. (*See* Doc. 84.) Plaintiffs oppose the United States' motion on procedural and substantive grounds. (*See* Doc. 85.) Their opposition boils down to a single statement: the United States is never entitled to a stay pending appeal where the potential irreparable harm is an economic loss. The law offers plaintiffs no support. Because the United States has demonstrated all of the requirements necessary for a stay, this Court should permit the Internal Revenue Service to continue to collect the PTIN user fee during the pendency of an appeal in this case.

I. THE TIMING OF THE UNITED STATES' MOTION FOR STAY IS JUST RIGHT.

Plaintiffs argue the United States' motion is both too early and too late, making it procedurally defective. (*See* Doc. 85 at 2.) They ignore prior cases in this district expressly permitting the United States to seek a motion for stay before it has filed a

notice of appeal and misleadingly state that the Service has made "no representation, statement, or even allusion to its intentions of filing an appeal." (*Id.* at 3-6.) They also fault the United States' counsel for not acting sooner. (*See id.*) This Court should reject these procedural arguments because: (a) the 14-day deadline to file the motion for stay was mutually agreed to by both parties and made pursuant to the Court's July 10, 2017 Scheduling Order and (b) a notice of appeal is not a prerequisite for the United States to file a motion for stay when there is reason to believe an appeal is likely in this case.

A. Because the United States' motion complied with the Court's July 7, 2017 Scheduling Order, it was not filed "too late."

Consistent with the Court's June 1, 2017 Summary Judgment Order, the parties jointly submitted a proposed final judgment and scheduling order. (*See* Doc. No. 80.) The proposed scheduling order—and the deadlines set forth therein—was the product of negotiation between the parties and gave the United States 14 days from the date the Court entered final judgment to file a motion for stay. (*See id.*, ¶4.) On July 10, 2017, the Court entered final judgment and a scheduling order that did not alter the deadlines submitted by the parties. (*See* Doc. 83.)

Plaintiffs argue the United States is not entitled to a stay because it "waited so long" and that the government's lawyers "dragged their feet." (Doc. 85 at 5-6.) But the United States could not have filed a Rule 62(c) motion for stay pending appeal prior to the entry of a final judgment by the Court. That the United States moved under Rule 62(c) rather than asking the Court to invoke its inherent authority to enter a stay prior to the entry of the final judgment does not make the motion for stay pending appeal

procedurally defective. And consistent with the scheduling order, the United States timely submitted its motion on July 24, 2017, or 14 days from the date the Court entered final judgment. (*See* Doc. No. 84.) It is "too late" for plaintiffs to now argue the United States' motion is procedurally improper: they waived this argument by agreeing to allow the United States 14 days to file such a motion when they jointly submitted the proposed scheduling order to the Court permitting such a filing in the first place.

B. Even though the United States has not filed a notice of appeal, its motion is not "too early" because there is ample reason to believe the United States will appeal.

The *Loving* district court stated, "[a]lthough no notice of appeal has yet been filed, that is not a prerequisite for relief under this Rule so long as there is reason to believe an appeal will be taken." *Loving v. I.R.S.*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013) (citing *Common Cause v. Judicial Ethics Comm.*, 473 F. Supp. 1251, 1254 (D.D.C. 1979); 11 Wright & Miller, Fed. Prac. & Proc. § 2904, at 707–08 (3d ed. 2012)). The Court explicitly found that the "IRS's representations to that effect here are sufficient for it to invoke Rule 62(c)." Plaintiffs recognize this case law. (*See* Doc. 85 at 2 (citing *Common Cause*, 473 F. Supp. at 1254).) They suggest, however, there is no likelihood in this case an appeal will be taken and incorrectly state the "IRS makes no representation, statement, or even allusion to its intentions of filing an appeal." (Doc. 85 at 3.)

Plaintiffs' arguments have no merit. *First*, while the Solicitor General, who has final authority on whether the United States will appeal, *see* 28 C.F.R. § 0.20(b), has not yet made that decision, certain factors make appeal likely. Given the administrative importance of this case, including both the magnitude of the amount at issue (upwards

of hundreds of millions of dollars) and the ability to charge a PTIN user fee in the future, an appeal was likely from the outset. Further, as the Court recognizes, its decision directly conflicts with every other decision on this issue. *See Steele v. United States*, No. 14-cv-1523, 2017 WL 2392425, at *9 (D.D.C. June 1, 2017) ("The Court acknowledges that courts in the Eleventh Circuit have found that the PTIN fees are permissible under the IOAA.").

Second, IRS Commissioner John Koskinen represented to an annual conference hosted jointly by the IRS and Urban-Brookings Tax Policy Center that the agency "was likely to appeal" this Court's June 1, 2017 Order. *See* Vidya Kauri, "IRS Turns to Congress for Power to Regulate Tax Preparers," Law360, June 21, 2017, *available at* https://www.law360.com/articles/937015/irs-turns-to-congress-for-power-to-regulate-tax-preparers. Notably, plaintiffs' counsel was also quoted in this article. Thus, the United States' representations here are sufficient to invoke Rule 62(c), and there is ample reason to believe that an appeal will be taken.

Plaintiffs argue "the fact that the Solicitor General has authority over the final determination has no bearing on the premature nature of the motion." (Doc. 84 at 3 (citing *Perez-Olano v. Gonzalez,* CV 05-03604, 2008 WL 11336794, at *2 (C.D. Cal. Feb. 5, 2008).) Plaintiffs contend that if the motion is premature under Rule 62(c) the Court may not consider it. Wright and Miller have criticized this type of argument as "unsound" because it makes Rule 62(c) a "nullity." 11 Fed. Prac. & Proc. § 2904, at 707–08. Moreover, plaintiffs misinterpret *Perez-Olano*. Recognizing federal courts have inherent power to stay an injunction both before and pending appeal, the *Perez-Olano*

court considered the merits of the United States' request for a stay even though no appeal was pending. *See* 2008 WL 11336794, at *2 (citing *Natural Res. Def. Council, Inc. v. Sw. Marine, Inc.*, 242 F.3d 1163, 116 (9th Cir. 2001)). Likewise, the Court can consider the United States' motion here.

In support of their argument, plaintiffs cite a litany of distinguishable cases. (*See* Doc. 85 at 2-3.) None involve a motion for stay filed pursuant to a Court's Scheduling Order. All but one of the cases involve litigation between private parties. Courts have recognized that where the United States is a party, a stay of an injunction is appropriate in order to avoid a major disruption and change to the United States' status quo. *See, e.g.*, *Reserve Mining Co. v. United States*, 498 F.2d 1073 (8th Cir. 1974); *United States v. State of Michigan*, 505 F. Supp. 467, 471 (W.D. Mich. May 9, 1980); s*ee also* 11 Wright & Miller, Fed. Prac. & Proc. § 2904, at 707–08 ("When there is reason to believe that an appeal will be taken, there is no reason why the district court should not make an order preserving the status quo during the expected appeal.").

Plaintiffs cite one case involving the United States, which actually supports a stay in this case. In *United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., ALF-CIO v. Thornburgh*, the United States sought a stay prior to filing a notice of appeal. *See* No. CIV. A. 90-2342, 1991 WL 171463, at *1 (D.D.C. Aug. 21, 1991)). The Court granted a 60-day stay of its injunction to permit the United States sufficient time to determine whether to appeal. *See id.* The Court recognized that the defendants were "several federal agencies and officials, all of whom must adjust and coordinate longstanding regulatory practices in order to comply with the Court's [Order]." *Id.* The

Court stated that "if defendants ultimately decide to pursue an appeal, the Court will consider their entitlement" to a stay pending appeal. *Id.*[1]

Plaintiffs' procedural arguments ultimately amount to nothing more than an inappropriate attempt to force the United States either to make an appeal decision faster than required or forego its ability to seek a stay. The United States has 60 days from the entry of final judgment to file an appeal and, pursuant to the Court's Scheduling Order, had 14 days from the entry of final judgment to file a motion for stay. Plaintiffs are well aware that an appeal in this case is likely. The United States has complied with the procedural requirements of Rule 62(c) and this Court should consider the merits of its motion for stay.

II. THE UNITED STATES HAS SATISFIED ALL THE REQUIREMENTS FOR A STAY.

A. The motion presents "serious and substantial questions," establishing the likelihood-of-success requirement.

The party seeking a stay can establish it is likely to succeed on the merits by merely showing its appeal will present "serious and difficult legal questions." *See Loving v. IRS*, 920 F. Supp. 2d at 110. The United States identified three such questions: (1) this Court's decision conflicts with decisions from the Eleventh Circuit and Northern District of Georgia; (2) the PTIN and RTRP regulations are sufficiently independent from each other to justify both the PTIN requirement *and* user fee; and (3) the statue and

[1] To be clear, the United States seeks a stay pending both its decision on appeal and during the pendency of an appeal. Unlike in *Thornburgh*, because the United States has given every indication that an appeal is likely, there is no need to grant a temporary stay and then revisit the issue after the filing of a notice of appeal.

regulations support a broader reading of the IOAA than the Court adopted here. (*See* Doc. 84-1 at 6.) Plaintiffs' opposition explicates why they believe the D.C. Circuit will rule in their favor on these questions. (*See* Doc. 85 at 8-14.) The United States disagrees with their merits arguments and will address them on appeal, as is appropriate. At this stage of the proceedings, it is enough that the D.C. Circuit must resolve these difficult and serious questions one way or another. The United States, therefore, has satisfied the likelihood-of-success requirement.

The *Loving* District Court, in considering the United States' motion to stay, analyzed the likelihood-of-success requirement as follows:

> As the IRS diplomatically notes, it is placed in the uncomfortable position of "asking a district court to determine whether its decision is likely to be overturned." Mot. at 3. The IRS is correct that the Court need not determine that it erred and will likely be reversed—an acknowledgment one would expect few courts to make; instead, so long as the other factors strongly favor a stay, such remedy is appropriate if "a serious legal question is presented." *CREW v. Office of Admin.*, 593 F. Supp. 2d 156, 160 (D.D.C. 2009) (citation omitted); *see also Holiday Tours*, 559 F.2d at 843. Although the Court continues to believe its decision was correct, it is certainly cognizant that the issue is one of first impression and raises serious and difficult legal questions. If the other factors tip in favor of a stay, therefore, this factor will not preclude one.

See Loving, 920 F. Supp. 2d at 110. The court ultimately denied the requested stay because it found the United States had not established irreparable harm. *See id.* at 110-11. It did, however, make clear its decision to invalidate the RTRP regulations *had no effect* on the PTIN requirement or user fee. *See id.* at 109 (stating the PTIN regulations "do not fall within the scope of the injunction and may proceed as promulgated").

As the United States survived the likelihood-of-success requirement in *Loving*, it also does here. Unlike *Loving*, this case is not one of first impression. Of the four decisions on this very issue, the Court's decision is the only one to rule against the United States. The *Brannen* district and circuit courts and the *Buckley* district court all ruled that the PTIN user fee was statutorily authorized. *See Brannen v. United States*, 682 F.3d 1316, 1319 (11th Cir. 2012); *Brannen v. United States*, No. 4:11-CV-0135, 2011 WL 8245026, at *5-6 (N.D. Ga. Aug. 26, 2011); *Buckley v. United States*, No. 1:13-CV-1701, 2013 WL 7121182, at *2 (N.D. Ga. Dec. 4, 2013). In resolving the United States' appeal, the D.C. Circuit will have to reconcile those decisions with this Court's decision. Given that the majority of courts considering this issue have ruled for the United States, the motion necessarily raises questions "going to the merits so serious, substantial, difficult and doubtful" to warrant a stay. *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911-12 (D.C. Cir. 2008) (internal quotations omitted).

B. The United States will be irreparably harmed absent a stay.

If a stay is not granted, the United States faces two distinct irreparable harms: (1) the loss of all PTIN user fees during the pendency of the appeal; and (2) the need to cut other taxpayer services and programs to cover the uncollected amounts. (*See* Doc. 84-1 at 13-18.) With regard to the first harm, there can be no dispute the Court's order prevents the United States from collecting the PTIN user fee, which amounts to approximately $37.6 million per year and will continue to grow the longer the appeal takes. (*See* Doc. 84-1 at 14-15; Zottola Decl., ¶¶5, 8.) Absent a stay, the United States will bear the cost associated with requiring the continued use of PTINs without

recovering the user fees intended to cover those costs. (*See* Campbell Decl., ¶¶16, 22, 25, 27.) If the United States is ultimately successful on appeal, the United States may not have any legal or practical method to recover the millions of dollars of fees that would go uncollected during the appeal process. (*See* Doc. 84-1 at 14.)

Nevertheless, plaintiffs argue the inability to collect and recover these fees does not constitute irreparable harm. (*See* Doc. 85 at 14-24.) Plaintiffs assert that "the IRS inflates its self-imposed economic loss." (*Id.* at 14.) In addition, "because the IRS does not have to incur PTIN-related costs pending appeal, because Accenture does everything necessary to issue and renew PTINs, and because the IRS has already collected sufficient excess PTIN fees to offset any losses, the government's alleged economic loss would not be *harmful*." (*Id.* at 14-15 (emphasis in original).) Plaintiffs also assert that "because the magnitude of that loss—even under the most generous estimate—is miniscule (0.3%) compared to the IRS's yearly budget ($11 billion), any harm that might ensue (if at all) is far from *irreparable*." (*Id.* at 15 (emphasis in original).)

Plaintiffs' arguments miss the point. These arguments primarily address plaintiffs' contention that the amount of the PTIN user fee is excessive, but that issue is not before the Court. The United States disagrees with all of plaintiffs' excessiveness arguments and will address them at the appropriate time. But more importantly, plaintiffs' arguments require the Court to assume the United States will not be successful on appeal, which is exactly opposite of the correct standard.

In evaluating whether the United States will be irreparably harmed absent a stay, the Court must consider what will happen if the United States *prevails on appeal*. *See*

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674-75 (D.C. Cir. 1985); *Virginia Petroleum Jobbers Ass'n v. PFC*, 259 F.2d 921, 925-26 (D.C. Cir. 1958). In other words, if the D.C. Circuit ultimately decides that this Court's injunction was unlawful, can the United States be made whole for the periods of time when it was improperly prevented from collecting the PTIN user fee? If not, it will be irreparably harmed. Here, the loss of approximately $37.6 million per year during the pendency of an appeal is: (1) "certain and great;" (2) "actual and not theoretical;" and (3) "'likely' to occur." *Wisconsin Gas Co.*, 758 F.2d at 674 (citations omitted).

Not only is this loss significant, the United States may not have any legal or practical method to recover the millions of dollars of fees that would go uncollected during the appeal process. The loss is therefore irreparable. Plaintiffs offer no viable solutions. Plaintiffs state "the IRS has at least three options to avoid future monetary losses." (Doc. 85 at 19.) *First*, "the IRS could cease to require renewals pending appeal and allow those who lack a PTIN to use their SSN instead." (*Id.*) If the United States took this "option" and prevailed on appeal, it would have no ability to recover fees that it should have lawfully been able to charge.[2] *Second*, "the government could attempt to

[2] Moreover, the United States and the public would be harmed by the change in process that would not allow the Service to effectively track return preparers, particularly those preparers who make repeated errors or engage in misconduct. The preamble to the 2015 temporary PTIN user fee regulations states:

> Requiring the use of PTINs improves tax administration and tax compliance and benefits tax return preparers by allowing them to provide an identifying number on the return that is not an SSN. Requiring the use of PTINs enables the IRS to better collect and track data on tax return

(continued...)

recover the lost fees through a restitution claim against PTIN holders." As the United States explained in its opening brief, even if the United States is entitled to restitution, numerous procedural and collection issues call into question whether the unpaid amounts would be collected. (*See* Doc. 84-1 at 16-17.) *Third*, "the IRS could charge higher fees during the next fiscal year to recoup any losses incurred pending appeal." The United States is unaware of any authority that would permit charging higher fees in future years as a matter of course.

The second harm faced by the United States is related to the first. Because the United States cannot collect user fees to cover the cost of requiring the use of PTINs, the United States will be forced to use amounts appropriated for other taxpayer services and programs to cover the shortfall. (*See* Doc. 84-1 at 18; Zottola Decl., ¶11.) There is no method to recover those losses. Plaintiffs state "if the government were correct, *any* economic loss that would result in the reallocation of *any* government resource would

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(…continued)

> preparers, including the number of persons who prepare returns, the qualifications of those who prepare returns, and the number of returns each person prepares. PTIN use allows the IRS to more easily identify and communicate with tax return preparers who make errors on returns, which benefits tax return preparers by improving compliance and therefore reducing the number of client returns that are examined. The PTIN also enables the IRS to more easily locate and review returns prepared by a tax return preparer when instances of misconduct or potential misconduct are detected, which aids tax administration and compliance. These aids to tax administration and compliance in turn benefit taxpayers and tax return preparers by working to reduce preparer error and misconduct.

Preparer Tax Identification Number (PTIN) User Fee Update, 80 FR 66792-01.

amount to irreparable harm," but "such an interpretation would entitle the government to an automatic right to a stay as long as it showed *some* loss." (Doc. 85 at 23 (emphasis in original) (citing *Air Transp. Ann'n of Am. v. Export-Import Bank of the United States*, 840 F. Supp. 2d 327, 335 (D.D.C. 2012)).)

The United States is not arguing that any economic loss is *per se* irreparable. Rather, as stated in *Air Transportation*, "[t]he wiser formula requires that the economic harm be significant." 840 F. Supp. 2d at 335-36 (discussing *Gulf Oil Corp. v. Dept. of Energy*, 514 F. Supp. 1019, 1026 (D.D.C. 1981)). Cutting approximately $37.6 million in taxpayer programs and services per year is significant by any measure. The United States government generally and the Internal Revenue Service in particular do not have "practically unlimited resources" as plaintiffs would have it. (*See* Doc. 85 at 23.) If the United States was required to demonstrate that its economic loss was a substantial portion of the yearly budget, the United States would never be entitled to a stay. Plainly that is not the requirement.

C. The remaining factors also weigh in favor of a stay.

Plaintiffs' other arguments are similarly unavailing. Plaintiffs state that a stay would upset the status quo, which in their view is the world as it was prior to 2011 when the Service began requiring the use of the PTIN. For example, plaintiffs state "[f]ollowing this Court's injunction, the IRS has voluntarily returned to that pre-2011 status quo—issuing PTINs free of charge." (Doc. 85 at 24.) Of course, the Service began issuing PTINs without charge to comply with the Court's opinion and order. The correct status quo is actually the world as it was for several years before the Court

entered its order, *i.e.* one where the Service required tax return preparers to obtain and use a PTIN on all tax returns and refund claims prepared for others for compensation and pay the PTIN user fee.[3] The United States' motion for stay seeks to preserve that status quo.

Plaintiffs assert that granting a stay "would create a high potential for confusion" and "would also treat tax return preparers differently based on when they applied for their PTIN." (Doc. 85 at 25.) Granting a stay would actually *lessen* the chance of confusion and differential treatment by maintaining the status quo. If all tax return preparers are required to continue to pay the PTIN user fee during the pendency of the United States' appeal, all tax return preparers will be treated the same. If the D.C. Circuit denies the appeal, all tax return preparers will be entitled to a refund of any amounts paid. If the United States prevails, all tax return preparers will have paid the same amount.[4] By contrast, if a stay is not entered and the United States prevails, it would seek to recover any unpaid amounts through restitution or any other avenue that may be available from all tax return preparers. Any individual who obtained a PTIN during the pendency of the appeal would face uncertainty regarding whether they would ultimately owe money to the United States.

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[3] In addition, after the PTIN became required in 2011, the Service began tracking PTIN abuse, misuse, and complaints, which increased costs to the United States. This issue, which relates to the excessiveness claim, is not before the Court at this time.

[4] The only possible subset of differently treated individuals would be those who obtained or renewed a PTIN after the Service began issuing PTINs without charge up until the entry of a stay order.

Finally, plaintiffs' equity and justice arguments (*see* Doc. 85 at 25-26) fail to address the well-settled law that a stay is in the public interest if the United States established it will face irreparable harm. *See Nken v. Holder*, 556 U.S. 418, 435 (2009); *Leiva-Perez v. Holder*, 640 F.3d 962, 970 (9th Cir. 2011).

CONCLUSION

For the foregoing reasons, the Court should stay its injunction during the pendency of any appeal in this case.

Dated: August 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF THE UNITED STATES' MOTION FOR STAY was filed with the Court's ECF system on August 14, 2017, which system serves electronically all filed documents on the same day of filing to all counsel of record including upon:

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