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

UNITED STATES' PARTIAL OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs seek leave to file a second amended complaint, which adds challenges to: (1) the amount of the user fee to obtain and renew a Preparer Tax Identification Number ("PTIN user fee") that the IRS began charging in 2020, and the amount of any subsequent PTIN user fees that may arise during the pendency of this case; and (2) the requirement that tax return preparers annually renew their PTIN ("PTIN renewal requirement"). *See* Doc. 139. The parties agree that the complaint may be amended to include the first challenge. The parties disagree whether plaintiffs can challenge the PTIN renewal requirement. The parties have submitted a copy of the proposed second amended complaint, which highlights their disagreements regarding paragraph 50 and paragraph 6 in the prayer for relief. *See id.*

The Court should deny plaintiffs leave to challenge the PTIN renewal requirement at this juncture of the case. In its prior opinion on summary judgment, the Court upheld the regulations requiring tax return preparers to obtain *and renew* a PTIN.

The D.C. Circuit in turn upheld that portion of this Court's opinion. In his motion for preliminary injunction, Allen Buckley admitted that "the *Montrois* opinion states: '[A]s the district court held the IRS's requirement that preparers obtain and renew a PTIN survives *Loving*." Doc. 128-1 at 4 (quoting *Montrois v. United States*, 916 F.3d 1056, 1068 (D.C. Cir. 2019)). Thus, it would be futile to permit amendment to challenge the PTIN renewal requirement as it would not survive a motion to dismiss. *See Singletary v. Howard Univ.*, 939 F.3d 287, 295 (D.C. Cir. 2019); *Sherley v. Sebelius*, 776 F. Supp. 2d 1, 15 (D.D.C. 2011) (citing 18B Wright & Miller, Fed. Prac. & Proc., § 4478 (2d ed. 1987)).

Further, as shown by the long procedural history of this case, plaintiffs have unduly delayed in seeking leave to amend the complaint. The parties agreed, and the Court ordered, that any further amendment of the pleadings would be filed by February 19, 2016. *See* Doc. 43. Plaintiffs were aware of the renewal requirement prior to this agreed deadline, yet they waited more than four-and-a-half years to seek leave to amend the complaint to challenge the PTIN renewal requirement.

The Court therefore should deny plaintiffs leave to challenge the PTIN renewal requirement and should strike paragraph 50 and prayer for relief 6 from the proposed second amended complaint.

BACKGROUND

The original complaint in this action was filed on September 8, 2014, with Allen Buckley appearing pro hac vice on behalf of the class immediately thereafter. *See* Docs. 1, 6. After the consolidation with a competing class action lawsuit (*see Dickson v. United States*, No. 1:14-cv-2221-RCL (D.D.C.)), the Court's June 30, 2015, Order required the

parties promptly to confer and then submit a proposed scheduling order. *See* Doc. 38. On July 15, 2015, in compliance with the Court's Order, the parties jointly proposed that:

> By no later than August 7, 2015, plaintiffs shall file an Amended Complaint consolidating the claims in the current *Steele* complaint with the claims previously pled in *Dickson* . . . . This Amended Complaint, once filed, shall be the sole operative Complaint for the claims raised in this action and those previously raised in the *Dickson* Action.

See Doc. 39, ¶ 1. The parties further committed to submitting "a complete discovery, class certification and dispositive motion schedule governing the balance of this case up until trial" no later than August 21, 2015. *Id.*, ¶ 2. On July 20, 2015, the Court adopted the parties' proposed August 7 and August 21, 2015, due dates. *See* Doc. 40. Accordingly, Plaintiffs filed their Amended Complaint on August 7, 2015, which consolidated the *Dickson* and *Steele* claims, and the United States timely answered. *See* Docs. 41, 48.

But far more important here, on August 21, 2015, the parties submitted their proposed pretrial schedule that states the "deadline for the amendment of pleadings . . . shall be February 19, 2016." *See* Doc. 42, ¶ 3. On August 31, 2015, the Court ordered that the deadline for further amending the complaint would be February 19, 2016. *See* Doc. 43, ¶ 3. No motion to amend the pleadings was filed by that deadline.

On September 7, 2016, in reliance upon the pleadings being final and complete, the parties filed their cross-motions for summary judgment. *See* Doc. 66-67. And over the following four years, the parties have continued to move this case forward.

On June 1, 2017, the Court granted Plaintiffs' motion for summary judgment in part, holding that the IRS may require the use of PTINs but may not charge fees under the Independent Offices Appropriations Act ("IOAA") to obtain and renew PTINs. *See Steele v. United States*, 260 F. Supp. 3d 52, 62–63 (D.D.C. 2017) ("the Court concludes that the IRS was authorized to issue the regulations requiring tax return preparers to obtain PTINs"). The United States appealed the decision that it could not charge a user fee to obtain and renew a PTIN. *See* Doc. 90. Plaintiffs did not file a notice of appeal regarding any issue.

On March 1, 2019, the D.C. Circuit vacated the judgment, finding "the IRS acted within its authority under the [IOAA] in charging tax-return preparers a fee ***to obtain and renew PTINs***." *Montrois,* 916 F.3d at 1058 (emphasis added). The Court remanded the action "for further proceedings, including an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs." *Id*. Now on remand, this case is in discovery to determine the appropriate amount that the Service may charge under the IOAA to issue and renew a PTIN.

ARGUMENT

While courts should grant leave to amend when justice so requires, leave may be denied for sufficient reason, including, in relevant part, where amendment would be futile or the moving party unduly delayed in seeking leave to amend. *See Foman v. Davis*, 371 U.S. 178,182 (1962); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). The Court should deny plaintiffs leave to challenge the PTIN renewal requirement

because it would be futile and because plaintiffs demonstrated undue delay by waiting five years to file this motion.

I. Plaintiffs' challenge to the PTIN renewal requirement is futile.

An amendment is futile if it would not survive a motion to dismiss, particularly when it reasserts a claim on which the Court previously ruled. *See Singletary*, 939 F.3d at 295; *McGee v. Dist. of Columbia*, 646 F. Supp. 2d 1115, 1119 (D.D.C. 2009) (citing *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002). Denial of a motion to amend is appropriate when the plaintiff has "little chance of a successful . . . claim." *Willoughby v. Potomac Elec. Power Co.*, 100 F.3d 999, 1003 (D.C. Cir. 1996).

As discussed above, this Court upheld the regulation requiring tax return preparers to obtain and renew the PTIN. *See Steele*, 260 F.3d at 62-63. Plaintiffs chose not to appeal that portion of the Court's decision. The D.C. Circuit upheld the authority to charge for both the initial and renewal PTIN user fees. *See Montrois,* 916 F.3d at 1058. Thus, the law of the case doctrine (sometimes called the mandate rule) precludes this attempt to challenge the renewal requirement. When "matters are decided by an appellate court, its rulings, unless reversed by it or by a superior court, bind the lower court." *Sherley,* 776 F. Supp. 2d at 15 ("'[t]he very structure of a hierarchical court system demands' that a lower court on remand be bound by the law of the case established on appeal" (citing 18B Wright & Miller, Fed. Prac. & Proc., § 4478 (2d ed. 1987))). Because the D.C. Circuit, in holding that the IRS could charge for renewals, necessarily upheld this Court's decision that the renewal requirement was valid, that issue has been resolved and is now law of the case.

Section 6109 specifically authorizes the Secretary of the Treasury to issue regulations regarding the identifying number for tax return preparers that must be included on any return. *See* 26 U.S.C. § 6109(a)(4) ("Any return or claim for refund prepared by a tax return preparer shall bear such identifying number for securing proper identification of such preparer, his employer, or both, as may be prescribed."); 26 U.S.C. § 6109(d) ("The social security account number issued to an individual . . . shall . . . except as shall otherwise be specified under regulations of the Secretary, be used as the identifying number for such individual for purposes of this title."). Accordingly, the Secretary issued regulations mandating the use of a PTIN as the required identifying number for tax return preparers under section 6109 (PTIN Requirement Regulations). Treas. Reg. § 1.6109-2(d).

The PTIN Requirement Regulations further permit the IRS to designate an expiration date and a renewal process for the PTIN. Treas. Reg. §1.6109-2(e) ("The Internal Revenue Service may designate an expiration date for any preparer tax identification number or other prescribed identifying number and may further prescribe the time and manner for ***renewing*** a preparer tax identification number or other prescribed identifying number, including the payment of a user fee, as set forth in forms, instructions, or other appropriate guidance." (Emphasis Added).) The IRS issued instructions, pursuant to those regulations, which require annual renewal of the PTIN. *See* Form W-12, *IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal*, and the Form W-12 Instructions.

This Court upheld the validity of the PTIN Requirement Regulations to the extent they require tax return preparers to obtain, use, and renew PTINs. *See Steele*, 250 F. Supp. 3d at 62–63. It further held that the United States could not charge a user fee in connection with obtaining and renewing a PTIN. *Id.* The United States appealed the decision that it could not charge a user fee. The Class did not appeal any issue. Issues not briefed on appeal are deemed waived. *See, e.g., Southern Cal. Edison Co. v. F.E.R.C.*, 603 F.2d 996, 1000 (D.C. Cir. 2010) ("A party can and does waive any argument not presented [on appeal] except those going to our own jurisdiction or similar structural issues . . . ."). The D.C. Circuit, in turn, upheld the District Court's holding that the PTIN Requirement Regulations, including the annual renewal requirement, were valid and reversed the holding that the United States could not charge a user fee to obtain and renew the PTIN. *See Montrois,* 916 F.3d at 1060, 1066. By failing to appeal this Court's holding that the annual renewal requirement is valid, the Class has waived that argument. *Southern Cal. Edison Co.*, 603 F.2d at 1000.

Plaintiffs argue that the D.C. Circuit, in determining that the United States could charge a user fee for issuing and renewing PTINs, did not find that the renewal requirement was valid in reaching that determination. *See* Doc. 128-1 at 2. There is no basis for this argument, as it ignores the underlying opinion of this Court and the D.C. Circuit's clear opinion and remand instructions. The D.C. Circuit, by holding that the IRS could charge for renewals, necessarily upheld the PTIN renewal requirement. *See Montrois*, 916 F.3d at 1060. It is clear from language throughout the D.C. Circuit's opinion that the court understood the renewal requirement to be settled. For example,

in describing the regulatory background relevant to the case, it specifically noted that the PTIN Requirement Regulations included an annual renewal requirement. *Id.* at 1059. The D.C. Circuit described the first question before it as "whether the IRS had authority under the [IOAA] to charge tax-return preparers a fee to obtain and renew a PTIN." *Id.* at 1062. In reaching its conclusion that the IRS provides a service, the D.C. Circuit noted that "[t]he IRS devotes personnel and resources to managing the PTIN application and renewal process and developing and maintaining the database of PTINs." *Id.* at 1063. Finally, in describing the specific benefit of SSN confidentiality, the court held that the same concern pertained to both initially providing a PTIN and to the annual renewal of a PTIN. *Id.* at 1066. In fact, the D.C. Circuit remanded this case with specific instructions regarding renewals:

> To be sure, the tax-return preparers might question whether the amount of the renewal fee bears an adequate relationship to the continuing costs incurred by the IRS to maintain the PTIN database. But those concerns pertain to the amount of the fee, not the antecedent question of whether the fee generally lies within the IRS's statutory authority under the Independent Offices Appropriations Act. On remand, the district court is free to consider arguments concerning the alleged excessiveness of the fee, including whether the renewal fee is "reasonably related" to the "costs which the agency actually incurs" in providing the service, *Nat'l Cable Television Ass'n*, 554 F.2d at 1107, and "the value of the service to the recipient," *Cent. & S. Motor*, 777 F.2d at 729. For purposes of the issue we consider at this stage of the proceedings, though, it is enough for us to conclude that the PTIN requirement specifically benefits tax-return preparers by helping to protect the confidentiality of their personal information.

Id. at 1066.

Because this Court and the D.C. Circuit already determined that the IRS *can* require return preparers to annually renew their PTIN, the proposed amendments to

challenge the PTIN renewal requirement would not survive a motion to dismiss. *Singletary*, 939 F.3d at 295; *McGee*, 646 F.Supp.2d at 1119. Therefore, the proposed amendments would be futile and plaintiffs' motion to amend should be denied. *Id*.

II. Plaintiffs have exhibited undue delay in seeking amendment.

A motion to amend the complaint should also be denied for undue delay. *See Elkins v. Dist. of Columbia*, 690 F.3d 554, 565 (D.C. Cir. 2012); *Williamsburg Wax Museum, Inc. v. Hist. Figures, Inc.*, 810 F.2d 243, 247–48 (D.C. Cir. 1987). Consideration of whether delay is "undue" may take into account whether amendment would prejudice the non-moving party. *See Atchinson v. Dist. of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996) (citing *Sinclair v. Kleindienst*, 645 F.2d 1080, 1085 (D.C. Cir. 1981)). However, while consideration of prejudice is a "helpful inquiry" to determine undue delay, it is not a necessary one; courts can deny a motion to amend based on undue delay even in the absence of prejudice to the nonmoving party. *Harris v. Sec'y, U.S. Dep't of Veterans Aff.*, 126 F.3d 339, 345 (D.C. Cir. 1997). Undue delay, on its own, can undercut the fairness and efficiency of the litigation. *See id.*

To determine whether a moving party has exhibited undue delay, the Court considers the amount of time that has elapsed, the parties' conduct during that period, and any explanation offered for the delay. *Hudson v. Am. Fed'n of Gov't Emp.*, No. 17-1967 (JEB), 2019 WL 3533602, at *3 (D.D.C. Aug. 2, 2019) (citing *Atchinson*, 73 F.3d at 426; *Trudel v. SunTrust Bank*, 924 F.3d 1281, 1288 (D.C. Cir. 2019); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 6 (D.D.C. 2008)).

The deadline for amending the complaint expired on February 19, 2016. Dkt. 43. But even though plaintiffs were aware of the PTIN renewal requirement prior to that deadline, they did not seek leave to amend by February 19, 2016. Despite various modifications to the discovery schedule, the deadline to amend the complaint was not extended further. *See,* Docs. 58, 72, 83, 100, 127. Even as discovery was extended, plaintiffs did not file for leave to amend. And even after this case was remanded, plaintiffs did not seek to amend their complaint and they did not seek an extension of time to do so.[1] Throughout this time, the IRS continued to require preparers to renew their PTINs.

Meanwhile, plaintiffs admit that the language of the proposed amendments were contemplated at least by 2015. Doc. 136 at 1. Yet no attempt to amend the complaint was made until 2020, five years later. Plaintiffs had sufficient opportunity to assert these claims but failed to provide any indication, to the Court or to the United States, of any plan to seek leave to amend. Nor have plaintiffs explained why they waited so long to seek leave to amend. Because of this unexplained lengthy delay, the Court should deny Buckley's motion. *See Doe v. McMillan*, 566 F.2d 713, 720 (D.C. Cir. 1977) (affirming denial of a motion to amend when the motion was filed three years after the case was filed).

[1] Plaintiffs incorrectly state that the IRS stopped requiring annual PTIN renewals after the Court's injunction in 2017. The IRS has, at all times since the PTIN Requirement Regulations became effective, enforced the annual renewal requirement. Thus, contrary to their assertions, plaintiffs were on notice of the IRS's intent to continue requiring annual renewals before the proposed regulations were issued in 2020.

Furthermore, the proposed amendments would prejudice the United States and the Class and undercut the efficiency of this litigation. The parties have litigated this case for over five years based on an amended class action complaint filed on August 7, 2015. *See* Doc. 41. Permitting amendment of the claims at this stage could potentially cause significant setbacks in resolution of this matter, delaying recovery by the class and causing the Court to continue expending significant judicial resources. Despite nearly two years of discovery following the D.C. Circuit's mandate, the parties have spent no resources addressing the renewal requirement. If the Court permitted plaintiffs to amend the complaint to challenge the renewal requirement at this late stage of the proceedings, the parties would have to expend time and resources on an issue that could have been addressed years ago. To require the parties to do so now would be the very definition of prejudicial.

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CONCLUSION

For the reasons stated above, the Court should deny plaintiffs leave to amend the complaint to challenge the PTIN renewal requirement and it should strike paragraph 50 and prayer for relief 6 from the proposed second amended complaint.

Dated: October 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on October 28, 2020, I filed the foregoing UNITED STATES' PARTIAL OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT with the Clerk of Court using the CM/ECF system, which will serve counsel for the plaintiffs.

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