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*.	Case No. 14-cv-01523-RCL

REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT

At issue is not a motion for summary judgement, etc., but rather whether the complaint can be amended to add back a provision of the original complaint, providing that only one filing need be made to get and maintain a PTIN.[1] The amendment is potentially pertinent to the preliminary injunction motion, relating to the challenge to the renewal aspect (i.e. the PTIN expiration feature) of 26 CFR § 1.6109-2(e)-(f). The expiration feature converted PTINs into licenses. The *Loving* case completely shut down licensing power. The fact that Defendant challenges the renewal provisions is telling: The IRS unlawfully has its hooks into tax return preparers and it won't let go.

The undersigned submits the current complaint (Doc. 41) is sufficient to permit the challenge to renewals. Prayer for Relief 5 requests: "A judgement declaring that the IRS may only request information from tax return preparers that is authorized by statute."

[1] For the reasons noted in Doc. 139, filed by co-counsel, the amended complaint herein discussed is Doc. 139-1, filed on October 28, 2020. With the exception of the renewal provisions (i.e. paragraph 50 and prayer 6 of Doc. 139-1), Defendant consents to the amended complaint. Thus, the sole dispute is whether the renewal provisions can be part of the second amended complaint.

The only potentially applicable statutory provisions are subsection (a)(4) and paragraph (c) of 26 U.S.C. § 6109. These provisions are discussed on page 1 of Doc. 128-1. The user fee statute aside, these simple identification provisions are *and have been since the filing of this action in 2014* the only pertinent statutory authorities. There is no new material. These statutory provisions provide that information can be requested to issue an identification number. They do not permit annual filing requirements. *Cf.* 26 U.S.C. § 5112, relating to alcoholic beverages subsequently used in manufacturing of nonalcoholic products, providing "[e]very person claiming drawback under this subpart shall register annually with the Secretary . . ." Prayer 6 of the existing complaint requests "[s]uch other relief as the Court deems equitable and just." So, the current complaint permits the renewal challenge, and there is no need for the challenged provisions of the Second Amended Complaint to be accepted in order for the motion for a preliminary injunction to be considered. The remainder of this reply covers the possibility of such not being the case.

FRCP 15 provides: "The court should freely grant leave when justice so requires." As noted in Doc. 134, at issue is whether approximately 800,000 Americans will have to annually spend one hour and 13 minutes (per instructions to IRS Form W-12—Doc. 128-14) renewing a permanent identification number (a PTIN) and annually pay fees for such number, indefinitely, due to the IRS's conversion of the number into a license pursuant to the foregoing statutory provisions. In a logical and fair world, it's pure insanity. Allowing such to happen would be unjust.

Under the 2019 *Montrois* ruling, Plaintiffs will very likely have to pay renewal fees for pre-2018 years. So, the Defendant is already entitled to an unlawful windfall. Allowing the renewal requirement to continue (given the statutory scheme) would simply allow more fees and injustice.

The original (2014) complaint included the following relief request in Count 12: "An injunction prohibiting Treasury from asking more information than is necessary to issue a PTIN, and requiring Treasury to ask for such necessary information only once." So, Defendant cannot

claim it is caught off-guard by the renewal relief prayer. As previously explained in Doc. 131, footnote 1 and Doc. 136, the undersigned requested almost identical language be included in the current (amended in 2015) complaint (Doc. 41). The requested language asked the following prayer be added: "A judgement declaring that return preparers need apply for a PTIN only once, and that PTIN applications will request only information necessary to issue a PTIN." I hand-wrote next to the requested language: "I need to discuss with Bill if you won't add." Instead, Prayer for Relief 5 was added (without getting back to me to discuss the matter).

The seminal case regarding Rule 15 is *Foman v. Davis*, 371 U.S. 178 (1962). It provides:

> If the underlying facts or circumstances relied upon by plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, and as the rules require, be 'freely given.'

Foman, p. 82. None of the *Foman* conditions that would prohibit amendment exist. Defendant can cease performing remaining licensing activities at any time. It has already received a windfall. As noted in Doc. 128-1, the IRS receives all the information it needs about return preparers from returns filed that they prepared. Renewal is unjust and unneeded overkill. Under the exact same statutory authority, it was not required before the 2010-2011 licensing system was implemented.

According to *Wright & Miller*:

> Perhaps the most important factor listed by the Court for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter a pleading [citing in footnote 5, *Zenith Radio Corp. v. Hazeltine Research, Inc.* 401 U.S. 321 (1971) and *U.S. v. Hougham*, 364 U.S. 310 (1960)]. Conversely, if the court is persuaded that no prejudice will accrue, the amendment should be allowed. . . .
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> In order to reach a decision on whether prejudice will occur that should preclude granting an amendment, the court will consider the position of both parties and the effect the request will have on them. This entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the

> material to be added in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.
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> For example, if the amendment substantially changes the theory on which the case has been proceeding and is proposed late enough so that the opponent would be required to engage in significant new preparation, the court may deem it prejudicial. In a similar vein, if the court determines that the proposed amendment would result in defendant being put to added expense and the burden of a more complicated and lengthy trial or that the issues raised by the amendment are remote from the other issues in the case and might confuse or mislead the jury, leave to amend may be denied. . . .
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> On the other hand, plaintiff typically will not be precluded from amending . . . simply because that amendment may increase the defendant's potential liability.

See Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1487 (3d ed.) Based on these considerations, leave to amend should be granted. The irreparable harm and hardship to the Plaintiffs has been thoroughly set forth—annual fees and significant time lost by approximately 800,000 people. "[M]onetary or other losses that are deemed to be incalculable or immeasurable usually will be found to constitute irreparable injury." 13 *Moore's Federal Practice—Civil* § 65.22. Here, the fees will exist if renewals occur. I attempted to include pertinent language in the current complaint. Good faith is relevant. *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F. 3d 1080, 1084 (D.C. Cir. 1998). No injustice whatsoever would result to Defendant from amendment. Rather, the injustice that has been ongoing would need to cease.

Defendant's response is *heavily* reliant on its position that the Court ruled in 2017 that renewals can take place. The undersigned disagrees. Obviously, it's the Court's call. If I had read the 2017 opinion as permitting renewals, I would have appealed that aspect of the ruling. Regarding any sort of prejudice due to the pre-trial schedule, etc. changing, all such schedules, etc. have been pushed back several times. They will be pushed back further. The case is in the midst of discovery. Defendant's claim that more time will need to be spent due to the matter is bogus.

One never knows how litigation will unfold. Plaintiffs did not control the case until mid-2015. The IRS could have completely capitulated after the Court's ruling in 2017. It did so after its

D.C. Court of Appeals loss in *Loving*. There, the IRS dropped the concept of a "registered tax return preparer" altogether and refunded testing fees. The same could have happened here in 2017, thus negating the need to seek an injunction. The same could also have happened after the *Montrois* opinion was issued (i.e. the IRS could have decided justice allowed it to require only one PTIN filing and only one fee for such filing). Instead, it went the opposite direction. Rule 15 is written flexibly to deal with changing conditions. There is no statute of limitations on requesting an amendment to a pleading. Amendment is permitted under the circumstances. In contrast, under 28 U.S.C. § 2401(a), there is a six-year statute of limitations on challenging a regulation. Case law has interpreted this provision as preventing challenges to regulations more than six years after the regulation became final. (Under the Wind River doctrine, based on *Wind River Mining Corp. v. United States*, 946 F. 2d 710 (9th Cir. 1991), an action must be brought against an agency within six years of finalization of a regulation.) The renewal regulation became final in 2011. This case represents the sole known opportunity to challenge it. Justice requires the challenge be allowed.

The undersigned requests the Court fully accept Doc. 139-1.

Dated: October29, 2020

Respectfully submitted,

/s/ Allen Buckley

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