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 **JOINT MOTION TO MODIFY SCHEDULING ORDER**

The parties jointly move the Court to modify the current Scheduling Order (Dkt. 43). The parties have recently had a series of in-person and telephonic discussions concerning the most efficient and economical approach to resolve the issues raised in this litigation. For the reasons set forth below, the parties believe that sequentially phasing the two primary issues in this case is the most appropriate way to proceed.

Background and Procedural Posture

This class action challenges fees the Internal Revenue Service imposes on tax return preparers to obtain what is known as a preparer tax identification number (or PTIN). Plaintiffs challenge the lawfulness of the fees on two grounds. The first ground is that the IRS has no authority to charge any PTIN fees because tax return preparers receive no "service or thing of value" in return for them, but only an identifying number. 31 U.S.C. § 9701(a); 26 U.S.C. § 6109(a)(4). The second ground is an alternative argument that, if the IRS is authorized to charge the PTIN fees, it charges more than is permissible because the fees far exceed any costs the IRS incurs to issue identification numbers. The United States maintains that the imposition of the PTIN fee is permissible, because the "service or thing of value" is the ability to prepare tax returns for compensation (*i.e.*, a PTIN confers such a right), and that the fees charged are not excessive.

Plaintiffs filed their two-count Amended Class Action Complaint on August 7, 2015. The United States filed its Answer on October 6, 2015. The parties have exchanged Initial Disclosures, and the United States has produced the administrative record. Each of the Plaintiffs has completed his/her document production, responded to interrogatories, and has been deposed. Discovery of the United States commenced in August and is ongoing. Non-party discovery is also underway. Plaintiffs timely moved for class certification on September 9, 2015. The United States has filed an opposition. Plaintiffs will be filing their reply by December 23, 2015. The parties are currently in compliance with all aspects of the Scheduling Order entered on August 31, 2015 (Dkt. 43).

Proposed Modification to the Scheduling Order

Plaintiffs' primary claim in this litigation is that "Treasury and the IRS lack legal authority to charge a fee for issuance or renewal of a PTIN under 31 U.S.C. § 9701, or any other statute." (Amended Class Action Complaint at ¶44; Dkt. 41 at 14). The parties agree that this issue can be decided as a matter of law and without further discovery. The parties further agree that should Plaintiffs be successful on this claim (after the conclusion of all appeals), the members of the putative class will be entitled to a refund of the PTIN fees they have paid to date, the IRS will cease charging fees in the future, and the case will be largely concluded.

If the Plaintiffs are unsuccessful on their primary claim, the court will then need to address Plaintiffs' alternative claim that the PTIN fees are excessive. This undertaking will necessarily be a fact-intensive inquiry, involving substantial cost-based discovery of the IRS and its vendors relating to direct and indirect costs, as well as expert discovery and testimony. Based on the parties' discussions, it appears that responding to the Plaintiffs' existing excessiveness document requests will require hundreds of man-hours of time to locate, process, and produce responsive documents. The IRS estimates that, given its current discovery backlog, it may take four to six

months to review and respond to the ESI portion of the discovery – putting the parties beyond the current discovery cut-off date of April 29, 2016. Moreover, the United States has asserted the deliberative process privilege and the attorney-client/work product privilege in response to many of the document requests, which will require the preparation of a *Vaughn* index and a privilege log. It is likely there will be discovery disputes that will require the Court's intervention. In short, the parties believe that the discovery and pretrial proceedings relating to the excessiveness claim would dwarf the proceedings related to the lawfulness claim.

For these reasons, the parties believe that the most efficient and economical way to proceed is to bifurcate Counts One and Two. Specifically, the parties suggest that the following process be adopted:

1. Class Certification. The Court would rule on the pending motion for class certification after the reply is filed on December 23, 2015.

2. Notice. If the Court grants certification of a class, in whole or in part under Rule 23(b)(3), Plaintiffs will provide notice to class members within 30 days of the Court's ruling. The parties will attempt to agree on the form and manner of the notice. Any disputes will be promptly brought to the Court's attention.

3. Motions for Partial Summary Judgment. Within 30 days of the Court's ruling on class certification, the parties will cross-move for summary judgment on Count One of the Amended Class Action Complaint. Oppositions will be filed 30 days thereafter.

4. Ruling and Further Proceedings. The Court will rule on the cross-motions for summary judgment. Based on the Court's ruling, the parties will meet and confer and, within 15 days of the ruling, propose a schedule for the balance of the case.

Conclusion

The parties acknowledge that this Court has previously stated that it "does not agree that bifurcation would expedite these proceedings." (Dkt. 38 at 3). At the time the Court made that statement, the United States opposed bifurcation, and Plaintiffs had not yet filed their Amended

Class Action Complaint. The parties are more knowledgeable now about the contours of the case and the issues presented. The parties now agree that the phased approach suggested above is the most efficient and economical manner in which to proceed. The parties are available for a telephonic or in-person status conference at the Court's convenience to discuss this proposal in more detail.

Dated: December 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William H. Narwold, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a member of the law firm MOTLEY RICE LLC, and my office is located at 20 Church Street, 17th Floor, Hartford, CT 06103.

On December 16, 2015, I caused to be filed the following in the above-captioned case:

Joint Motion To Modify Scheduling Order

[Proposed] Order Modifying Scheduling Order

with the Clerk of Court using the Official Court Electronic Document Filing System, which served copies on all interested parties registered for electronic filing.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 16, 2015

Respectfully submitted,

By: */s/ William H. Narwold*
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