

**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

**PLAINTIFFS’ PARTIALLY UNOPPOSED MOTION
FOR LEAVE TO FILE A SURREPLY**

On June 6, 2022, the United States moved to extend the deadline for summary-judgment reply briefs from June 10 to July 8, 2022 so that it could include a new argument regarding the PTIN user fee imposed in Fiscal Years 2011-2013. ECF 197 at 1-2; ECF 198 at 1. Plaintiffs did not oppose the motion but requested a surreply. ECF 198 at 1. The Court deemed the request for a surreply “premature” but stated that “plaintiffs may renew their request after the United States files its Reply Brief.” ECF 200 at 1. Plaintiffs have discussed this motion with the United States as required by Local Rule 7(m). The United States opposes the motion in part. Exhibit 1 (email from Stephanie Sasarak stating partial opposition to Plaintiffs’ motion). Specifically, the IRS does not oppose Plaintiffs’ motion to file a surreply about the concessions made for the first time in the IRS’s reply brief. *Id.* The IRS does oppose Plaintiffs’ request to file a surreply on new arguments made in reply about the validity of the Accenture portion of the PTIN fee. *Id.*

“The decision to grant or deny leave [to file a surreply] is committed to the sound discretion of the Court.” *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85 (D.D.C. 2014) (Lamberth, J.) (internal quotation marks and citation omitted). Motions for leave to file a surreply are “routinely

granted when a party is unable to contest matters presented to the court for the first time in the last scheduled pleadings.” *Id.* (internal quotation marks and citation omitted); *GFL Advantage Fund., Ltd. v. Colkitt*, 216 F.R.D 189, 197 (D.D.C. 2003) (“If the last pleading filed, the reply, raises new matters, then the opponent may be “sandbagged” by not being able to answer a contention that appeared for the first time in reply.”). In deciding whether to grant leave, courts generally consider three factors: (1) “whether the movant’s reply in fact raises arguments or issues for the first time”; (2) “whether the nonmovant’s proposed surreply would be helpful to the resolution of the pending motion”; and (3) “whether the movant would be unduly prejudiced were leave to be granted.” *Exxon Mobil*, 69 F. Supp. 3d at 85 (internal quotation marks and citation omitted); *United States ex rel. Barko v. Halliburton Co.*, 241 F. Supp. 3d 37, 80 (D.D.C. 2017) (Lamberth, J.). Here, all three factors weigh in favor of granting Plaintiffs’ motion.

The United States introduced new arguments in its reply regarding concessions for 2011-2013, and the Accenture portion of the PTIN user fee. Permitting Plaintiffs to file a surreply to address the following issues will aid the Court in deciding the pending cross-motions for summary judgment:

- (1) whether the IRS portion of the PTIN fee for 2011-2013 is still excessive because it includes the cost of impermissible activities, despite an additional concession per PTIN of \$2.95;
- (2) whether the Accenture portion of the PTIN fee was authorized by the PTIN fee regulation, as the IRS argues, even though it was discussed only in the preamble as an unnamed vendor fee, and expressly excluded from the regulation; and
- (3) whether the validity of the Accenture fee is not properly before the Court, as the IRS argues, even though it was included in the Complaint and has been at issue throughout the entire litigation.

A surreply here would permit Plaintiffs to “contest matters presented to the court for the first time in the last scheduled pleading,” *Stevens v. Sodexo, Inc.*, 846 F. Supp. 2d 119, 130 (D.D.C. 2012)

(Lamberth, J.) (cleaned up), not to provide “amplification of an issue” Plaintiffs have already had an opportunity to address. *Shea v. Clinton*, No. CV 02-577 (RCL), 2012 WL 13075787, at *1 (D.D.C. Dec. 7, 2012) (Lamberth, J.) (cleaned up).

The United States will not be prejudiced by Plaintiffs’ surreply as it has fully briefed these three issues, and, in responding to Plaintiffs’ request, claimed no such prejudice. *Exxon Mobil*, 69 F. Supp. at 86 (“Absence of prejudice is another factor in favor of granting leave to file a surreply.”). The issues are purely legal and require no discovery or supplementation of the record. The government can hardly complain of additional delay having just requested an additional month to secure approval of concessions that could have been made months ago.

Should the Court grant the motion, Plaintiffs have attached a copy of their proposed surreply so that it can be considered without additional delay. Plaintiffs respectfully request that the Court grant their Partially Unopposed Motion for Leave to File a Surreply and consider the attached three-page surreply in deciding summary judgment.

Dated: July 15, 2022

Respectfully submitted,

/s/ William H. Narwold

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2022 I electronically filed Plaintiffs' Partially Unopposed Motion for Leave to File a Surreply. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: July 15, 2022

/s/ William H. Narwold

William H. Narwold