

Second, the government argues that Plaintiffs have not shown that they are entitled to a “final judgment” under Rule 54(b) because “Plaintiffs move for partial judgment only on a *portion* of the Second Claim alleged in their Second Amended Complaint.”¹ ECF No. 233 at 2 (emphasis in original). The government asserts that “Rule 54(b) allows for the entry of judgment as to ‘one or more’ claims, not portions of claims.” *Id.* But the Court of Federal Claims has rejected a similar argument, explaining that “the government’s definition of ‘claim’”—the same definition it presses here—was “overly restrictive” and “elevat[ed] form over substance.” *Entergy Nuclear Palisades, LLC v. United States*, 122 Fed. Cl. 225, 228 (Fed. Cl. 2015). Where, as here, a defendant has conceded a portion of damages, courts have “treated the uncontested portion of the damages as a resolved ‘claim’ for the purposes of Rule 54(b), and the unresolved portion as the remaining ‘claim,’ even when both portions of damages arose from the same original cause of action.” *Id.* at 229-30; *see also Stockton E. Water Dist. v. United States*, 120 Fed. Cl. 80, 83 (Fed. Cl. 2015) (recognizing authority on remand to “enter partial judgment as to a sum certain in damages for which a defendant is liable” regardless of whether the court must “adjudicate other requests for damages by plaintiff arising out of the same legal claim”). Because “a portion of the damages has been definitively established and further litigation will not impact the government’s obligation to pay at least that amount,” the conceded amount is a “final judgment” under Rule 54(b). *Entergy*, 122 Fed. Cl. at 228-29; *see also* ECF 222 at 1 (finding the PTIN fees “unlawfully excessive under the IOAA to the extent that they were based on. . . [a]ll activities already conceded by the

¹ Contrary to the government’s assertion, Plaintiffs addressed the factors outlined in *Curtiss-Wright Corp. v. Gen. Electr. Co.*, 446 U.S. 1 (1980) in their opening brief without mentioning the “test” by name. *See* 229 at 1-2 (discussing the appropriateness of entry of a partial final judgment for uncontested damages and emphasizing the potential harm to the class if final judgment is delayed).

government in this case”). That should be even more true here, where the concededly unlawful amounts constitute their own “illegal exactions” that could have been pleaded as separate counts.²

Third, granting partial final judgment on the concededly unlawful exactions is in the best interest of the class and there is no just reason for delay. The IRS has already refunded \$28,982,499 of the portion of PTIN fees that it concedes was unlawfully exacted despite now arguing that “it is unclear whether this proposed relief is even available to Plaintiffs.” ECF No. 233 at 5. This money has been placed in escrow, invested, and earned over \$90,000 in interest. ECF No. 229 at 1-2. Plaintiffs seek to do the same with the rest of the concededly unlawful exactions. Here, “the delay in payment is particularly problematic” because it is the government’s position that “plaintiff[s] will not be able to collect interest” on those concededly unlawful exactions. *Entergy*, 122 Fed. Cl. at 230 (finding that the inability to collect interest weighs “heavily in favor of granting partial judgment at this time”). In addition, annual inflation rates continue to rise. The IRS has provided no timeline for when it will complete its work on remand and has indicated that it “has identified certain portions of the Court’s Opinion and Order that may be grounds for appeal,” ECF No. 231, which would inevitably prolong a resolution.

The government argues that recovery should be delayed based on its offset argument—an argument the Court explicitly rejected in its Summary Judgment Opinion. ECF No. 226 at 33 (“But whatever the Court’s authority to order an offset as an exercise of equitable discretion, it declines to do so in this case for several reasons.”). But even if the government were to appeal that decision and prevail, Plaintiffs are not seeking to distribute the conceded money to class members at this time. They request partial final judgment only so they can place the rest of the concededly unlawful

² Should the Court find it necessary, Plaintiffs are willing to amend their complaint to add a separate claim for the concededly unlawful exactions, which would then allow the Court to grant final judgment as to that claim even under the government’s definition of what constitutes a “claim” for Rule 54(b) purposes. But that just points up the senselessness of the government’s position—and the reason why this Court should reject it as overly formalistic.

exactions in an interest-bearing escrow account for the benefit of the class. Should an offset be ordered in the future, the funds to cover that offset will be in escrow and available to transfer back to the government. The government does not explain how that scenario is unworkable or would not solve the hypothetical problem posed by its offset argument.

For the reasons set forth in their opening brief and this reply, Plaintiffs respectfully request the Court grant their Motion for Partial Final Judgment Under Rule 54(b) and order the government to remit payment of the remaining conceded amount.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2023, I electronically filed Reply in Further Support of Plaintiffs' Motion for Final Judgment Under Rule 54(b) through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: April 14, 2023

/s/ William H. Narwold

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