

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' Motion for Leave to File Response to  
Defendant's Notice of Refund Estimation**

On January 24, 2023, this Court entered its Memorandum Opinion and accompanying Order on the cross-motions for summary judgment. ECF Nos. 222, 226. The Court remanded this matter to the IRS “to determine an appropriate refund for the class.” ECF No. 222 at 2. The Court also retained jurisdiction. *Id.* On January 22, 2024, after eleven months of interim status reports, the IRS filed a Notice and a Declaration of Kimberly Rogers, the Director of the Return Preparer Office of the IRS, in response to the Court’s Opinion and Order. ECF Nos. 256, 257. In that Notice, the IRS stated that, for fiscal years 2011-2017, it had calculated an aggregate refund for the class of \$167,766,068. ECF No. 256 at 1. During that same period, the members of the class paid \$305,910,808 in PTIN fees. ECF No. 176-73 at 4.

Also on January 22, 2024, the parties filed a Joint Status Report. ECF No. 255. In that report plaintiffs stated that “[i]f plaintiffs do not accept the United States’ refund calculations [contained in the Notice and Declaration] and intend to challenge the IRS’s work on remand, they will meet and confer with the United States and propose to the court a schedule for further proceedings.” *Id.* at 2. On January 30, 2024, plaintiffs wrote to counsel at the DOJ expressing a number of concerns regarding the IRS’s work on remand. Thereafter, on January 31, 2024, the

parties met and conferred via telephone to discuss the Notice and Declaration and appropriate next steps.

During the meet and confer, counsel for the DOJ stated that the IRS would be filing a Supplemental Declaration from Ms. Rogers providing more detail as to certain of the refund calculations, but noted that the refund amount would not change. On February 7, 2024, counsel for the DOJ informed plaintiffs that the IRS “anticipates” filing the Supplemental Declaration by February 28, 2024. Also during the meet and confer, plaintiffs notified DOJ of their intention to challenge the IRS’s work on remand. Counsel for the DOJ responded that the IRS would oppose any effort by the plaintiffs to challenge the IRS’s work on remand, unless such challenge was directed solely to a claim that the IRS was including impermissible expenses in its fee calculations.

Plaintiffs intend to challenge the IRS’s work on remand. That work, as set forth in the Rogers Declaration, does not comply with this Court’s Opinion and Order or the Administrative Procedure Act, 5 USC § 706. By way of example, the Court need only look at the IRS’s “work” on remand as to the Accenture portion of the PTIN fees. Decl. of Kimberly Rogers ¶¶28-60, ECF No. 257. In its January 24, 2023 Opinion, this Court stated that “[t]he government does not dispute that a significant portion of the [Accenture] fees went to fund activities that had nothing to do with providing or maintaining PTINs.” ECF No. 226 at 29. Yet, the IRS determined that of the \$74,350,958 in Accenture fees paid by the plaintiffs from 2011 to 2017, ECF No. 176-73 at 2, only \$6,411,971 (8.6%) was for activities other than issuing and maintaining PTINs. ECF No. 257 ¶ 60. And it reached this conclusion, in large measure, apparently by arbitrarily counting the number of sentences (or sentences and significant bullets—the Rogers Declaration does not state its methodology, but refers to contract line item numbers, “CLINs”) in the two Accenture contracts that (in the IRS’s view) related to activities other than issuing and maintaining PTINs and then

comparing those numbers (18 and 14), on a percentage basis, to the majority of the remaining sentences in the contracts. *Id.* ¶¶ 43-46, 55-57. The IRS does not explain how, simply by counting the number of sentences in the Accenture contracts (albeit inaccurately), it has complied with this Court's remand order that it "determine reasonable estimates of the portions it lawfully could have charged of. . . the FY2011 through 2017 vendor fees based on the IRS-Accenture contracts." ECF No. 226 at 38.

It is apparently the position of the IRS that its remand work determining the appropriate refunds is unreviewable – that is, the Court is required to accept the IRS's determination of its own liability in this case without further review. The IRS contends that this is what the Court stated in its January 24, 2023 Opinion. Plaintiffs submit that is not what this Court said. The Court said that it was remanding the matter to the IRS "to show its work and set a new fee within the bounds of what the law allows." *Id.* The Court must still determine whether the IRS has done that, and plaintiffs are entitled to be heard on that issue. The Court retained jurisdiction "for purposes of further proceedings to follow [post remand]," ECF No. 222 at 2, and, therefore, may hear plaintiffs' challenge. Moreover, the IRS's work on remand is a new agency action. It is subject to renewed arbitrary-and-capricious review under Section 706 of the Administrative Procedure Act. 5 U.S.C. § 706. *See, e.g., Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 102 (D.D.C. May 17, 2016) (concluding government's explanation on remand was arbitrary and capricious under the APA); *Air Trans. Ass'n of Canada v. Fed. Aviation Admin.*, 323 F.3d 1093, 1094 (D.C. Cir. 2003) (recognizing that the APA applies to new agency action post remand); *Chamber of Com. v. Sec. Exch. Comm'n*, 412 F.3d 133 (D.C. Cir. 2005), *remanded and vacated with a stay of the mandate*, 443 F.3d 890 (D.C. Cir. 2006). As such, Plaintiffs are entitled to challenge the IRS's work on remand. *See, e.g., Min. Order Granting Pl's Mot. for Leave to File*

Resp. to Defs.' Notice and Mem. on Remand, *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*,  
No. 1:14-cv-02103-JEB (D.D.C. Mar. 9, 2016).

Accordingly, plaintiffs respectfully request an opportunity to respond to the IRS's work on  
remand in accordance with the following proposed briefing schedule:

Plaintiffs' Opening Brief. Within 30 days of the granting of this motion or within 30 days  
of the filing of the Supplemental Rogers Declaration, whichever is later, plaintiffs shall file  
their opening brief, identifying and briefing any challenges to the IRS's work on remand.

IRS Response Brief. Within 21 days of the filing of plaintiffs' Opening Brief, the IRS shall  
file its Response Brief.

Plaintiffs' Reply Brief. Within 14 days of the filing of the IRS's Response Brief, Plaintiffs  
shall file their Reply Brief.

Plaintiffs have discussed this motion with the government as required by Local Rule 7(m).

The government opposes this motion.

Dated: February 12, 2024

Respectfully submitted,

/s/ William H. Narwold

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*Additional Counsel for Plaintiffs Adam Steele, Brittany Montrois, Joseph Henchman, and the Class*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2024, I electronically filed Plaintiffs' Motion for Leave to File Response to Defendant's Notice of Refund Estimation 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.

*/s/ William H. Narwold*

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William H. Narwold