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

UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE RESPONSE TO DEFENDANT'S NOTICE OF REFUND ESTIMATION

Plaintiff moves this Court to enter a briefing schedule to allow it to articulate "any challenges to the IRS's work on remand." ECF No. 263 at 4; ECF No. 264 at 4. The United States opposes this Motion because it is premature. As described more fully below, plaintiffs have requested more detailed information related to the calculations, which the government has agreed to produce in a supplemental declaration. Without that information, plaintiffs cannot articulate their specific concerns and the government cannot respond to those concerns. Moreover, the premature and hypothetical nature of this Motion makes it impossible to meet and confer under Local Rule 7(m). If plaintiffs raise issues related to what activities should be excluded and the government agrees, it will recalculate. If plaintiffs raise issue related to what activities the government excluded and the government disagrees, the issue will be briefed. If plaintiffs challenge the methodology of the IRS in determining how to calculate a number, the government will

oppose briefing. There are simply too many variables at this time to allow for a meaningful discussion.

BACKGROUND

On February 21, 2023, the Court issued an unsealed version of its January 23rd opinion granting in part and denying in part both parties' motions for summary judgment. The Court determined that:

> [T]he PTIN and vendor fees for FY 2011 through 2017 were excessive to the extent that they were based on the following activities:
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> • All activities already conceded by the government in this case.
>
> • Any Compliance Department activities other than (1) investigating ghost preparers · (2) handling complaints regarding improper use of a PTIN use of a compromised PTlN, or use of a PTIN obtained through identity theft · and (3) composing the data to refer those specific types of complaints to other IRS business units.
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> • All Suitability Department activities.
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> • The portion of support activities that facilitated provision of an independent benefit to the agency and the public.
>
> • The portion of Accenture's activities as a vendor that facilitated provision of an independent benefit to the agency and the public.
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> ECF No. 226 at 38–39.

Further, the Court remanded the case to the Internal Revenue Service ("IRS") to "determine an appropriate refund by recalculating those fees, using the 2010 Cost Model as a benchmark for the FY 2011 through 2015 PTIN fees and the 2015 Cost Model as a benchmark for the FY 2016 and 2017 PTIN fees, and excising a reasonable estimate of the portions of those fees that the Court has held unlawful" *Id.* at 39. In reaching its

decision to remand to the IRS, the Court was very specific to say that "notwithstanding the reviewing court's authority to determine what *activities* an agency may lawfully charge for under the IOAA, that statute commits the *amount* to be charged to agency discretion." *Id.* at 37 (citing 31 U.S.C. § 9701(b); and *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729, 738 (D.C. Cir.) (Judges "do not sit as a board of auditors, steeped in accountancy and equipped to second-guess an estimate which seems on its face to be reasonable."). Finally, the Order stated that "[w]hen the IRS has completed this review on remand, the government shall file a notice in this Court informing plaintiffs and the Court of the refund it has estimated to be appropriate." *Id.* at 2.

In accordance with the Court's Order, the IRS determined the amount of the refund in accordance with the parameters set by the Court of what activities could and could not be included in the calculation. On January 22, 2024, the United States filed a Notice informing the Court that its estimate of the Court ordered incremental (i.e., in addition to the United States' prior concessions) refund is $57,444,051. Including the United States' prior concessions, the Court ordered incremental refund increases the United States' liability for fiscal years 2011–2017 to a total of $167,766,068.[1] On the same

[1] This number was calculated using the 2010 Cost Model to calculate the incremental refund for fiscal years 2014–2015. If the 2013 Cost Model was used to calculate the incremental refund for fiscal years 2014–2015, which the government believes is a more correct approach for a more "granular breakdown of the various RPO departments' activities" (*see Steele v. United States,* 657 F. Supp. 3d 23, 39 n.9 (D.D.C. 2023)) projected for FY2014–2015, then the calculated total refund liability is reduced by $16,162,059; that is, reduced from $167,766,068 to $151,614,009.

day, the United States filed the Declaration of Kimberly D. Rogers to explain the methodology underlying the numbers provided in the notice. ECF No. 257 (redacted); 258-2 (Sealed). The parties also filed a Joint Status Report, in which plaintiffs stated:

> Within 21 days of receipt of the Notice and the Rogers declaration, plaintiffs will notify the court whether they will accept the refund calculations. . . . If plaintiffs do not accept the United States' refund calculations 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.
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> ECF No. 255 at 2.

Plaintiffs' counsel reached out to the United States's counsel with specific concerns related to the declaration and the need for more information. After a lengthy discussion, the United States agreed to file a supplemental declaration to address plaintiffs' concerns. This supplemental declaration will not change any the amount of the refund or numbers included in the Notice. Instead, the new declaration is meant to provide more detailed information to assist plaintiffs in replicating the numbers contained in the Notice. For example, Plaintiffs raise an issue related to the Accenture costs in their Motion by arguing, that the government has calculated it's numbers "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)." ECF No. 263 at 2–3; ECF No. 264 at 2–3. Beyond being an absurd conclusory characterization of the extensive

work performed by the IRS in reaching its number as arbitrary,[2] plaintiffs' statement demonstrates the futility of their request: the United States has agreed to produce the contracts, the CLINs, and the calculation in a supplemental declaration after Plaintiffs requested to see what items were included.[3] Until it receives the information in the supplemental declaration, plaintiffs are in no position to challenge whether included amounts should be excluded. If plaintiffs believe an activity should be excluded, it should meet and confer with the government about the issue. A briefing schedule eliminates this very important step and races straight to argument.

Rather than wait for the supplemental declaration, plaintiffs have moved this court for a briefing schedule.

ARGUMENT

In accordance with the Court's Order, the IRS provided a Notice containing an estimated refund of amounts related to activities the Court determined were excessive. Plaintiffs gave themselves a self-imposed due date to notify the Court whether they accepted the IRS numbers. As part of this assumed obligation, plaintiffs reached out to the United States for more information. The United States agreed to provide the information in a supplemental declaration. However, without seeing any of this

[2] Plaintiffs claim that "the Rogers Declaration does not state its methodology," but then goes on to describe that methodology in detail. ECF No. 263 at 2–3; ECF No. 264 at 2–3. The fact that plaintiffs don't agree with the Government's methodology is insufficient to allow briefing. The caselaw simply does not permit it to "substitute its own judgment." ECF No. 226 at 38.

[3] The Declaration describes what information was excluded. ECF 257 at 15.

information, plaintiffs have decided that they will have a problem with whatever is provided. Plaintiffs may very well have an issue with the number. But they do not have one yet because the United States is addressing the concerns that they have raised. Until those concerns are addressed, and plaintiff articulates whatever new concerns they have, there is no need for briefing.[4]

Local Rule 7(m) requires:

> Before filing any nondispositive motion in a civil action, counsel shall discuss the anticipated motion with opposing counsel in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement. The duty to confer also applies to non-incarcerated parties appearing pro se. A party shall include in its motion a statement that the required discussion occurred, and a statement as to whether the motion is opposed.

Plaintiffs have represented they "have discussed this motion with the government as required by Local Rule 7(m). The government opposes this motion." ECF No. 263 at 4; ECF No. 264 at 4. But it is impossible to meet and confer on the hypothetical relief plaintiffs are requesting. For example, if plaintiffs will attempt to argue that the IRS methodology and judgment is incorrect, then the United States would oppose such briefing as not being permitted by the Court's Order, which clearly states, "But it would be anomalous to allow plaintiffs the opportunity to have a court set the fee and substitute its own judgment for the agency's simply because they waited until after they had paid the fee for several years to challenge it and seek monetary relief." ECF No.

[4] By asking for a briefing schedule for a future potential problem, plaintiffs have done the equivalent of seeking to file a Motion to Compel after the other side has agreed to give them their documents in a discovery dispute because it is convinced that the produced documents would be lacking somehow.

226 at 38. If the Court does not have this authority, then neither do plaintiffs. If, however, plaintiffs will wish to challenge that an item was included that should have been excluded, that would be an item that could be challenged. However, before any such challenge, the United States should be allowed to engage in meaningful discussions to potentially correct or at least narrow the issue before it is briefed. As a result, the United States opposes the motion as premature.

The Court should deny Plaintiffs' Motion.

Dated: February 15, 2024

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Court's ECF system on February 15, 2024, which system serves electronically all filed documents on the same day of filing to all counsel of record.

/s/ Emily K. McClure
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