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

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SURREPLY

Plaintiffs filed a motion for leave to file a surreply to the United States' reply motion on three issues: (1) the United States' concession of PTIN user fees collected for fiscal years 2011 through 2013; (2) whether the vendor fee portion of PTIN user fee was authorized by the regulations; and (3) whether the Plaintiffs properly pleaded a regulation challenge to the vendor fee in their amended complaint. Although the first issue on the concession does not raise a "new" issue giving rise to surreply, the United States does not object to the Court granting a surreply to address conceded issues.

The United States objects to the Plaintiffs filing a surreply on issues two and three[1] because they are not new issues raised for the first time by the United States in its reply

[1] Issues two and three are one issue. In the required meet and confer, Plaintiffs characterized their request as seeking a surreply to address (1) the United States' new concessions; and (2) the United States' argument that the Accenture portion of the PTIN user fee was included in a regulation. Plaintiffs appear to be increasing the size of the net hoping it will make it easier to score a goal. Alternatively, Plaintiffs failed to meet and confer under the local rules before filing their motion.

brief. The arguments advanced by the United States in its reply brief on whether the vendor fee was authorized by the regulations was merely a response to an argument raised for the very first time in this 8-years long litigation by Plaintiffs' opposition. *See*, *e.g.*, Dkt. No. 185, Plaintiffs' Opp. at 19-20 ("Accenture's portion was not included in any PTIN-fee regulation"). "As Courts consistently observe, when arguments raised for the first time in reply fall 'within the scope of the matters [the opposing party] raised in opposition,' and the reply 'does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate.'" *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 188 (D.D.C. 2012) (quoting *Crummey v. Social Sec. Admin.*, 794 F. Supp. 2d 46, 63 (D.D.C. 2011), *aff'd*, 2012 WL 556317 (D.C. Cir. Feb. 6, 2012); *EEOC v. Freeman*, 961 F. Supp. 2d 783 (D. Md. 2013) (internal quotation omitted) ("Where the arguments made by Defendants in their reply brief are merely responses to new arguments made by Plaintiffs in their response, a sur-reply is not appropriate."); *Shea v. Clinton*, No. CV 02-577 (RCL), 2012 WL 13075787, at *1 (D.D.C. Dec. 7, 2012) (Lamberth, J.) ("Where the movant's reply does not expand the scope of the issues presented, leave to file a surreply will rarely be appropriate.").

Because Plaintiffs raised the issue, they cannot now claim surprise or prejudice to the fact that the United States responded to the argument. Characterizing the issue as newly raised by the United States is legal gaslighting. Plaintiffs suggest that the United States, sua sponte, began making arguments about the validity of its regulation completely unprompted by any argument made by Plaintiff. It did not. In fact, the United States' Reply takes Plaintiffs to task for making this new argument at the eleventh hour

for the first time in their Opposition. *See* Dkt. No. 203 at 18-19 ("Now at the eleventh hour, Plaintiffs contradict their own motion for summary judgment and argue that the Accenture vendor fee must be refunded entirely because it was not established by regulation."). Plaintiffs' motion failed to explain how the United States' response to Plaintiffs' Opposition argument is new. Instead, their brief merely relies on conclusory statements of law.

Plaintiffs mischaracterize the government's opposition as potential concern about "additional delay." Dkt. No. 211 at 3. This is not case as the government does not object to a surreply on the first issue. Instead, the United States objects to being prejudiced by the Plaintiffs' tiresome desire for endless briefing. How many briefs should Plaintiffs be afforded? There are currently two other supplemental filings pending by the Plaintiffs that were not agreed upon or included in the Court's scheduling order because Plaintiffs' counsel cannot agree on a theory of the case. *See* Dkt. No. 188, Supplemental Memorandum; Dkt. No. 206, Motion to File an Amendment to Draft Order. The Plaintiffs made an argument in an opposition and the United States replied.

The Court should deny Plaintiffs' request to file a surreply as to items two and three because the United States merely responded to issues raised by the Plaintiffs in their opposition. "Otherwise, briefing would become an endless pursuit." *Shea v. Clinton*, No. CV 02-577 (RCL), 2012 WL 13075787, at *1 (D.D.C. Dec. 7, 2012) (Lamberth, J.).

(Signatures on following page)

Dated: July 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONSE was filed with the Court's ECF system on July 15, 2022, which system serves electronically all filed documents on the same day of filing to all counsel of record.

/s/ Stephanie A. Sasarak
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