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*.	)	No.: 1:14-cv-01523-RCL

DEFENDANT'S OPPOSITION TO MOTION FOR JUDICIAL NOTICE OR, IN THE ALTERNATIVE, MOTION TO STRIKE PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE

Plaintiffs' purported Request for Judicial Notice is an improper surreply in disguise. Plaintiffs neither engaged in the required meet-and-confer with Defendant, nor requested the required leave from this Court to file this surreply. Even had Plaintiffs filed a procedurally proper request for judicial notice, which they did not, such a request still would have failed because it would have requested judicial notice of an irrelevant fact. And to top it off, the linchpin of Plaintiffs' extended improper argument is yet a second, different, purported "fact" which is not even true. As a result, Plaintiffs' motion should be denied or its improper filing stricken.

ARGUMENT

Plaintiffs did not file a procedurally proper short request for judicial notice. A procedurally proper request would have simply, and briefly, requested that the Court take judicial notice that the PTIN fee for 2023 has been reduced by $5.20 to $30.75. Little more than the preceding sentence would have been required. But even such a procedurally proper request

for judicial notice should have been denied. That that the PTIN fee was lowered by $5.20 for 2023 is irrelevant to the pending summary judgment motion that addresses the amount of PTIN fee in 2010-2017. *See Deakle v. Westbank Fishing, LLC*, 559 F. Supp. 3d 522, 526 (E.D. La. 2021) ("Courts should not take judicial notice of irrelevant facts."); *Varsity Spirit, LLC v. Varsity Tutors, LLC,* 3:21-cv-0432-D, 2022 WL 1266030, at *1, n.5 (N.D. Tex. April 28, 2022) (same); *United States v. Emmons,* 524 F. App'x 995, 996 (6th Cir. May 14, 2013) (declining to take judicial notice of an irrelevant fact).

But Plaintiffs did not file a short direct request for judicial notice. Instead, Plaintiffs filed an extended argumentative surreply. *See* Dkt. No. 218*; Spann v. Cmty. Bank of N. Va.*, 2004 WL 691785, at *7 (N.D. Ill. Mar. 30, 2004) (further arguments in a motion for judicial notice were an improper surreply). This is improper. "Requests for judicial notice, notices of supplemental authority, and the like, cannot be used as a means for circumventing the showing that is required for securing leave to file a surreply." *Crummey v. Social. Sec. Admin,* 794 F. Supp. 2d 46, 64 (D.D.C. 2011).

The "Local Rules do not authorize surreplies." *Baptist Hospital v. Sebelius,* 765 F. Supp. 2d 20, 31 (D.D.C. 2011) (Lamberth, J.). Therefore, to file a surreply, a party must first engage in meet-and-confer, and then a "surreply may be filed only by leave of Court." *Id.* (quoting *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.,* 238 F. Supp. 2d 270, 275–75 (D.D.C. 2002)).

And Plaintiffs know this because they have already tried to file a surreply for the pending summary judgment cross-motions. *See* Dkt. No. 211. For their previously requested surreply, Plaintiffs both engaged in meet-and-confer with Defendant, and then moved for leave of Court. *Id.* at 1. But this time, Plaintiff did neither. This second attempted surreply should be stricken.

E.g., *Bishop v. J.P.Morgan Chase,* 2013 WL 3177826, at *6 (D. Del. June 21, 2013) ("In the motion for judicial notice, Bishop continued to advance . . . an argument in his answering brief, [therefore] it operates as a sur-reply for which Bishop neither requested nor obtained prior court approval to file."); *Limaco v. Wynn Las Vegas, LLC,* 2019 WL 1748103, at *5 (D. Nev. April 18, 2019) (striking Plaintiff's request for judicial notice because it "contain[s] substantive discussion of the merits of Plaintiff's claims" and therefore the "request for judicial notice [is] an improper surreply"). Plaintiffs' motion for judicial notice is therefore procedurally deficient.

But even if the Court were to entertain Plaintiffs' improper extended argument, that argument is also lacking for four reasons.

First, the linchpin of Plaintiffs' improper surreply is not the undisputed fact that the PTIN fee was reduced by $5.20 for 2023. Instead, the linchpin of Plaintiffs' argument is a second, different, purported "fact"; *i.e.:* "Without a regulation, there is no way to know which part of the PTIN fee has been reduced—the IRS portion, the vendor portion, or both." *See* Dkt. No. 218 at 2. But this second purported "fact" is subject to reasonable dispute, thereby rendering it unfit for judicial notice. Fed. R. Evid. 201. Contra to what Plaintiffs claim, there is a current PTIN fee regulation operative for 2023.[1] The current fee regulation plainly states that the IRS portion of the PTIN fee continues at $21. *See* 26 C.F.R. § 300.11(b) (eff. 03/31/2022) ("The fee to apply for or renew a preparer tax identification number is $21 per year and is in addition to the fee charged

[1] Plaintiffs' claim that a new regulation is required is a new issue related to a different year that can only be brought under the Administrative Procedure Act. The amended complaint in this case does not raise this issue.

by the contractor."). This current regulation shows that the $5.20 reduction was solely a reduction of the vendor portion of the PTIN fee.[2]

Second, Plaintiffs' improper surreply states that it continues to assert that the 2020 fee (and underlying 2019 cost model) are irrelevant[3] to a determination of whether the PTIN fees at issue (fees collected from 2010 through 2017) fees are reasonable. Dkt. No. 218 at 2. However, if the Court accepts the IRS' argument that the 2020 fee is a "reasonable proxy" for the earlier fees, plaintiffs argue the Court should also consider the newly reduced fees. *Id*. The 2020 fee (2019 cost model) is relevant to understanding the PTIN user fee for prior years and the plaintiffs have stipulated that is relevant for such understanding. Dkt. No. 144 (Stipulation), ¶ 4 ("The parties agree that plaintiffs will not undertake discovery relating to the Post-2019 Claim prior to the Initial Adjudication. The parties recognize that information regarding the current operations of the Internal Revenue Service's Return Preparer Office may be relevant to understanding the period 2010-2017."). As the United States explained before, the 2019 cost model was used by the IRS as a guidepost on which to base its concessions *i.e*., issues that are no longer before this Court. The 2019 cost model was the first one created after the D.C. Circuit held the IRS was

[2]In addition, the Notice of Proposed Rulemaking ("NPRM") for the current PTIN user fee regulation states that the vendor portion of the PTIN fee might change when Accenture's contract came up for renewal and was competitively rebid. *See Preparer Tax Identification Number (PTIN) User Fee Update,* Notice of Proposed Rulemaking, 85 Fed. Reg. 21,126 at 21,129 (April 16, 2020) ("The third-party contractor was chosen through a competitive bidding process. The amount of the contractor portion may change in 2021 when the contract expires and will be re-computed."). Contra to what Plaintiffs' claim, this NPRM furnishes yet another "way to know which part of the PTIN fee has been reduced." *See* Dkt. No. 218 at 2.

[3] This statement is only true depending on which one of Plaintiffs' various briefs the Court reads. Plaintiffs have offered competing theories and briefs. Plaintiffs submitted two opposition briefs. One states the 2019 cost model is irrelevant. Dkt. No. 185 at 14. The other relies on the 2019 cost model to support calculations on what the appropriate amount of the fee should be. Dkt. No. 188-1 at 2; Dkt. No. 188-2. The United States objected to the plaintiffs' competing briefs and shifting theories. Dkt. No. 191.

within its legal authority to charge a PTIN user fee. Thus, the 2019 Cost Model is a reasonable mechanism to explain the cost activities the IRS would have included in the PTIN user free from 2011 through 2017 had it known that one portion of the regulatory program on which the PTIN was initially based would be invalidated (the Registered Tax Return Preparer Program) while another portion remained intact (the PTIN Program). *See generally* Dkt. No. 203 at 15–18. The IRS cannot go back in time. But it can certainly conduct a post hac review using all the tools available (*i.e.,* the 2019 cost model) to make a reasonable determination on what activities require concession as a matter of law.

Third, Plaintiffs use the improper surreply to substantively attack, even if only incorrectly, the United States claim for offset for the years it was enjoined from collecting PTIN user fees pending appeal. Plaintiffs note that the IRS is now allowing multi-year renewals and registrations for 2021 and 2022 while registrations before the 2020 year remain free. Dkt. No. 218 at 3, n.1. Plaintiffs then argue that this "suggests that the IRS believes it is not entitled to fees for the 2017 to 2020 period." If plaintiffs had met and conferred before filing their motion, the United States could have disabused them of the incorrect assumption. The United States recognizes and respects that (1) the IRS was enjoined from collecting fees from 2017 through 2020, and (2) the Court has not yet ruled on whether the United States is entitled to an offset. It would therefore be unjust to presume it can charge for those fees and get ahead of a Court ruling on this issue. Moreover, if the Court holds that the United States is entitled to an offset for 2018 through 2020, there will be no "unexplained inconsistency," *see* Dkt. No. 218 at 3, n.1, because return preparers who paid a PTIN fee for any year from 2011 through 2017, or any of 2021 through 2023, will all be members of the class subject to the United States' offset affirmative defense.

Fourth, Plaintiffs' improper surreply complains that the IRS increased its user fees relating to enrolled agents (EAs) and enrolled retirement plan agents (ERPAs) while decreasing its PTIN user fee for 2023 and 2024. Dkt. No. 218 at 2–3. Plaintiffs argue that "it is impossible to know if part of the increase in the EA/EARP fee and the reduction in the PTIN fee reflect a shift of costs from the PTIN fee to the EA/ERPA fee." *Id*. at 3. As a threshold matter, this Court is not making determinations on the EA/ERPA user fee so any increase in that fee is irrelevant, and the United States declines to address the reasonableness of that fee in this case. To the extent it relates to the PTIN user fee, however, the Declaration of Carol Campbell states that the concession is aligned with the 2019 Cost Model which did not include any improper EA/ERPA user fee cross-subsidization that was found in the 2013 and 2015 cost models. As a result, the IRS conceded 100% of the EA/ERPA user fee cross-subsidization costs for fiscal year 2017 and prior years because those services relate solely to EAs and ERPAs and not to all PTIN holders. Dkt. No. 183-002 (Campbell Decl.), ¶ 8 (chart) and ¶ 10 (chart). Plaintiffs' improper argument is a non-issue given the United States' concession.

CONCLUSION

For the foregoing reasons, Defendant requests that Plaintiffs' improper Request for Judicial Notice be denied or stricken.

(Signatures on next page)

Dated: January 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Court's ECF system on January 19, 2023, which system serves electronically all filed documents on the same day of filing to all counsel of record.

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