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 PARTIAL FINAL JUDGMENT UNDER RULE 54(b)

The Plaintiffs' motion for partial final judgment both lacks merit and violates the local rules, and therefore the motion should be denied.

As a preliminary matter, Plaintiffs again failed to comply with LCvR 7(m) and did not engage in the required meet-and-confer with the United States. *See also* ECF Nos. 191, 219, 230. Courts may strike from the docket any motions which fail to comply with LCvR 7(m). *See, e.g.*, *Andrades v. Holder*, 286 F.R.D. 64, 65 n. 2 (D.D.C. 2012). Local rules require counsel to discuss any anticipated nondispositive motion with opposing counsel in good faith, to determine whether the parties can narrow the areas of disagreement. LCvR 7(m). The moving party is also required to include in its motion a statement that the discussion occurred. *Id.* Plaintiffs have complied with neither requirement. ECF No. 229. Accordingly, the Court should strike the Plaintiffs' motion.

ARGUMENT

The Plaintiffs have failed to satisfy the requirements of Rule 54(b) for two reasons. First, the Plaintiffs are not seeking final judgment as to "one or more" of their claims. Second, the Plaintiffs have not even tried to satisfy the Supreme Court's two-part test to determine whether relief under Rule 54(b) is warranted.

A. The Plaintiffs cannot utilize Rule 54(b) because they do not want final judgment on "one or more" of their claims.

Rule 54(b) allows a court to "direct entry of a final judgment as to *one or more*" of the claims when certain requirements are satisfied. Fed. R. Civ. P. 54(b) (emphasis added). In their Second Amended Complaint, Plaintiffs identified three counts in their complaint: (1) "Unlawful PTIN Fees", (2) "Excessive PTIN Fees for the Period 2010–2017", and (3) "Excessive PTIN Fees for the Period 2020 and Thereafter." ECF No. 148 at 14–15. Yet Plaintiffs' motion for partial judgment does not ask for judgment as to any of one of these claims, nor does Plaintiffs' motion even specify the claim for which they seek partial judgment. ECF No. 229. Instead, Plaintiffs appear to request partial judgment as to a portion of the user fees for some of the years at issue, or in other words, a portion of a portion of their claim for monetary relief in their complaint. *Id.* at 2. This is not appropriate. Rule 54(b) allows for the entry of judgment as to "one or more" claims, not portions of claims.

Specifically, Plaintiffs move for partial judgment only on a *portion* of the Second Claim alleged in their Second Amended Complaint. *See* ECF No. 148 (2nd Am. Class Action Compl., ¶¶ 50–54). Granting judgment as to a portion of the Second Claim

would be, by definition, judgment on less than one claim, not on "one or more." 10 *Moore's Federal Practice* (3rd ed.), § 54.22[2][a][i]] ("If the district court enters judgment on something less than a final disposition of an entire claim, the Rule 54(b) judgment is improper, and the court of appeals is without jurisdiction to hear the appeal."); Wright, Miller & Kane, *Fed. Pract. & Proc.* § 2657 (for Rule 54(b) to apply, the "entirety" of at least one claim must "be decided with finality"). To allow Plaintiffs to succeed would be to ignore the plain language of the Federal Rule.

B. The Plaintiffs have failed to satisfy the Supreme Court's two-part test to determine if relief under Rule 54(b) is warranted.

Even if relief under Rule 54(b) was available to Plaintiffs, they have failed to allege, much less demonstrate, they have met their burden under the Rule. And they could not demonstrate those elements even if they tried. The Supreme Court has explained that there is a two-part test to determine whether relief under Rule 54(b) is warranted. *Curtiss–Wright Corp. v. Gen. Electr. Co.*, 446 U.S. 1, 7–8 (1980); *see also*, *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 161 F.3d 740, 744 (D.C. Cir. 1998). First, the district court must determine that it is dealing with a "final judgment," meaning that it is a decision on a "cognizable claim for relief" and that it is "an ultimate disposition of an individual claim." *Curtiss–Wright Corp. v. Gen. Electr. Co.*, 446 U.S. at 7. Second, the district court must find that there is "no just reason for delay." *Id.* at 8.

Plaintiffs have not even tried to satisfy the test outlined above and have waived their chance to do so—even though the sole case they cite explains and applies the same test. ECF No. 229 at 2 (citing *Entergy Nuclear Palisades, LLC v. United States*, 122 Fed. Cl.

225, 228 (Fed. Cl. 2015)). But Plaintiffs ignore these standards. Instead, they cite *Entergy* for the proposition that partial judgment is proper when "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." ECF No. 229 at 2 (quoting *Entergy Nuclear Palisades, LLC*, 122 Fed. Cl. at 228). Conveniently omitted, however, are the other factors *Entergy Nuclear Palisades* enumerates for the Court to consider. *Entergy Nuclear Palisades*, 122 Fed. Cl. at 228. Plaintiffs' failure to argue these points in their opening brief means that they waived their chance to argue them in a future reply brief. *United States v. Powers*, 885 F.3d 728, 734 (D.C. Cir. 2018) ("by waiting to present the claim until [movant's] reply brief, [he] forfeited it"); *see also Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (arguments must be raised a party's "opening brief to prevent 'sandbagging' . . . and to provide opposing counsel the chance to respond").

Next, Plaintiffs could not satisfy the "final judgment" element even if they had tried. A district court "should not certify under Rule 54(b) until it has determined "that it is dealing with a final judgment." *Bldg. Indus. Ass'n of Superior Cal.*, 161 F.3d at 744 (internal quotations omitted). It must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.* And it must be a "judgment" in that it determines a claim for relief. *Id.* Neither is present in this case. Plaintiffs' proposed relief is not a final ultimate disposition of an individual claim because the IRS will still have work to do on remand before the claim can be fully adjudicated. And it does not determine a claim for relief because Plaintiffs merely want the turnover of funds rather than final judgment on any of their claims.

Furthermore, because this is a claim under the Administrative Procedure Act, it is unclear whether this proposed relief is even available to Plaintiffs. *See Epsilon Elec., Inc. v. U.S. Dep't of Treas. Off. of Foreign Assets Control*, 857 F.3d 913 (D.C. Cir. 2017).

Finally, Plaintiffs could not show there is no just reason for delay even if they had tried. Courts in this District may only enter judgment under Rule 54(b) after expressly finding "that there is no just reason for delay." *Fox v. Dist. of Columbia*, 297 F.R.D. 550, 551 (D.D.C. 2013) (citing *Blackman v. Dist. of Columbia*, 456 F.3d 167, 175 (D.C. Cir. 2006). To make this finding, courts must consider the equities involved and judicial administrative interests such as "whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." *Id.* (quoting *Curtiss-Wright Corp. v. Gen. Electr. Co.*, 446 U.S. 1, 8 (1980)).

Here, neither the equities nor the interests of judicial administration support partial final judgment under Rule 54(b). *See Fox*, 297 F.R.D. 551. The United States has asserted a claim to offset the amount of PTIN fees it could have charged return preparers if not for this Court's 2017 injunction. ECF No. 226 at 31. While the Court has declined to grant that relief at this time, the United States may still appeal that determination once a final judgment is entered. And if the United States is ultimately successful, the amount of money owed to the Plaintiffs, including the portion requested in their Rule 54(b) motion, would be decreased. In short, while the United States has conceded certain portions of the PTIN fee, there remains a controversy as to whether

the United States would ultimately be required to pay Plaintiffs the amount they have requested. This matter is unlike Plaintiffs' cited *Entergy Nuclear Palisades* where the United States had stated that "it will not appeal," and that the remaining "litigation will not have effect on the government's obligation to pay" the conceded amount because there was no possibility of a "setoff." *Entergy Nuclear Palisades,* 122 Fed. Cl. at 229–30. By contrast, the United States respectfully contends that it has a valid $88 million offset here.[1] Thus, judicial administration does not support partial judgment here.

Moreover, Plaintiffs' motion undercuts the purpose of entering final judgment on less than all the claims. Rule 54(b) is designed as an avenue for immediate appeal—not a vehicle to collect payment before final judgment. Granting Plaintiffs' relief would create a procedurally unworkable "final judgment" that the parties would have to appeal from now. But the claims under review from Plaintiffs' proposed final order are linked with the work the IRS is conducting on remand. This would create a high probability that appellate courts would need to decide the same issues in successive appeals. Thus, Plaintiffs have not adequately demonstrated that relief under Rule 54(b) is appropriate here.

[1] The Court remanded this matter to the IRS to determine an appropriate refund. ECF No. 226. Consequently, the United States reserves the right to appeal on the denial of its offset claim and certain other parts of the Court's decision until after remand and any further proceedings thereon.

CONCLUSION

For the foregoing reasons, Defendant requests that Plaintiffs' Motion for Partial Final Judgment under Rule 54(b) be denied.

Dated: March 31, 2023

DAVID A. HUBBERT
Deputy Assistant Attorney General

/s/ Emily K. Miller
EMILY K. MILLER
STEPHANIE A. SASARAK
JOSEPH E. HUNSADER
BENTON T. MORTON
Trial Attorneys, Tax Division
JOSEPH A. SERGI
Senior Litigation Counsel
U.S. Department of Justice
Post Office Box 227
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 307-2250
Facsimile: (202) 514-6866
Joseph.A.Sergi@usdoj.gov
Joseph.E.Hunsader@usdoj.gov
Stephanie.A.Sasarak@usdoj.gov
Emily.K.Miller@usdoj.gov
Benton.T.Morton@usdoj.gov
Counsel for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed with the Court's ECF system on March 31, 2023, which system serves electronically all filed documents on the same day of filing to all counsel of record.

/s/ Emily K. Miller
EMILY K. MILLER
Trial Attorney, Tax Division
U.S. Department of Justice