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*.	Case No. 14-cv-01523-RCL

PLAINTIFFS' MOTION FOR RECONSIDERATION

Last week, this Court granted class certification of the plaintiffs' claims for declaratory relief but denied certification of their claims for monetary relief, finding that the plaintiffs "have not yet demonstrated that the Court has subject matter jurisdiction over that aspect of the case." Dkt. 54. The Court stressed, however, that "this ruling is subject to reconsideration," explaining that it would "reevaluate this jurisdictional issue" when considering the parties' dispositive motions, currently due 30 days after entry of the certification order (March 10). Dkt. 55, at 23.

We file this motion to explain why this Court indisputably has jurisdiction over all of plaintiffs' claims, and to respectfully request that the Court reconsider class certification *before* addressing the merits. We ask that the Court do so in part to avoid a potential "one-way intervention" problem—a problem that can arise when "dispositive motions are addressed before class certification motions" in cases seeking monetary relief, where class notice is required by Federal Rule of Civil Procedure 23(b)(3). *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997). Postponing certification in such cases would "allow[] members of a Rule 23(b)(3) class the option of joining an action as plaintiffs after a favorable judgment on the merits while avoiding

the *res judicata* effect of an adverse decision by not joining if the named plaintiffs have been unsuccessful." *Postow v. OBA Fed. Savings & Loan Ass'n*, 627 F.2d 1370, 1381–82 (D.C. Cir. 1980). Because the defendant is "the risk-bearer[] in this situation," courts will generally resolve all class-certification issues before reaching the merits, unless the defendant "waive[s] any right to have the certification motions decided first." *Hyman*, 982 F. Supp. at 11. Absent such a waiver, the most prudent course is to decide class certification (and hence jurisdiction) before considering the merits. *Cf.* Fed. R. Civ. P. 23(c)(1)(A) (providing that "the court must determine by order whether to certify the action as a class action" at "an early practicable time" after the filing of suit).

This motion lays out the jurisdictional basis for the plaintiffs' monetary claims and, as a result, shows why certification of those claims is warranted. In particular, it shows that at least one of two statutes—the Administrative Procedure Act (APA), 5 U.S.C. § 702, and the Little Tucker Act, 28 U.S.C. § 1346(a)—confers subject-matter jurisdiction on the Court and waives sovereign immunity. Because the Court "plainly ha[s] jurisdiction" under one statute "or the other, [it] need not decide which is the more appropriate." *United States v. Green*, 499 F.2d 538, 540 n.5 (D.C. Cir. 1974); *see Oliver v. U.S. Dep't of the Army*, 2015 WL 4561157, *8 (D.N.J. July 28, 2015) (declining to dismiss claim "for lack of subject matter jurisdiction" insofar as it "arises under the APA and the Little Tucker Act," without deciding between the two).[1]

1. Jurisdiction under the APA. In denying certification, the Court noted that "[t]he first and primary statute that plaintiffs specifically invoke [as a basis for jurisdiction] in their complaint is the [APA], which does not constitute a waiver of sovereign immunity for money damages." Dkt. 55, at 21. The Court expressed doubt about whether the monetary claims here

[1] Accompanying this motion is a motion to modify the scheduling order, which (if granted) would move the deadline for the parties' cross-motions for summary judgment to 30 days after the Court's ruling on reconsideration.

(in a case challenging the legality of PTIN fees charged by the IRS and seeking the return of those fees) can be characterized as restitution rather than damages.

But "[t]he Supreme Court has long instructed that the 'generous review provisions' of the APA must be given 'a hospitable interpretation' such that 'only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review.'" *El Rio Santa Cruz Neighborhood Health Ctr.*, 396 F.3d 1265, 1270 (D.C. Cir. 2005) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). Although the APA's waiver extends only to claims for "relief other than money damages," 5 U.S.C. § 702, "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *see id.* at 896 (rejecting the government's suggestion that the Court "substitute the words 'monetary relief' for the words 'money damages' actually selected by Congress").

Instead, the APA's use of the term "money damages" refers to "a sum of money used as compensatory relief"—that is, "to substitute for a suffered loss"—"whereas specific [equitable] remedies" of the kind permitted by the APA "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* at 895 (quoting *Md. Dep't of Human Resources v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)); *see also Am.'s Cmty. Bankers v. F.D.I.C.*, 200 F.3d 822, 829 (D.C. Cir. 2000) ("[M]oney damages represent compensatory relief, an award given to a plaintiff as a substitute for that which has been lost; specific relief in contrast represents an attempt to restore to the plaintiff that to which it was entitled from the beginning."). This understanding is consistent with a longstanding distinction in the law of remedies between specific and substitute relief. *See generally* Colleen Murphy, *Money as a 'Specific' Remedy*, 58 Ala. L. Rev. 119 (2006) (discussing *Bowen*'s distinction between specific and

substitute relief as applied to claims for money); Dan D. Dobbs, *Law of Remedies* § 3.1, at 209 (2d ed. 1993) (distinguishing between specific and substitute relief).

Here, the plaintiffs are seeking the return of money that was taken from them in violation of a federal statute, "rather than money in compensation for the losses, whatever they may be, that [they] will suffer or ha[ve] suffered by virtue of the [taking] of those funds." *Bowen*, 487 U.S. at 895 (quoting *Md. Dep't of Human Resources*, 763 F.2d at 1446). "The fact that in the present case it is money rather than in-kind benefits" that the plaintiffs request be returned to them "cannot transform the nature of the relief sought—specific relief, not relief in the form of damages." *Id.*; *see also Am.'s Cmty. Bankers*, 200 F.3d at 829 ("Where a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages.").

This case is no different from the D.C. Circuit's decision in *America's Community Bankers*. As was true of that case, "this case questions whether the government can retain funds which originally belonged to [the plaintiffs]." *Id.* at 830. The plaintiffs here, like the plaintiffs there, are "not seeking compensation for economic losses suffered by the government's alleged wrongdoing; [they] want[] the [IRS] to return that which rightfully belonged to [them] in the first place." *Id.* Specifically, they allege that the IRS violated federal law "by assessing more" in PTIN fees "than the statutory scheme permit[s]" (which, in the plaintiffs' view, is either no fee at all or, at most, a fee limited to the cost of providing the "service or thing of value," 31 U.S.C. § 9701). *Id.* If the plaintiffs are "correct in [their] statutory interpretation, then the [IRS] improperly collected money from [them], and they are entitled under the statutory scheme to get their money back." *Id.* And they may do so under the APA: If "the [IRS] violated its statutory obligation" here, "then under established and binding precedent, [the plaintiffs'] claim represents specific relief within the scope of 5 U.S.C. § 702, not consequential damages compensating for an injury." *Id.*

at 829–30; *see also Holly Sugar Corp. v. Veneman*, 355 F. Supp. 2d 181, 192–93 (D.D.C. 2005), *rev'd on other grounds*, 437 F.3d 1210 (D.C. Cir. 2006) (finding APA jurisdiction because "[a]n award of restitution for the surcharges that were allegedly illegally collected" was "an 'adjustment,' which under *Bowen* is not a claim to recover money damages").

2. Jurisdiction under the Little Tucker Act. Even if the APA did not apply, this Court would still have jurisdiction under the other statute that the plaintiffs invoked in their amended complaint: the Little Tucker Act, which confers jurisdiction on district courts over monetary "claim[s] against the United States, not exceeding $10,000 in amount," in "cases not sounding in tort." 28 U.S.C. § 1346(a)(2); *see* Dkt. 41, ¶ 5.[2]

This jurisdictional provision "operate[s] to waive sovereign immunity." *United States v. Bormes*, 133 S. Ct. 12, 17 (2012). And it "is not expressly limited to actions for 'money damages,'" *Bowen*, 487 U.S. at 900 n.31, but "include[s] claims for money arising out of equitable as well as . . . legal demands." *Md. Dep't of Human Resources*, 763 F.2d at 1447 (quoting *United States v. Jones*, 131 U.S. 1, 18 (1889)). Moreover, "the Little Tucker Act's amount-in-controversy limitation," when applied to class actions, "require[s] only that the 'claims of individual members of the clas[s] do not exceed $10,000'"—not that the total amount sought be $10,000 or less. *Bormes*, 133 S. Ct. at 16 n.1 (quoting *United States v. Will*, 449 U.S. 200, 211, n.10 (1980)); *see also Chula Vista City Sch. Dist. v. Bennett*, 824 F.2d 1573, 1579 (Fed. Cir. 1987).

[2] As an alternative to subsection (a)(2) of the Little Tucker Act, this Court may also have jurisdiction under subsection (a)(1), encompassing "any civil action against the United States for the recovery of … any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." The plaintiffs allege that the IRS has charged an illegal or excessive fee that the agency claims is authorized in part by an amendment to the Internal Revenue Code, 26 U.S.C. § 6109, "which is part of the IRC and thus an 'internal-revenue law[]'" under the Little Tucker Act. *E.W. Scripps Co. v. United States*, 420 F.3d 589, 597 (6th Cir. 2005) (holding that "any sum" "wrongfully collected under the internal-revenue laws" included interest charged by the IRS). Because the plaintiffs here "allege[]" that a "sum" has been "excessive or in any manner wrongfully collected" in part under an amendment to an "internal-revenue law," this provision may provide a further basis for jurisdiction. 28 U.S.C. § 1346(a)(1).

Each putative class member in this case has a monetary claim against the government that does not exceed $10,000. They also each have a cause of action (irrespective of whether the APA supplies one): The Federal Circuit has long recognized that plaintiffs seeking "to recover an illegal exaction by government officials" may bring suit under the Little Tucker Act "when the exaction is based on an asserted statutory power"—regardless of whether the statute itself creates an express cause of action. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–74 (Fed. Cir. 1996) (allowing illegal-exaction claim challenging excessive user fees); *see also Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). The reason that "the lack of express money-mandating language in the statute does not defeat [an] illegal exaction claim" is that, were it "otherwise, the Government could assess any fee or payment it wants from a plaintiff acting under the color of a statute that does not expressly require compensation to the plaintiff for wrongful or illegal action by the Government, and the plaintiff would have no recourse." *N. Cal. Power Agency v. United States*, 122 Fed. Cl. 111, 116 (2015).

That reasoning applies with full force here. If there were no cause of action to bring an illegal-exaction claim in this case, and the APA did not apply, the plaintiffs would be left without recourse. The IRS could charge them any fee that it wanted, however illegal (and however much), without ever giving them their money back. Fortunately, that is not the law. As the IRS acknowledges, should the plaintiffs succeed on their illegal-exaction claim, "the members of the putative class will be entitled to a refund of the PTIN fees they have paid to date." Dkt. 51, at 2.

The class members, of course, seek more than just money. Because they have an ongoing relationship with the IRS—and because the formula for determining the excessiveness of the PTIN fees, for example, could prove complex (should the Court reach that question)—the plaintiffs also seek declaratory relief and "other relief as the Court deems equitable and just,"

including injunctive relief. Dkt. 41, at 15. The APA authorizes this relief (even if the Little Tucker Act does not, *see Lee v. Thornton*, 420 U.S. 139, 140 (1975) (per curiam)), as this Court recognized when it granted class certification as to the plaintiffs' non-monetary claims.

The Court should do the same as to the plaintiffs' monetary claims—whether under the APA or the Little Tucker Act. Regardless of which statute applies, the Court has subject-matter jurisdiction, the United States has waived its sovereign immunity, and the plaintiffs have a cause of action. Either way, class certification is warranted. So, this Court need not decide which statute is the more appropriate basis for jurisdiction over the plaintiffs' monetary claims. *See Green*, 499 F.2d at 540 n.5 (D.C. Cir. 1974) ("Since, then, we plainly have jurisdiction by the one procedural route or the other, we need not decide which is the more appropriate."). The Court may simply grant class certification as to those claims.

CONCLUSION

The plaintiffs' motion for reconsideration should be granted, and the Court's February 9, 2016 class-certification order should be revised to certify a class as to the plaintiffs' claims for monetary relief, just as the Court did as to their claims for non-monetary relief.

Respectfully submitted,
/s/ William H. Narwold

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February 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, I electronically filed this motion for reconsideration 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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