intelligent action to avoid undesired consequences." *Id.* Whatever amount the IRS theoretically could have charged in FY 2014 and 2015 based on its internal 2013 Cost Model, it chose instead to charge the amount noticed by regulation as calculated in its 2010 Cost Model. The government cannot now avoid liability for any excessive fees charged in FY 2014 and 2015 based on activities for which it theoretically could have charged but actually did not. The Court will therefore evaluate the alleged excessiveness of the PTIN fees for all of FY 2011 through 2015 based on the justifications given in the 2010 Cost Model.[9]

(i) Compliance and suitability costs

Plaintiffs argue that none of the RPO Compliance or Suitability Departments' activities were a valid basis for the FY 2011 through 2015 PTIN fees because those activities were invalidated by *Loving*. *See* Pls.' S.J. Mem. at 20–21. The government concedes that many costs related to suitability activities were an invalid basis for PTIN fees for that same reason, but it continues to defend compliance and suitability costs in four categories. *See* Def.'s Opp'n at 19–24. The Court agrees with plaintiffs in part and the government in part as to the Compliance Department and agrees with plaintiffs in full as to the Suitability Department.

First, the government defends in full the IRS's decision to charge for the activities of the RPO Compliance Department, which "processes taxpayer complaints against return preparers, identifies return preparers who require enforcement, and conducts enforcement activities against return preparers who misuse or who do not use a PTIN." Def.'s Opp'n at 19–20. Specifically, the government asserts that the Compliance Department's activities include:

> (1) investigating "ghost preparers" (return preparers that do not list their PTINs on returns they prepared for compensation as required by law); (2) handling complaints from return preparers that a client's

[9] That is not to say that the IRS may not use later cost models for assistance in calculating an eventual *refund* based on a more granular breakdown of the various RPO departments' activities. But in determining how much the IRS over-charged return preparers, the *baseline* must be the amount it actually charged in the first instance.

> prior return preparer may have acted improperly by using a compromised PTIN or committed identity theft to obtain a PTIN; and (3) composing the data to refer complaint cases to IRS business units outside the RPO for further enforcement if necessary.

Def.'s Opp'n at 19. According to the government, those activities are permissible bases for an IOAA fee because they "are reasonably related to the PTIN Program," which "advances the goals of protecting against identity theft recognized by *Montrois* as a special benefit justifying the PTIN user fee." *Id.*

As explained above, the government confuses the applicable standard by discussing whether these activities are reasonably related to the PTIN program *overall* rather than specifically to the associated private benefit of providing return preparers with a means of identification that protects their identity. Nevertheless, the Court agrees that the IRS permissibly charged for at least some of the three specific categories of Compliance Department activities that the government identifies. To the extent that they relate to misuse of PTINs, all three are reasonably related to the provision of the private benefit that the Circuit identified in *Montrois*—protection of preparers' identity—because the misuse of PTINs compromises their ability to serve as a secure means of identification. And tellingly, plaintiffs do not expressly dispute that much in their reply brief. *See* Pls.' Reply at 13–15, ECF No. 207-4.

However, uncontroverted record evidence establishes that the Compliance Department undertook additional activities unrelated to the misuse or nonuse of PTINs. For example, the declaration of Diann Wensing, the former Director of RPO Compliance, which the government cites as giving a "more complete description" of the Compliance Department's work, DRPSUMF ¶ 84, states that the Compliance Department's referral groups handled a broad swath of complaints, "includ[ing] theft of refund, preparer misconduct, RPO Program Noncompliance, Tax Preparation Noncompliance, . . . TPPS Count Mismatch, etc." Wensing Decl. ¶ 161, Ex. BH to Oliver Decl.,

ECF No. 176-60. Wensing further states that the Compliance Department's Enforcement Planning & Direction Group undertook certain activities apparently unrelated to misuse or nonuse of PTINs, including "[d]eveloping strategy recommendations for IRS Senior Management" to "Address Unregulated Return Preparer Conduct." *Id.* ¶ 208. In short, it is apparent that some of the Compliance Department's activities concerned misconduct affecting return preparers' *customers* rather than the return preparers *themselves*. Those activities indisputably confer an independent public benefit, and thus their cost must be disaggregated from that of the three categories of preparer-benefitting activities identified above.

Accordingly, the Court holds with respect to the Compliance Department that only the direct and indirect costs of (1) investigating ghost preparers; (2) handling complaints regarding improper use of a PTIN, use of a compromised PTIN, 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 were valid bases for the corresponding amount of the FY 2011 through 2015 PTIN fees.

Second, the government defends the IRS's decision to charge for the Suitability Department's professional designation checks ("PDCs"), which "verify the self-reported credentials of CPAs and attorneys" working as return preparers. Def.'s Opp'n at 20–21. Plaintiffs argue that PDCs have nothing to do with the provision of a private benefit to return preparers because they "were designed to confirm credentials, not identities, and were performed at additional cost after PTIN applicants had received PTINs and had been identified." Pls.' Reply at 10. The Court agrees with plaintiffs. The government provides no explanation whatsoever as to how verifying that an already-identified preparer's self-reported professional credentials are accurate is reasonably related to protecting that or any other preparer's identity. Instead, the government merely relies on "[t]he IRS['s] . . . interest in verifying the identity of PTIN holders

and verifying this same identifying information is correctly displayed on [a] public facing website" that includes a directory of preparers. Defs.' Opp'n at 21. That is an independent benefit to the agency and the public at large whose cost must be disaggregated from that of providing private benefits to return preparers. *See Cent. & S.*, 777 F.2d at 729. Accordingly, the Court holds that the IRS unlawfully included the cost of PDCs in its calculation of the FY 2011 through 2015 PTIN fees.

Third, the government defends the IRS's decision to charge for the Suitability Department's prisoner list checks and specially designated national ("SDN") checks, which determine whether an applicant is incarcerated or designated by the Treasury Department as being associated with certain targeted countries or illicit activities, respectively. *See* Def.'s Opp'n at 21–23. Plaintiffs argue that prisoner list and SDN checks provide no benefit to return preparers. *See* Pls.' Reply at 11. The Court agrees with plaintiffs. The government asserts that prisoner list and SDN checks help the Bureau of Prisons and Treasury Department to administer their own programs and that "[i]t is reasonable for the IRS to determine that the PTIN Program should be administered in compliance with, and without undermining, other important federal programs and regulations." Def.'s Opp'n at 22. Reasonable though that determination may be, it does not justify charging for prisoner list and SDN checks as part of the PTIN fee under the IOAA, because facilitating other agencies' operations is not reasonably related to the private benefit of protecting return preparers' identities. Again, that is an independent public benefit whose cost must be disaggregated from that of the private benefit to return preparers. *See Cent. & S.*, 777 F.2d at 729. Accordingly, the Court holds that the IRS unlawfully included the cost of prisoner list and SDN checks in its calculation of the FY 2011 through 2015 PTIN fees.

Fourth, the government defends the IRS's decision to charge for the Suitability Department's processing of suitability referrals by taxpayers or agency components of preparers who purportedly should not be able to obtain or maintain a PTIN—for example, because a preparers has been "legally enjoined from return preparation and from obtaining or renewing a PTIN." Def.'s Opp'n at 23–24. Plaintiffs point out that referrals also involved other complaints, such as "personal tax compliance," PDCs, and prisoner list and SDN checks, and argue that "[t]he suitability checks and referrals, including referrals about enjoined preparers, were separate services undertaken to improve tax administration, benefit[t]ing only the IRS and the public." Pls.' Reply at 12. The Court agrees with plaintiffs. Suitability referrals were merely an intake system for the processing of Suitability Department inquiries that either the government no longer defends or the Court has just held provided no identifiable private benefit. Accordingly, the Court holds that the IRS unlawfully included the cost of suitability referrals in its calculation of the FY 2011 through 2015 PTIN fees.

(ii) Support costs

The remainder of plaintiffs' motion with respect to the FY 2011 through 2015 PTIN fees challenges the IRS's decision to charge for certain RPO customer support, communication, IT, and operational support activities beyond those plaintiffs consider "necessary" to the provision of PTINs. *See* Pls.' S.J. Mem. at 20–25. In the corresponding portion of its cross-motion and its opposition, the government continues to defend a substantial portion of those costs. *See* Def.'s S.J. Mem. at 20–23; Def.'s Opp'n at 24–26. The Court cannot agree with either party in full.

Rather than identify specific support costs as being insufficiently related to the provision of a private benefit, plaintiffs simply assert that the only "activities [that] were (and are) necessary to provide tax-return preparers a PTIN [are] (1) a small portion of customer support costs; (2) a

small portion of communication costs; (3) a small portion of IT costs; (4) a small portion of OPR/PMO Ops Support." Pls.' S.J. Mem. at 21 (internal quotation marks and citation omitted). Plaintiffs then explain why some specific costs in those categories *were* permissible bases for a fee under the IOAA but make no effort to explain why other support costs *were not*. The Court cannot simply accept plaintiffs' unexplained assurances that support costs beyond those on their list were not allowable.

Still, it is undisputed that the IRS charged for support activities facilitating its entire pre-*Loving* return preparer regulatory apparatus. *See* 2010 Cost Model at 3 (listing such broad, department-wide support activities as "Programmatic Executive Management/Oversight" and "Operations Support"). Some of those support activities must have facilitated substantive activities that had nothing to do with protecting return preparers' identities, some of which were also invalidated by *Loving*. The portion of the support costs associated with those activities cannot be considered reasonably related to the provision of a private benefit and thus cannot form a valid part of the basis for an IOAA fee.

While the government concedes some support costs included in the 2010 Cost Model, its concessions apparently do not reach all activities insufficiently related to the provision of a private benefit. As summarized in a declaration by current RPO Director Carol Campbell, those concessions do not include IT costs at all and only include communications and operational support costs "that are not PTIN-related." Second Carol Campbell Decl. ¶ 6, ECF No. 203-1. Given the breadth of the RPO program before *Loving* and the 2010 Cost Model's failure to separate out the different work that the supporting departments were supporting, it is virtually certain that some RPO IT activities between FY 2011 and 2015 supported substantive activities invalidated by *Loving*. Furthermore, the government makes no attempt to estimate the portion of any RPO support

costs that went to providing the PTINs' associated identity-protecting benefit by issuing them and maintaining the PTIN database rather than other "PTIN-related activities" like PDCs which, as explained above, provided only an independent benefit to the agency and public. The government has not demonstrated that all of the support costs it continues to defend were reasonably related to the provision of a private benefit and therefore has not demonstrated its entitlement to partial summary judgment on that issue.

Ultimately, the determination of which support costs were allowable must come down to the portion of those costs that went to support the provision of PTINs and maintenance of the PTIN database, and thus the conferral of the attendant private benefit of identity protection, rather than other RPO activities that were not PTIN-related or aspects of the PTIN program that conferred an independent public benefit, such as the Suitability Department activities discussed above. Only the former were valid bases for the FY 2011 through 2015 PTIN fees. As explained below, the agency will have an opportunity to determine what portion of support costs laid out in the 2010 Cost Model meet that bar on remand.

2. The FY 2016 and 2017 PTIN fees

The Court now turns to the PTIN fees for FY 2016 and 2017, which were set at $33 based on the 2015 Cost Model. Plaintiffs argue that those fees were excessive for the same reasons argued with respect to the FY 2011 through 2015 fees. *See* Pls.' S.J. Mem. at 25–27. The government makes essentially the same concessions it did with respect to those earlier fees—defending all compliance costs, certain suitability costs, and most support costs—and argues that it is entitled to partial summary judgment holding that a PTIN fee of $24 was permissible under the statute for FY 2016 and 2017. *See* Def.'s S.J. Mem. at 23–25.

Since the same activities remain in dispute with respect to the FY 2016 and 2017 PTIN fees as the FY 2011 through 2015 fees, the Court's holding as to each of those activities remains the same. First, allowable compliance costs include only the direct and indirect costs of (1) investigating ghost preparers; (2) handling complaints regarding improper use of a PTIN, use of a compromised PTIN, 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. Second, it was unlawful for the IRS to charge for any suitability costs as part of the PTIN fees. Finally, it was only lawful for the IRS to charge PTIN users for support costs to the extent that they funded activities supporting the provision of PTINs, maintenance of the PTIN database, and in turn, the attendant private benefit rather than an independent benefit to the agency and public.

The FY 2016 and 2017 PTIN fees do differ from the FY 2011 through 2015 PTIN fees in one relevant respect: They were determined based on the 2015 Cost Model. Thus, on remand to the agency, that later cost model will be the yardstick against which to measure which costs were actually allowable under the IOAA.

3. The FY 2011 through 2017 vendor fees

The Court will now consider the vendor fees that the IRS required PTIN users to pay Accenture from FY 2011 to 2017. As noted above, those fees were set at $14.25 for new PTIN registrations and $13 for PTIN renewals during FY 2011 through 2016 and $17 for both new registrations and renewals in FY 2017.

As an initial matter, the Court will not consider plaintiffs' argument, raised for the first time in their reply brief, that the entire vendor fee was unlawful because it was not promulgated by regulation as required by the IOAA. *See* Pls.' Reply at 16–17. Whatever the merits of that argument, plaintiffs had every opportunity to include it in their opening summary judgment brief

but chose not to do so. "Arguments raised for the first time in a reply brief are waived." *Nippon Shinyaku Co., Ltd. v. Iancu*, 369 F. Supp. 3d 226, 239 n.8 (D.D.C. 2019).

What is properly before the Court is plaintiffs' argument that the *amount* of the FY 2011 through 2017 vendor fees was excessive under the IOAA. As with the PTIN fees themselves, plaintiffs argue that only the portion of the vendor fees "necessary to providing tax-return preparers a PTIN" were properly included in the PTIN fee. Pls.' S.J. Mem. at 19–20. The government defends the FY 2011 through 2017 vendor fees in full, arguing that they were set before Accenture updated the PTIN system to include capabilities invalidated by *Loving*. *See* Def.'s Opp'n at 27–29.[10] The Court agrees with plaintiffs in part.

The government does not dispute that a significant portion of the vendor fees went to fund activities that had nothing to do with providing or maintaining PTINs and their attendant private benefit of identity protection to return preparers. For instance, the government admits that, at least in later releases, the PTIN system that Accenture designed and maintained had "the ability to . . . determine preparer suitability based on tax compliance history successfully, . . . process continuing education credit hours completed by calendar year, and perform case management," DRPSUMF ¶ 52 (internal quotation marks and citation omitted), and that Accenture's contract with the IRS required it to maintain a call center to address "preparer questions related" not only to "registration [and] renewal," but also to "testing, and [continuing education] processes and timelines," *id.* ¶ 41 (internal quotation marks and citation omitted). Those activities are not reasonably related to the

[10] The government also appears to argue in its opposition brief that plaintiffs lack standing to challenge the vendor fee because it was set by a contract to which they were not a party and thus may be challenged only in the Court of Federal Claims under the Administrative Dispute Resolution Act, and then only if they are "interested parties" within the meaning of that statute. *See* Def.'s Opp'n at 27 (citing *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001)). However, the government concedes in the very next paragraph that "the only challenge Plaintiffs *can* raise in this proceeding is whether the product or service for which the IRS contracted is a direct or indirect cost of the PTIN Program that can be charged consistent with the IOAA and OMB Circular A-25." *Id.* at 28 (emphasis added). Plaintiffs *only* challenge the vendor fee as a user fee under the IOAA.

provision of a private benefit—rather, they provided an independent public benefit that was later invalidated by *Loving*.

Nevertheless, the government argues that none of that matters, because the fees were initially set by contract in 2010, before many of those capabilities were implemented, and the initial release of the PTIN system only had the ability to issue, renew, and maintain PTINs. *See* Def.'s Opp'n at 28–29. That argument is unpersuasive. It is not as if the IRS and Accenture contracted for a more limited system and Accenture then just *happened* to expand its capabilities at a later date. The 2010 contract between the IRS and Accenture, which set the vendor fee amounts in effect during FY 2011 through 2016, expressly contemplated that Accenture would implement capabilities beyond the issuance, renewal, and maintenance of PTINs and would maintain a call center taking questions beyond those subjects. For example, the contract required Accenture to "develop and maintain a system capable of recording self-certification of continuing education reported by paid tax return preparers," including "capabilities to receive and electronically record test results," IRS-Accenture Contract (eff. Sept. 10, 2010) ¶ 1, Ex. AA to Pls.' Mot. for S.J., ECF No. 177-9, and to implement support for "a tax compliance check prior to receiving a PTIN verifying that return preparers have no outstanding obligations on their personal or business federal tax returns" and a function "check[ing] to see if additional [continuing education] or test requirements are necessary," *id.* ¶ 2.2 (internal quotation marks omitted). It also required Accenture to "[d]evelop a service delivery program that address[es] preparer questions related to" not only PTIN registration and renewal, but also continuing education and testing. *Id.* ¶ 3. The vendor fees were calculated to compensate Accenture for developing and maintaining the entire expanded PTIN system, and the government cites no authority for the proposition that the Court should deem those fees not to include the costs of certain activities simply because those activities,

which were expressly contemplated by the contract from the very beginning, began some time after the contract became effective.

Because the FY 2011 through 2017 vendor fees went beyond funding the portions of Accenture's work related to the issuance, renewal, and maintenance of PTINs and charged return preparers to cover portions of that work that benefitted only the agency and the public, those fees were excessive under the IOAA. The Court therefore holds that the IRS unlawfully required return preparers to pay whatever portion of the FY 2011 through 2017 vendor fees was attributable to activities unrelated to the issuance, renewal, and maintenance of PTINs and support for those activities. As explained below, the IRS will have an opportunity on remand to estimate that portion.

B. The Government's Claimed Offset

In its motion for partial summary judgment, the government argues that in the event it is found liable for some amount of restitution to the class, it is entitled to an offset in the amount of reasonable PTIN fees it could have charged return preparers, and vendor fees it would not have had to pay to Accenture itself, during FY 2018 through 2020 if not for this Court's 2017 injunction against the assessment of any PTIN fees, which the Circuit reversed. *See* Def.'s S.J. Mem. at 28–33. That argument is riddled with problems, and the Court cannot accept it.

As a general rule, "[t]he right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." *Baltimore & O.R. Co. v. United States*, 279 U.S. 781, 786 (1929). Accordingly, courts have recognized claims in restitution to "money [] paid pursuant to a court order that is subsequently reversed." *Broadcom Corp. v. Qualcomm Inc.*, 585 F. Supp. 2d 1187, 1189 (C.D. Cal. 2008). But this case presents a different scenario. The government does

not actually assert a counterclaim for restitution.[11] Moreover, if it did so, it would be seeking restitution not for money the IRS paid to plaintiffs, but for the value of the IRS's uncompensated work of providing and maintaining their PTINs during the injunction period.

The government cites no case in which a court has offset a plaintiff's eventual restitution award based on a sum that the defendant could have charged the plaintiff for its services but for a later-invalidated permanent injunction. The primary case that the government does cite, *Williams v. Wash. Metro. Area Transit Comm'n*, 415 F.2d 922 (D.C. Cir. 1968), involved an entirely different scenario. In that case, the Washington Metropolitan Area Transit Commission ("the Commission") issued an order raising transit fares that the Circuit later determined to be unlawful. *Williams*, 415 F.2d at 925–26. The Circuit ordered the Commission "to make restitution for all amounts collected as a consequence of the fare increase initially authorized by" the order, except for a certain amount of that increase "conceded" by the plaintiffs to have been lawful. *Id.* at 976. *Williams* is not analogous to this case for two reasons. First, the later-invalidated order at issue was not a court-ordered injunction, but an agency-ordered fare increase. Second, the Circuit reduced the amount of restitution not by an amount that the agency *could have* charged but was *unable* to, but an amount that the agency *did* charge and concededly *was* able to.

Without any support on point, the government is asking the Court to approve a type of offset that is, to the Court's knowledge, entirely novel. That does not automatically make it impermissible—as the government correctly notes, the form of monetary relief plaintiffs seek is restitution, an equitable remedy whose amount the Court may reduce if equity so requires. *See*

[11] Because the Court declines to order an offset for a variety of independent reasons, it need not consider plaintiffs' argument that the government was *required* to plead its claimed offset as a counterclaim rather than an affirmative defense. *See* Pls.' Opp'n at 20–21.

Williams, 415 F.2d at 943–45. But whatever the Court's authority to order an offset as an exercise of equitable discretion, it declines to do so in this case for several reasons.

For one, the period for which the government seeks an offset actually extends past the vacatur of the injunction, into a period during which no order of this Court was stopping the IRS from assessing PTIN or vendor fees if it so desired. The Circuit's mandate vacating this Court's earlier judgment issued in March 2019, *see* ECF No. 98, and yet the government now seeks an offset for forgone fees extending all the way up to August 2020, when the IRS finally reinstated the PTIN and vendor fees, *see* Def.'s S.J. Mem. at 30–33. The government offers no explanation as to why the IRS did not attempt to assess PTIN or vendor fees in the intervening period of nearly a year and a half. If any offset due to the injunction were theoretically available, it would only be for the period during which the injunction was actually in effect: between July 2017 and March 2019.

Moreover, even narrowing the government's claimed offset to the relevant period, an offset to monetary relief requires the existence of mutual debts, which the government has not established here. "The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 19 (1995) (quoting *Studley v. Boylston Nat. Bank*, 229 U.S. 523, 528 (1913)). There are two problems with applying that principle in this case as the government requests. First, just because the government should have been *able* to charge PTIN and vendor fees during the relevant period, that does not necessarily mean that return preparers who registered or renewed during that period now *owe* the government the amount that it should have been able to charge. There is no evidence in the record that the IRS ever communicated to PTIN users during the relevant period that it intended to charge them a fee in the

event that the injunction was vacated, much less that it did so in accordance with the requirements of the IOAA, which would have been the basis for it to impose a financial obligation in exchange for the PTIN registrations and renewals. Second, there is a problem of mutuality: It appears that the class that the Court certified does not perfectly match up with the group of return preparers that the government now essentially asserts owes the IRS back-fees. As noted above, the Court certified a class of "[a]ll individuals and entities who have paid an initial and/or renewal fee for a PTIN, excluding Allen Buckley, Allen Buckley LLC, and Christopher Rizek." ECF No. 63. It is possible that some return preparers who paid a fee to obtain or renew a PTIN before the injunction did not renew that PTIN during the injunction period, and that some who obtained a PTIN for the first time during the injunction period did not subsequently renew that PTIN after the injunction was lifted and pay a fee. While the class-action form necessarily requires some rough justice in adjudicating the *amount* of monetary relief class members are due, what the government seeks here is essentially the adjudication of an alleged mutual debt that is not, in fact, mutual to every class member.

Finally, an order approving the offset that the government seeks would have the effect of imposing (albeit retrospectively) a user fee, a task that the IOAA authorizes only "[t]he head of each agency" to carry out, and by "regulation[]" at that. 31 U.S.C. § 9701(b). The Court is not the right entity, nor an order of restitution the right means, to assess under the statute a fee that was never formally set by the agency.

For these reasons, the Court declines to fashion an equitable remedy for plaintiffs' restitution claim that offsets the IRS's liability by the amount of PTIN and vendor fees that it would have charged but could not, or did not, because of this Court's subsequently invalidated 2017 injunction. To be clear, the Court expresses no opinion as to whether the IRS may claw back

the forgone PTIN and vendor fees through some other means, such as an administrative process setting fees retroactively for return preparers who registered or renewed their PTINs during the relevant period, or a civil action of its own for restitution. That question is beyond the scope of the present proceeding.[12]

C. The Information Requested on the PTIN Applications

Finally, plaintiffs argue that the IRS lacks statutory authority to request any information on the PTIN application beyond the preparer's "name, address, telephone number, social security number and date of birth," Pls.' S.J. Mem. at 27, and perhaps email address, *id.* at 28 n.12, because that is the only information that "may be necessary to assign an identifying number," which is all the statute authorizes the IRS to require, 26 U.S.C. § 6109. However, while one factual allegation in the operative complaint hints at plaintiffs' belief that the IRS asks for more information than is necessary to provide a PTIN, *see* Second Am. Compl. ¶ 20 ("For more than a decade, the IRS charged no fee to issue a PTIN and required tax return preparers to submit only their name, address, SSN (if applicable), and date of birth."), an express claim that the IRS exceeds its statutory authority under the PTIN statute by requesting further information is nowhere to be found in that complaint, *see id.* ¶¶ 43–59 (listing claims).[13] "New claims cannot be pled in summary judgment briefs." *Cloud Foundation, Inc. v. Salazar*, 999 F. Supp. 2d 117, 127 (D.D.C. 2013). That is just

[12] The government also argues that plaintiffs previously asserted that an offset would be available and are now estopped from arguing to the contrary. *See* Def.'s Reply at 21. But in the pleading that the government cites, plaintiffs' opposition to the government's motion for a stay pending appeal, ECF No. 85, plaintiffs took no such position. Rather, plaintiffs argued that "if it prevailed on appeal, the government could attempt to recover the lost fees through a restitution *claim* against PTIN holders." *Id.* at 19 (emphasis added). That assertion contemplates a separate action or counterclaim, and besides, it says nothing of plaintiffs' view of the *merits* of such a claim.

[13] In its prayer for relief, the operative complaint does request "[a] judgment declaring that the IRS may only request information from tax return preparers that is authorized by statute." Second Am. Compl., Prayer for Relief ¶ 5. However, even there, the complaint does not identify the authorizing statute or what specific requested information allegedly exceeds that authority. Thus, with respect to the application questions, the operative complaint does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief," as any claim must. Fed. R. Civ. P. 8(a)(2).

what plaintiffs attempt to do here. The Court therefore will not entertain plaintiffs' argument about the IRS's statutory authority to request additional information on PTIN applications or their request for a declaratory judgment on that subject.

D. The Appropriate Remedy

As explained above, the PTIN and vendor fees for FY 2011 through 2017 were excessive to the extent that they were based on the following activities:

- 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 PTIN, 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.
- All Suitability Department activities.
- 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.

But the scope of the compliance and support activities just identified is unclear from the record. It thus remains to be determined how that scope, and the corresponding cost amount, will be ascertained.

The parties have not meaningfully briefed the appropriate course of action in the event that, following the Court's summary judgment decision, disputes remain as to the scope of the activities at issue and the cost of carrying out those activities. Plaintiffs assume that there will be a trial, at least on the amount of restitution. *See* Pls.' S.J. Mem. at 4 ("[P]laintiffs move only for an order granting summary judgment as to liability . . . while reserving the amount of the excess fees

for trial."). The government, on the other hand, asserts for the first time in its reply brief that, "[i]n the unlikely event that the Court finds that the adjusted PTIN user fee is still unreasonable, remand is the appropriate remedy because neither the Court nor a party challenging the fee may seize the authority to develop the fee that has been granted to the agency by Congress." Def.'s Reply Supp. S.J. at 4–5. At any rate, the Court must now decide how this case will proceed following the adjudication of the cross-motions for summary judgment.

This case cannot go to trial. Although the Court has permitted plaintiffs to seek the monetary remedy of restitution, this is still a case in which the Court is reviewing an agency action—the setting of IOAA fees, with an eye to whether those fees were excessive—under the APA.[14] And in pushing for a trial on the extent to which the challenged fees were excessive, plaintiffs "misunderstand the role the district court plays when it reviews agency action. The district court sits as an appellate tribunal, not as a court authorized to determine in a trial-type proceeding whether" an agency determination was "factually flawed." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225 (D.C. Cir. 1993).

The only proper place for this case to go is back to the IRS. That is because, 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. *See* 31 U.S.C. § 9701(b); *Cent. & S.*, 777 F.2d at 729. 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." *Id.* at 738. Accordingly, when a court determines that an IOAA fee was excessive because it charged for unallowable activities, the extent and expense of which are in

[14] As explained in the Court's August 8, 2016 Memorandum Opinion, although the APA does not waive the United States's sovereign immunity with respect to money *damages*, it does in some cases waive sovereign immunity with respect to *restitution* of funds paid to the agency. *See* ECF No. 64 at 9–14 (citing *America's Community Bankers v. FDIC*, 200 F.3d 822, 830 (D.C. Cir. 2000)).

dispute, the proper remedy is to remand to the agency to show its work and set a new fee within the bounds of what the law allows. *See, e.g.*, *Engine Mfrs. Ass'n*, 20 F.3d at 1184. To be sure, this is an unusual case in which the agency will be asked to do so retrospectively. 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.

Accordingly, the Court will remand to the IRS to determine an appropriate refund for the class that is consistent with this Opinion and the accompanying Order. Specifically, the Court will order the IRS to determine reasonable estimates of the portions it lawfully could have charged of the FY 2011 through 2015 PTIN fees based on the 2010 Cost Model, the FY 2016 and 2017 PTIN fees based on the 2015 Cost Model, and the FY 2011 through 2017 vendor fees based on the IRS-Accenture contracts. The Court will retain jurisdiction.

IV. CONCLUSION

For the foregoing reasons, the Court will **GRANT** in part and **DENY** in part plaintiffs' motion for summary judgment and **GRANT** in part and **DENY** in part defendant's motion for partial summary judgment. The Court will issue a declaratory judgment holding that the PTIN and vendor fees for FY 2011 through 2017 were excessive to the extent that they were based on the following activities:

- 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 PTIN, 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.
- All Suitability Department activities.

- 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.

Furthermore, the Court will remand to the IRS and order it 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. The Court will retain jurisdiction. A separate Order shall issue this date.

Date: 1/23/23

Royce C. Lamberth
United States District Judge