

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

**Reply in Support of Plaintiffs’ Motion for Leave to File Response to
Defendant’s Notice of Refund Estimation**

This case was filed nine and a half years ago. Three and a half years ago the IRS made the first of several concessions, “conced[ing] partial liability” of \$17,747,583. Over a year ago, the Court granted in part and denied in part motions for summary judgment filed by plaintiffs and the government. The government’s continuing attempts to delay—with no end in sight—should be rejected.

The IRS has informed the Court that its calculations will not change. ECF No. 265 at 4. Thus, although the scope of the challenge is uncertain at this point, a challenge is certain (if permitted by the Court) because no amount of additional information will cure the deficiencies in the IRS’s remand work. For example, plaintiffs intend to challenge the IRS’s reliance on various post-hoc rationalizations, which are prohibited both by this Court’s Order (ECF No. 222) and established case law. *See, e.g., Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984); *Prairie State Generating Co. LLC v. Sec’y of Labor*, 792 F.3d 82, 93-94 (D.C. Cir. 2015); *Honeywell Tech. Sols., Inc. v. Dep’t of Air Force*, 779 F. Supp. 2d 14, 27 (D.D.C. 2011) (“new material should be merely explanatory of the original record and should contain no new

rationalizations”). This impermissible ex post data includes at least data from Accenture’s operation of the call center, and a declaration prepared by Accenture in 2021 in response to written requests served by plaintiffs. This data was not before the agency when it set the PTIN fees, and was not identified by the Court when it directed the IRS to consider certain specific materials on remand. No additional information will moot this challenge to the IRS’s reliance on improper “ex post” data.

Plaintiffs will challenge some of the IRS’s methodologies as arbitrary and capricious, including the “CLIN,” or “sentence-counting” methodology it used in calculating the lawful amount of the Accenture fee. After conceding that “the IRS does not have access to Accenture’s exact costs,” the IRS created a new methodology that involves no contemporaneous cost data at all. ECF No. 257 at 12 (redacted); ECF No. 258-2 at 12 (sealed). Under this methodology, the IRS, “listed all Contract Line Item Numbers (CLINs) in the first Accenture contract . . . (374 total CLINs),” then “identified all unique and specific CLINs (210 CLINs).” ECF No. 258-2 at 15. The IRS did not provide either the list of 374 or 210 CLINs, but it did provide a table listing the “non-chargeable” CLINs. ECF No. 258-7. That table identifies the CLINs by “Section – Sentence #,” presumably because there are no actual CLINs in the contract. Despite the Court’s recognition that “a significant portion of the [Accenture] fees went to fund activities that had nothing to do with providing or maintaining PTINs,” (ECF No. 226 at 29), and Defendant’s acknowledgment that Accenture charged \$1.25 more for PTIN issuance than PTIN renewal because “a renewal requires fewer resources on average to process in comparison to an initial registration,” (ECF No. 258-2 at 13), the IRS only deemed 8.6% of the Accenture fee impermissible under the “sentence-counting” methodology. ECF No. 264 at 2. No amount of additional information will make sentence counting an appropriate methodology by which to determine lawful costs. *See, e.g., Resolute Forest Prods.,*

Inc. v. U.S. Dep't Agric., 187 F. Supp. 3d. 100, 122 (D.D.C. 2016) (noting that ““an agency rule [is] arbitrary and capricious if the agency. . . offered an explanation for its decision that. . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”” (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). There is nothing premature or hypothetical about this challenge either.

Plaintiffs also intend to challenge the IRS's continued inclusion of certain costs, including IT costs. As the Court noted in its summary judgment opinion, “[g]iven 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*.” *Steele v. United States*, 657 F. Supp. 3d 23, 43 (D.D.C. 2023). Yet, the IRS determined on remand that less than 1% of the IT costs supported impermissible activities for 2011-2013. *Compare* ECF No. 258-2 at 6 (including \$19,339 in IT costs as impermissible) *with* ECF No. 176-21 at 5 (allocating \$6,785,772 to IT costs in the 2010 cost model). In addition, before remand the IRS conceded only 12% of costs for “OPR/PMO Ops Support” [Office of Professional Responsibility/Program Management Office Operations Support] for 2011-2013, but failed to make *any* further adjustments on remand. *Compare* ECF No 257-2 at 3 (conceding \$3,160,834 in the Second Declaration of Carol A. Campbell) *with* ECF No. 176-21 at 5 (allocating \$26,443,642 to OPR/PMO Ops Support in the 2010 cost model).

The D.C. Circuit held that the “agency's PTIN-related services are now confined to generating and maintaining a database of PTINs.” *Montrois v. United States*, 916 F.3d 1056, 1063 (D.C. Cir. 2019). Under the terms of its contract, Accenture performed these tasks, not the IRS,

but according to the Rogers Declaration, the IRS's permissible costs still exceed Accenture's costs. That makes no sense.

It is true that additional information explaining the IRS's calculations may moot some of plaintiffs' expected challenges, but that is why plaintiffs' proposed briefing schedule is tied to the IRS's anticipated supplemental submission. In waiting to submit their challenge until after the IRS's supplemental submission (of information that should have been provided initially), plaintiffs will be able to account for that information and tailor their submission accordingly.

Plaintiffs conferred with the government before moving the Court for a briefing schedule in order to comply with Local Rule 7(m). Because the rule only applies to nondispositive motions, Plaintiffs are not required to confer with the government on the merits of each of their challenges to the IRS's remand work, which will be submitted to the Court in a motion for summary judgment. Summary judgment is the proper vehicle by which to challenge an agency's work on remand. *See, e.g., Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 67 (D.D.C. 2011) (considering cross-motions for summary judgment following agency remand).

Plaintiffs thus respectfully request that the Court permit plaintiffs to file a response to the IRS's work on remand, and further request that their proposed briefing schedule (ECF No. 264) be ordered by the Court.

Dated: February 20, 2024

Respectfully submitted,

/s/ William H. Narwold
MOTLEY RICE LLC
William H. Narwold
bnarwold@motleyrice.com
DC Bar No. 502352
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
Telephone: (860) 882-1676
Facsimile: (860) 882-1682

MOTLEY RICE LLC
Meghan S.B. Oliver
moliver@motleyrice.com
Charlotte Loper
cloper@motleyrice.com
Ebony Bobbitt
ebobbitt@motleyrice.com
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450

*Counsel for Plaintiffs Adam Steele, Brittany
Montrois, Joseph Henchman, and the Class*

LAW OFFICE OF ALLEN BUCKLEY LLC
Allen Buckley
ab@allenbuckleylaw.com
2900 Paces Ferry Road, Suite C-2000
Atlanta, GA 30339
Telephone: (678) 217-4083
Facsimile: (855) 243-0006

GUPTA WESSLER PLLC
Deepak Gupta, Esq.
deepak@guptawessler.com
Jonathan E. Taylor
jon@guptawessler.com
1735 20th Street, NW
Washington, DC 20009
Telephone: (202) 888-1741
Facsimile: (202) 888-7792
Facsimile: (202) 888-7792

CAPLIN & DRYSDALE, CHARTERED
Christopher S. Rizek, Esq.
crizek@capdale.com
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
Telephone: (202) 862-8852
Facsimile: (202) 429-3301

*Additional Counsel for Plaintiffs Adam Steele,
Brittany Montrois, Joseph Henchman, and the Class*

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2024, I electronically filed the Reply in Support of Plaintiffs' Motion for Leave to File Response to Defendant's Notice of Refund Estimation 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
William H. Narwold