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

OPPOSITION TO PLAINTIFFS' MOTION TO VACATE CHALLENGED AGENCY ACTIONS OR, IN THE ALTERNATIVE, FOR A SCHEDULE TO ENFORCE THE COURT'S SUMMARY JUDGMENT ORDER [ECF NO. 222]

AND

MOTION TO STRIKE EXHIBIT 2
PTIN COST ANALYSIS PREPARED BY ALLEN BUCKLEY[1]

[1] Undersigned counsel contacted Plaintiffs' counsel on April 29, 2024, to meet and confer about the requested relief of striking the Buckley Exhibit 2. Plaintiffs' counsel did not consent to the requested relief and believes that such a motion is unnecessary because the IRS can make the same arguments in opposition to their pending motion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Other Authorities

INTRODUCTION

Plaintiffs filed this suit in 2014 seeking a refund of all PTIN fees paid, including renewal fees. This claim for relief has been denied by both the Circuit Court and this Court several times. Plaintiffs are once again arguing that "[PTIN fees] should be set aside and refunded in their entirety." ECF No. 276 at 27.[2] This time, Plaintiffs' counsels' infighting has produced two competing theories, both of which fail.

First, Plaintiffs seek to challenge the detailed calculations provided by the IRS, along with supporting reasoning provided in two declarations, as arbitrary and capricious. Plaintiffs' arguments should be rejected by the Court because they are unreasonable and relate to the quantitative methodology (i.e., activity cost calculation) chosen by the IRS and not to the qualitative legality (i.e., IOAA reimbursable activity) of the fee. With a few minor exceptions for 2011–2015,[3] Plaintiffs do not identify the activities they believe that the IRS should have included or excluded from its calculation or claim that its number is patently unreasonable. Plaintiffs simply do not

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[2] Plaintiffs Motion is captioned a Motion to Vacate Challenged Agency Actions. It is unclear what Agency Actions Plaintiffs are seeking to vacate as they never say. If they are seeking to vacate the requirement that applicants pay for PTINs, the DC Circuit has resolved that issue. More likely, this is yet another attempt by Plaintiffs to muddy the facts. *See e.g.*, *Steele v. United States,* Case No. 1:23-cv-918-RCL, ECF No. 24 (dismissing splinter suit on same claims for violating the rule against claim-splitting).

[3] ECF No. 276 at 12–13 (referencing ECF No. 270-2 at rows 72–75 & 104).

like the number the IRS calculated. The IRS's calculation is reasonable and consistent to what the Court ordered of it on remand.

Second, Plaintiffs offer a PTIN Cost Analysis, which should be characterized as an untimely expert report, written by Allen Buckley, an attorney in this case who has been admonished multiple times for exceeding his authority.[4] The Court should strike Buckley's Cost Analysis in its entirety, or disregard it, as it is improper on multiple levels. For example, it improperly attempts to substitute Plaintiffs' own calculation for the IRS calculation, it seeks restitution for activities this Court found were properly included in the fee, and it is a legal opinion.

Third and finally, Plaintiffs' Motion raises issues related to restitution that highlight flaws in their class certification (primarily relating to class definition and the potential windfall for the Plaintiff class) that must be addressed before payments can be made.

BACKGROUND

The IRS charges a fee to tax return preparers for issuance and renewal of Preparer Tax Identification Numbers ("PTINs"). Plaintiffs filed a class action seeking declaratory, injunctive, and monetary relief on the grounds that the IRS lacked

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[4] *See also*, D.C. Rules of Professional Conduct, R. 3.7(a): "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . ." except in three instances not applicable here. Mr. Buckley may not serve as both advocate and expert witness.

authority to charge those fees under the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701. This Court agreed, granted summary judgment to Plaintiffs, and enjoined the IRS from continuing to charge fees for PTIN registrations and renewals. *Steele v. United States* ("Steele I"), 260 F. Supp. 3d 52, 63–67 (D.D.C. 2017). On appeal, the D.C. Circuit vacated this Court's judgment, holding that the statute authorized PTIN fees, and remanded the case for consideration of whether the fee amounts were excessive. *Montrois v. United States,* 916 F.3d 1056, 1062–68 (D.C. Cir. 2019).

The parties cross moved for Summary Judgment. On February 21, 2023, the Court issued an unsealed version of its January 23, 2023 opinion granting in part and denying in part both parties' motions for summary judgment. The Court determined that:

> [T]he 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.

ECF No. 226 at 38–39.

In reaching this conclusion, the Court stated,

> 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. 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."

ECF No. 226 at 37 (citations and footnotes omitted).

The Court remanded the case to the IRS 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." *Id.* at 39. In reaching its decision, the Court clarified that "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." *Id.* at 37 (citing 31 U.S.C. § 9701(b); and *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729, 738 (D.C. Cir. 1985) (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."). Finally, the Remand Order stated that "[w]hen the IRS has completed this review on remand, the government shall file a notice in this Court informing plaintiffs and the Court of the refund it has estimated to be appropriate." *Id.* at 2.

After the decision, Plaintiffs moved for clarification and argued that costs related to ghost preparers and foreign preparers should be restituted to Plaintiffs. The Court denied Plaintiffs' Motion and found that they did not properly confer regarding ghost return preparers and sought "not clarification, but relitigation of a matter already decided" with regards to foreign preparers.[5] ECF No. 248 at 1.

In compliance with the Court's Remand Order, the IRS determined the total restitution amount in accordance with the parameters set by the Court of what activities could be included in the calculation. On January 22, 2024, the United States filed a Notice informing the Court that its estimate of the Court ordered incremental (i.e., in addition to the United States' prior concessions) restitution is $57,444,051. ECF No. 256. Including the United States' prior concessions, the Court ordered incremental restitution increases to the

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[5] While not reaching the issue, the Court stated, "On this topic the summary judgment opinion is not 'ambiguous or vague.' *Philip Morris*, 793 F. Supp. 2d at 168. In fact, the Court stated *three times* that the PTIN fee properly included 'the direct and indirect costs of . . . investigating ghost preparers.' *Steele,* 2023 WL 2139722, at *12, 14, 18. And the Court defined ghost preparers are those who 'used someone else's PTIN or an invalid number' (misuse) or 'failed to use a PTIN' (non-use). *Id.* at 2. The opinion is therefore clear that costs relating to ghost preparers may be included in the PTIN fee." ECF No. 248 at 24, fn. 3 (italics in original).

United States' liability for fiscal years 2011–2017 to a total of $167,766,068.[6] On the same day, the United States filed the Declaration of Kimberly D. Rogers to explain the methodology underlying the numbers provided in the Notice. ECF Nos. 257 (redacted); 258-2 (Sealed).

Plaintiffs' counsel reached out to the United States's counsel with specific concerns related to the declaration and the need for more information. After a lengthy discussion, the United States agreed to file a supplemental declaration to address Plaintiffs' concerns. This supplemental declaration did not change any restitution amount, or numbers included in the Notice. Instead, the supplemental declaration provided more detailed information to help Plaintiffs replicate the numbers contained in the Notice. *(See below citing* ECF Nos. 270; 271 (Sealed)). It also included spreadsheets showing the calculation of each number.[7] The United States did this to accommodate Plaintiffs' request and not to "correct" the original declaration as Plaintiffs represented in their briefing.

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[6] This number was calculated using the 2010 Cost Model to calculate the incremental refund for fiscal years 2014–2015. If the 2013 Cost Model was used to calculate the incremental refund for fiscal years 2014–2015, which the government believes is a more correct approach for a more "granular breakdown of the various RPO departments' activities" (*see Steele v. United States*, 657 F. Supp. 3d 23, 39 n.9 (D.D.C. 2023)) projected for FY2014–2015, then the calculated total refund liability is reduced by $16,162,059; that is, reduced from $167,766,068 to $151,614,009.

[7]At Plaintiffs' request, an electronic copy of these spreadsheets, with formulas, was also provided.

Plaintiffs moved for a briefing schedule (ECF No. 264-1), which the United States opposed as premature. ECF No. 265, p. 1. Rather than adopting a briefing schedule, the Court ordered "that Defendant shall file any Supplemental Declaration of Kimberly D. Rogers no later than March 8, 2024. Plaintiffs shall file any challenge to the IRS's decision by March 22, 2024. In their memorandum, plaintiffs shall set forth any legal basis for further action by this Court." ECF No. 269.

The United States filed the supplemental declaration on March 5, 2024. (ECF Nos. 270; 271 (Sealed)). Rather than filing the Memorandum contemplated by the Court, Plaintiffs filed the current Motion, which seeks to, once again, relitigate the issues in the case, micromanage the quantitative decision making of the IRS, and invalidate the PTIN in its entirety. Plaintiffs also included, as a 95-page single-spaced Exhibit to their Motion, the PTIN Cost Analysis of Allen Buckley. ECF Nos. 276-3; 277-3 (Sealed). This document makes several conclusory and self-serving statements related to the PTIN programs, interpretations of the Court's Orders, and purports to be either an expert's report of RPO costs and activities or an expert's report rebutting the IRS calculations. Buckley was not disclosed as an expert and is counsel of record here.

The Court reached a qualitative ruling on what categories of activities the IRS could charge for and remanded the case to the agency to determine a reasonable quantitative amount for each category. Plaintiffs were then given the opportunity to examine those numbers. The Court recognized that neither it nor Plaintiffs was to quantitatively second guess the IRS recalculated estimated cost of Court approved PTIN

activity costs, holding that "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." ECF No. 226 at 38.

Apparently, Plaintiffs did not understand the Court's assignment. Instead, they recalculated the numbers and demanded a full refund of all PTIN fees in the current Motion.

ARGUMENT

A. The Quantitative IRS Calculation need not be Perfect; The Standard is Reasonableness

The IRS undertook careful analysis to ensure the amount of the PTIN that should be conceded in each category it determined to be invalid after *Loving*. The Court agreed with the IRS's conceded categories but added categories to be restituted. The fact that the IRS had conceded most of the funds ($110 million) that Plaintiffs are entitled to ($167 million) does not mean that the IRS, as Plaintiffs alleges, "has simply thumbed its nose at the members of the class and the Court." ECF No. 276 at 1. Nor has the IRS "defied this Court's order" (*id.* at 24); quite the opposite, it has calculated additional restitution of $57 million. The IRS's actions show the diligence and thoroughness that it utilized in its concession, and Court ordered restitution, calculations.

Indeed, after subtracting the IRS concessions and additional Court ordered restitution, the remaining "net fee" for the IRS portion of the PTIN fee is consistent with,

if relevant[8], the current fee that Plaintiffs highlight (ECF No. 276 at 3 (highlighting that the IRS portion of PTIN fee for 2024 is $11)):

	2011-2015	2016-2017	Six Elapsed Years[9]	2024
IRS portion fee	$50	$33	--	$11
IRS portion Concessions + Court Ordered Refund	$36.38[10]	$19.39[11]	--	--
"Net Fee"	$13.62	$13.61	--	$11

Particularly given the many changes that occurred during the following six years, the IRS portion "net fee" for 2011-2017 is consistent with the current $11 fee for 2024.

[8] The IRS continues to contend that the amounts of very recent year PTIN fees are irrelevant to the much earlier 2011 to 2017 fees at issue. See ECF No. 218 (Pls.' Mot. for Judicial Notice of 2023 PTIN fee); ECF No. 219 (Def's Opp.); ECF No. 222 at 3 (Order Denying Pls.' Mon. for Judicial Notice).

[9] Because of this Court's July 2017 injunction, the IRS did not charge any PTIN fees for 2018, 2019 and 2020. As Plaintiffs point out (ECF No. 276 at 3), the IRS portion of the PTIN fee reinstated after remand for 2021–2023 was $21. If the Court's additional refund order for 2011–2017 were applied forward in time to 2021–2023, the IRS has already tentatively calculated the "net fee" for 2021–2023, and that "net fee" (which is tentatively estimated at between $11–12) is thereby also consistent with the current $11 fee.

[10] ECF No. 270-2 (Column I (Eye) total).

[11] ECF No. 270-3 (Column G total).

Plaintiffs' improper quantitative criticisms (*e.g.*, that for certain costs the IRS should have chosen some percentage either somewhat higher or lower than 33%[12]; that the Compliance 28% restitution is too low[13]; that the United States should restitute 9% more of the IRS portion of the fee (ECF No. 276 at 5 (IRS should restitute 78% instead of 69.6%)), do not undermine the overall reasonableness of the IRS's calculated restitution. It is "quibbling over trifles." *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d at 738.

In its decision, this Court stated, that it "will not defer to the IRS's determination of whether the activities used to justify the PTIN and vendor fees were sufficiently related to the provision of PTINs to return preparers, but it will defer to the IRS's estimation of how much it costs to carry out those activities." ECF No. 226 at 20. As can be seen more fully below, and despite Plaintiffs' manufactured cries of indignancy, the IRS has provided more than enough information to show that it has fully followed the Court's Order.

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[12] This improper quantitative challenge (ECF No. 276 at 10) is especially weak because only 75% of the expected costs for those 24 rows were allocated to the PTIN fee in the 2010 Model. ECF No. 270-2 (column C for all of rows 6-8, 11, 17, 65-66, 78-82, 84-86, 88-92, 94-96 & 107). As a result, the "net fee" charges only about 50% of those 24 rows' expected costs.

[13] This improper quantitative challenge (ECF No. 276 at 14) is just as weak because it references only one of RPO Compliance Department's three groups, even though all three groups do ghost preparer work (ECF No. 173-21, *especially* ¶¶ 13, 15) approved by this district court. *See supra,* p. 3.

The simple matter is that this Court ordered the IRS to produce its number and a top-level calculation by category, which it did. ECF Nos. 256 (Notice); 257 (Rogers Decl.); 258 (Sealed). Plaintiffs then complained that they did not have enough information. The United States sought to accommodate their request by supplementing its declaration with even more details. The supplemental declaration provides a clear roadmap that traces the cost model to the IRS's restitution calculation by category. ECF No. 270-1. It is clear what is being conceded in full, what is being conceded in part and by how much, and what is allowed in full.[14] Plaintiffs are still not satisfied. They say that the IRS must now provide calculations behind the partial restitution to show how each percentage was determined. Presumably, if that number is provided, Plaintiffs will say that there isn't enough information to determine something else. At some point, the digging must stop.

Plaintiffs' motion falls back on two meaningless mantras that are merely hollow quips lacking relevant legal substance to the current posture of this case. First, Plaintiffs allege that the IRS failed to "disaggregate with respect to each charged-for activity the cost of providing the service to private beneficiaries from the cost of doing work that benefits the agency and the general public." ECF No. 276 at 27. But this allegation is not

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[14] *See* ECF No. 270-2 (for fiscal years 2011–2015, spreadsheet showing each of the 2010 Cost Model's over 100 expected cost categories being restituted in whole, in part—with specific restitution percentages—or not at all); ECF No. 270-3 (for fiscal years 2016–2017, spreadsheet showing each of the 2015 Cost Model's expected RPO Department and other cost categories being restituted in whole, in part—with specific restitution percentages—or not at all).

a challenge to the IRS's quantitative determination on remand. It is a veiled challenge to this Court's qualitative determination of which activities provide service to private beneficiaries and were incorrectly included in the PTIN fees. Second, Plaintiffs claim that the IRS repeatedly failed to "show its work." The IRS has done more than just show its work. It has provided a detailed roadmap that allows the Court and Plaintiffs to see the method behind the quantitative restitutions.

B. Defendant properly removed fees attributable to a public benefit.

The Court has already ruled on conceded categories and accepted the quantitative determinations identified in the prior Carol Campbell Declarations. *Compare* ECF Nos. 257-1 and 257-2 (Campbell Declarations explaining activities conceded and amounts attributable) *with* ECF No. 222 (Remand Order stating that "It is further ordered that the PTIN and vender fees for FY 2011 through FY 2017 were unlawfully excessive under the IOAA to the extent that they were based on the following activities: All activities already conceded by the government in the case."). And the IRS followed the Court's order regarding any "independent benefit to the agency or the public" further, both in its original concessions[15], and by increasing conceded percentages when calculating the Court ordered additional restitution. *E.g.*, ECF Nos. 270-2 (column [G]) & 270-3 (column [E]). Moreover, neither the Court's Memorandum Opinion nor the Court's Remand

[15] *E.g.*, ECF No. 270-3 (conceding over $3 million in EA Fee Subsidization that had independently benefitted Enrolled Agents).

Order directed the IRS to adjust its quantitative determinations except to order the IRS to utilize the 2010 Cost Model for fiscal years 2014 and 2015. *See* ECF Nos. 222 and 226 at 20-21.

Plaintiffs also claim that the IRS never explained its earlier concessions. Plaintiffs are wrong. Not only was this information provided in the updated charts and declarations, but it was also provided in two declarations filed during Summary Judgment briefing and are attached to the Rogers post-remand declaration as Exhibits. ECF Nos. 257-1 and 257-2.[16]

The Court accepted the information from the declarations and spreadsheets to determine that the IRS's restitution calculations are reasonable. The IRS need only show that its estimates associated with costs "seems on [their] face to be reasonable." *Cent. & S. Motor Freight Tariff Ass'n*, 777 F.2d at 738. Plaintiffs' unsubstantiated hyperbole to the contrary serves no purpose other than to drag out this case even further.

C. Plaintiffs' Arguments Related to the IRS portion of the PTIN Fee Are Inappropriate

To support its view that the PTIN fee is arbitrary and capricious, Plaintiffs make several claims that have either been rejected by this Court or fall within the discretion of the agency. For example, Plaintiffs state that "the IRS's cost model recalculation includes

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[16] For example, the Carol Campbell Declaration explains that the concession for Communications is attributable activity costs for development of commercials, advertising, and a webinar related to the other RPO programs that are not PTIN-related, and thereby independently benefit the public or the agency. *See* ECF No. 257-2, ¶ 6.

activities that are facially unlawful and cannot be remedied by additional information or reasoning." ECF No. 276 at 5. Plaintiffs do not support their bold assertion.[17] Similarly, Plaintiffs repeated claim that the IRS has not shown its work is false. The methodology is explained in the initial Rogers Declaration and includes what percentage the IRS, in its discretion, determined was reasonable. When Plaintiffs requested the underlying numbers, the government produced them. The IRS calculations are shown in the supporting schedule. Now, Plaintiffs complain that they need more information underlying the percentages selected by the IRS. Plaintiffs have not said, and cannot say, how or why this additional information will make the IRS concessions more or less reasonable.

For example, with regard to the Office of the Director, the IRS explained for FY 2016 and 2017 that "In order to comply with the Court's Memorandum Opinion, additional refunds were calculated by adjusting the allocation to 40% of PTIN-related oversight activities." ECF No. 258, Rogers Decl. ¶ 25. This type of facially reasonable

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[17]For 2011–2015, Plaintiffs claim that the IRS improperly failed to restitute only five of the 116 rows shown for the 2010 Model. ECF No. 276 at 12–13 (referencing ECF No. 270-2, rows 72–75 & 104). For 2016–2017, Plaintiffs claim that the IRS "refund[ed] only a portion of five of the seven PTIN funded departments." ECF No. 276 at 13 (citing ECF No. 270-3, rows, 6-9 and 12). But Plaintiffs mislead the Court because they fail to say that for the other two rows 10 and 11 ("RP Suitability" and "RP Suitability (OPR)"), the IRS restituted, not a "portion", but restituted the entire 100%. ECF No. 270-3 (row 10 & 11, columns C, F & G.) And the reason that none of the costs of four other RPO Departments is restituted is that those costs were *not* included in the PTIN fee to begin with. ECF No. 270-3 (rows 13-16, columns B, C, & G)).

estimate submitted by the agency official in charge of the program is the precise type that courts defer to the agency to decide. *See*, *e.g.*, *Cent. & S. Motor Freight Tariff Ass'n, Inc.*, 777 F.2d at 738 (rejecting claim that agency's reliance on the judgment of a senior staff member regarding how many hours a task would take was arbitrary and capricious, referring to the challenge as "quibbling over trifles at its worst."). Plaintiffs, after exhaustive discovery efforts, have access to the same information as the United States and have not raised a single reason why a 40% estimate is not reasonable. As this Court stated, "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." ECF No. 226 at 37. It can hardly be said that any of the IRS percentages are unreasonable, and Plaintiffs haven't established that they are.

To support their conclusion, Plaintiffs cite two cases where courts have required greater detail for to explain an agency fee. Neither case applies here. The first, *Nat'l Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1096 (D. C. Cir. 1976), involved a specific remand to the FCC for clarification of the justification for its fee with an explanation of the specific items of direct and indirect expense that make up the cost basis. *Id*. at 1100. The Court in that case needed sufficient information to determine whether the value to the recipient standard was met. *Id*. The second, *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1178 (D. C. Cir. 1994), the court remanded the matter to the EPA for a more detailed cost justification of the program fee schedule because the cost analysis contained page after page of tables almost entirely void of text that appeared to have been prepared for internal agency use.

Neither case is analogous to this case. First, unlike the cited cases, here the D.C. Circuit Court has determined the value to the recipient and a detailed preexisting plain language model was utilized as a starting point to determine what categories should be conceded. *Second*, on remand from the D.C. Circuit, this Court has determined which activity (qualitative) costs are legally permitted under the IOAA for the PTIN user fee and ordered a narrow remand requiring the IRS to assign costs (quantitative) consistent with the Court's qualitative determination and directed the agency as to which cost model it should utilize. The IRS has now done so.

Plaintiffs are challenging things that this Court held are not to be challenged:

> any challenge to an IOAA fee amount could potentially involve two separate inquiries, each of which requires a different level of deference to the agency. The first, and most relevant here, is whether, as a qualitative matter, the activities whose cost is used to justify the fee are reasonably related to the provision of the private benefit associated with the fee rather than an independent benefit to the agency and the public. The Court need not give any special deference to the agency in making that determination. But if the charged-for activities meet that qualitative bar, then the other inquiry is whether, as a quantitative matter, the amount charged for carrying them out is reasonable. And the agency's estimation of that amount is "more than mere deference or weight."

ECF No. 226 at 19. (Citations omitted). Unlike the cases on which Plaintiffs rely, there is no mystery here as to which activities have been assigned costs in the government's restitution calculation. And those costs were determined by utilizing the appropriate cost model.

Ultimately, the Court ordered certain categories be restituted (qualitative). The IRS utilized the relevant cost models to determine a per applicant cost for each category. The

IRS then conceded the categories the Court listed in full and used its discretion to determine what percentage should be restituted for activities that contained permissible and impermissible costs (quantitative).[18] Plaintiffs do not raise any substantial qualitative challenge. Instead, Plaintiffs attempt, not for the first time, to relitigate the entire case under a new arbitrary and capricious theory. Indeed, Plaintiffs continue to maintain a position rejected by this Court many times. Plaintiffs argue that "the IRS simply refuses to accept that it may only charge tax-return preparers for issuing PTINs and maintaining a database of those PTINs." ECF No. 276 at 2 (*see also* at 4, 5, 14, 24-25). This Court, however, held that the IRS can collect fees related to ghost preparers and foreign providers. ECF No. 226. The Court reminded Plaintiffs of this holding when moved for "clarification" and admonished them for "relitigation of a matter already decided." ECF No. 248 at 1. The Court held that the IRS may charge for more than just issuing a number and maintaining a spreadsheet.

[18] And the IRS restitution percentages were many, and specific. For 2011–2015, for the 91 individual rows (116 rows including subtotals and final total), and in part because of the structure of the 2010 Model, the IRS restituted 0%, 33%, 91.3% (row 63), or 100%. ECF No. 270-2 (Column [H]). For 2016–2017, the IRS made restitution for each and every RPO Department that the PTIN funded, and also for the EA Subsidization and Contracts expected costs that were separately included in the 2015 Model. ECF No. 270-3 (column F calculating particular and specific restitution percentages of 14%, 28%, 38.1%, 48.8%, 60% and 100%); *see also* fn. 12, *supra.*

D. Plaintiffs' Arguments Related to the Accenture Portion of the PTIN Fee are Inappropriate.

Nowhere is Plaintiffs' agenda clearer than in its discussion of the Accenture fee. Plaintiffs cannot complain they don't have enough information, as they repeatedly attempt to do regarding the IRS portion of the PTIN user fee. As explained in the Roger's Declaration, restitution of the Accenture portion of the fee proved a unique problem because Accenture did not provide a breakdown of its costs.[19] As a result, the IRS utilized a methodology based on information obtained in discovery provided by Accenture and the tasks in the original contract to determine the amount of the Accenture contracts to be refunded. Once again, Plaintiffs did not like the result. Without law or facts to support their distaste, Plaintiffs instead bang on the lectern.

Plaintiffs first claim that the Court's Order was clear that the Accenture Contracts should be utilized. ECF No. 276 at 1. They were. ECF No. 257, ¶¶ 28–29. Plaintiffs then argue that the IRS relies on an Accenture declaration prepared for litigation to support its calculation. Finally, they claim that the IRS cherry-picked data. None of these

[19] If a private party does not provide its internal cost data to the United States, and thus the federal agency is facing a "data-poor environment," the Court's deference to the agency's estimate of those private costs should be especially high. *Southwest Airlines v. T.S.A.*, 650 F.3d 752, 756 (D.C. Cir. 2011) (Kavanaugh, J.) (private airline security screening costs for earlier year not available to Government).

conclusions are true.[20] Plaintiffs, whether by mistake or design, omit the fact that it was they who obtained and negotiated this Accenture declaration and information in discovery. These were questions that the Plaintiffs crafted presumptively to address the activities and associated costs charged by the Accenture under the contracts. Plaintiffs themselves offered and relied on the Accenture declaration at summary judgment.[21] And class counsel now attach and rely on additional discovery responses, too. *E.g.*, ECF No. 276-2 (attaching United States interrogatory answers). The Accenture declaration is not a self-serving declaration but the equivalent of testimony in the case. Moreover, as the Court acknowledged, "this is an unusual case in which the agency will be asked to [show its work and set a new fee within the bounds of what the law allows] retrospectively." ECF No. 226 at 38. Of course, there is not even agreement among Plaintiffs' counsel. Class counsel vehemently argue, "the information contained in the declaration is not in the Accenture contracts and was not in existence when the fees were established." ECF No. 276 at 16. Yet "Plaintiffs' co-counsel, Attorney Allen Buckley, believes that under the unique circumstances of this case—retrospectively setting a user fee and the availability

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[20] Plaintiffs admit that they waived the argument that the Accenture fee was "excluded . . . from the regulation." ECF No. 276 at 22. They further weaken their waived regulatory argument by admitting that the "the two Accenture contracts" are now part of the "extant administrative record." ECF No. 276 at 26.

[21] ECF No. 176 (Oliver Decl.), p. 3 (Accenture declaration offered as Pls.' Exhibit Y); ECF No. 175-2 (Pls.' Undisputed Fact No. 38 relying on Accenture Declaration).

of material produced in discovery regarding actual costs—the Court should also utilize information produced in discovery . . . ." ECF No. 276 at 26.

The IRS needed to create a reasonable method to estimate the restitution for the Accenture portion of the fee. It is a method that is fully disclosed and in the agency's discretion to determine. Yet Plaintiffs complain about this methodology. Plaintiffs first erroneously charge that the IRS's "sentence-counting approach" is "contradicted" by the Accenture contracts. ECF No. 276 at 17-18.[22] They next complain that "The IRS also has provided no explanation for its wholesale elimination from the calculation of certain sentences that it has deemed 'not unique.'" ECF No. 276 at 18. Apparently, Plaintiffs cannot see the obvious reason: these CLINs were excluded in order to not double count duplicative obligations in the Accenture contracts. For 2016–2017, Plaintiffs also complain about the exclusion of certain Annual Filing Season Program ("AFSP") sentences from both the numerator and the denominator. ECF Nos. 276 at 18–19 (redacted); 277 at 18–19 (Sealed). But this exclusion was proper because the IRS, and not the return preparers,

[22] Plaintiffs' quoted contract language at 18 does not "contradict" the IRS's methodology. In addition, Plaintiffs err because they do not quote the final Accenture contract, but mistakenly quote an earlier version. ECF No. 276 at 18 (citing "ECF No. 177-11 at 838") (see ECF No. 177-11 at 838 (i.e., Oliver Decl., Ex. AC at 838) which set the Accenture portion of the fee a different amount for registrations and renewals than charged in the final contract; ECF No. 177-11 is not Rogers Declaration, Ex. C filed at ECF No. 258-3 (Sealed)).

paid Accenture for these AFSP services in 2016–2017.[23] These sentences were therefore properly excluded from both the numerator and the denominator. Plaintiffs don't understand why the IRS gives each CLIN equal weight and refer to the IRS method, without explanation, as "the facial absurdity of this "sentence-counting" approach." ECF No. 276 at 18. But had the IRS given *unequal* weighting to the many obligations in each of the Accenture contracts—even though there was no specific internal Accenture cost allocation information that might support such unequal weighting—Plaintiffs would have complained even louder.[24] Plaintiffs are entitled to their opinion, but what they cannot do is challenge the reasonable quantitative analysis of the IRS. The CLINs themselves show that the overwhelming majority of the contracted activity was for permitted activity. ECF Nos. 271-2 (Sealed); 271-3 (Sealed); ECF No. 258-2 (Sealed) (Rogers Decl., ¶¶ 44(c) & 56 (over 100 unique CLINs in each Accenture contract). Plaintiffs challenge – qualitatively and specifically — only a small fraction of those many unique CLINs.

Plaintiffs claim the IRS should have calculated Accenture restitution equaling 35%, and not 8.6%, because the Accenture portion for 2024 is $5.50 less than the Accenture

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[23] ECF No. 258-4 (Sealed) (USA-0021044 & USA-0021079 indicating Accenture AFSP services not charged as part of user fee but separately charged to IRS).

[24] For an example of factually unsupported unequal weighting, see Buckley's unequal 2.0 to 1.0 weighting of his Form W-12 "flavored" versus "vanilla" questions. ECF No. 277-3 (Sealed at 11 of 95).

portion for 2011 – 2015. ECF No. 276 at 3, 5, & *especially* 15. Plaintiffs imply that this $5.50 reduction resulted from the "district court's February 2023 memorandum opinion in Steele" that excluded certain improper costs. *Id.* at 15. Plaintiffs are mistaken. As a result of competitive re-bidding of the vendor contract, Accenture had reduced its portion by $5.20 in October 2022, *well before* the district court's February 2023 decision. ECF No. 218 at 1; ECF No. 219 at 1, 4 & n. 2. It is true that "[s]ubsequent" to the February 2023 "memorandum opinion in *Steele*" the "IRS entered into a modified contract" with Accenture "that allows the government to pay those [improper] costs." ECF No. 276 at 15 (partially quoting *Preparer Tax Identification Number (PTIN) User Fee Update,* 88 Fed. Reg. 68,456, 68,457-58 (10/4/2023)). However, the subsequent reduction in the Accenture portion that occurred between 2023 and 2024 was only $1.00 (i.e., $9.75 for 2023 minus $8.75 for 2024). That $1.00 reduction – now effectively paid by the IRS — for 2024 is consistent with the IRS's calculation of Accenture restitution for the much earlier years that are at issue, *see* p. 27, *infra* (calculating IRS should pay annual restitution of $0.97 for 2011 – 2015, and pay $1.94 for each of 2016 - 2017). If the 2024 Accenture portion of $8.75 is at all relevant, it confirms that the IRS's 8.6% restitution calculation is reasonable. Plaintiffs' demand for a refund of the entire Accenture portion is unreasonable.

E. The Report of Allen Buckley is Not Reliable, Not Appropriate and Includes Legal Arguments that the Court has Rejected

Plaintiffs attach, as Exhibit 2 to their Motion a PTIN Cost Analysis prepared by their co-counsel, Allen Buckley. Plaintiffs claim that this Analysis was included "in this

spirit [of cooperation] that class counsel consents to the inclusion" of the Buckley Cost Analysis, which was "was authored by Attorney Allen Buckley without input from class counsel." ECF No. 276 at 27, n.5. Plaintiffs cannot avoid responsibility or repercussions from this highly inappropriate submission by recasting it as "cooperation." The irony is not lost on the United States that Plaintiffs inexplicably referred to the IRS's reliance on an Accenture declaration obtained by Plaintiffs as "self-serving" while also submitting an untimely expert report by their own counsel of record. Irony aside, as a matter of substance the Buckley Cost Analysis is utterly unreliable.

First, and foremost, it directly defies the Court's ruling on what Plaintiffs could challenge as it completely re-does the IRS's quantitative analysis. Second, it goes against Plaintiffs' arguments that only information available at the time of the creation of the fee may be utilized to calculate restitution, as Buckley's analysis mainly relies on ex post data. Third, it contains improper legal briefing that contradicts the Circuit and District Court Orders here. In short, the analysis is worthless and should be disregarded by the Court. And even with all of that, the Buckley Analysis demands lower restitution ($278 million) than do class counsel ($305 million). ECF No. 276 at 4 & 25.

As described more fully above, Plaintiffs cannot substitute their judgment for the reasonable judgment of the IRS. For that reason alone, the PTIN Cost Analysis of Allen Buckley should be struck. At bottom, it is merely Plaintiffs' rambling quantitative analysis of the Court's qualitative ruling. More interesting is that in Mr. Buckley's prior motion to compel he stated that it was impossible for him to figure out the PTIN amounts

without access to information sought in discovery. ECF Nos. 167 and 172. Yet now, Mr. Buckley is somehow able to calculate a generous refund well above the amount calculated by the IRS, which includes items the Court has determined are permissibly charged. The Buckley Cost Analysis also includes a legal opinion that attempts to once again argue that foreign preparer costs and ghost preparer costs are not chargeable. *E.g.*, ECF No. 277-3 (Sealed at 81 of 95) ("The September 25, 2023 ruling of the district court that *Montrois* allows the costs of foreigner preparers' PTINs processing costs to be charged is not consistent with *Montrois*, the legislative history of the 1998 Act or the two U.S. Supreme Court cases covering 31 U.S.C. § 9701."). Mr. Buckley does so even though this Court has already admonished Plaintiffs for attempting to do so at least once before. ECF No. 248 at 1. If this Court even considers the Buckley Cost Analysis, these ten pages of legal argument on their face are clearly inappropriate, ECF No. 277-3 (Sealed at 80-89 of 95), and, like the rest of the report, should be struck or ignored.

F. As the Refund is Pure Restitution, Class Member Recovery Should Be Limited to Amounts Paid

Plaintiffs' filing raises several concerns related to the restitution payments here. As this Court explained in its August 8, 2016, Memorandum Opinion, the APA does not waive the United States' sovereign immunity with respect to money damages. *See* ECF

No. 64 at 9–14. But for actions seeking monetary relief,[25] the APA does waive sovereign immunity when the plaintiff requests specific relief. *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (explaining that the APA's waiver of sovereign immunity "hinge[s] on the distinction between specific relief and substitute relief, not between equitable and nonequitable categories of remedies."). "Specific relief" is "the very thing to which [the plaintiff] was entitled'" to in the first instance. *Id.* at 262. As opposed to "substitute relief," or money damages. *See id.*

In this case, the Court permitted Plaintiffs to seek the monetary remedy of restitution. ECF No. 64. Restitution here would be limited, by virtue of the class certification, to the amounts paid by each class member for their PTIN number. This is why the IRS provides the Court with both an aggregate number and the breakdown of the refund per PTIN. The Plaintiffs' motion highlights several problems related to their claim for restitution.

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[25] The Supreme Court has explained that:

> Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty.

Great-W. Life & Annuity Ins. v. Knudson, 534 U.S. 204, 218 n.4 (2002) (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 918–919 (1988) (Scalia, J., dissenting)); *see also id.* at 218 n.4 (noting that a claim for restitution at law was nothing more than "a freestanding claim for money damages.").

First, the class certification states that it is for "All individuals and entities who have paid an initial and/or renewal fee for a preparer tax identification number (PTIN)." ECF No. 63. This certification does not distinguish between members who obtained PTINs in different years or in multiple years and treats everyone the same.

Second, the IRS calculated its restitution amounts based on the assumption that every class member would file a claim. Each class member who fails to file a claim increases the windfall to the remaining class members. The United States has not waived sovereign immunity with regards to this windfall. *See Blue Fox, Inc.*, 525 U.S. at 260–62. In an action under the APA for monetary restitution relief the United States has only waived its sovereign immunity for "specific relief." *Id.* "Specific relief" is "the very thing to which [the plaintiff] was entitled'" to in the first instance. *Id.* at 262. In this case, that is a PTIN fee that is not excessive under the IOAA. Ordering the United States to pay more money than will actually be restituted will constitute a windfall to the Plaintiffs—i.e., money damages not allowed under the APA. 5 U.S.C. § 702. The only proper approach would be for the class to be administered and then any unclaimed funds be returned in full to the United States. As these amounts are not properly included in any restitution award, they should also be excluded from the calculation of any other expenses, such as contingent attorney fees. This approach is consistent with the United States' waiver of sovereign immunity in Section 702 and the relief the Plaintiffs seek in their Second Amended Complaint. ECF No. 148 at 17 (seeking restitution of fees to class members).

Conclusion

For the reasons stated above, the United States requests that this Court accept the IRS calculations and issue a restitution order that establishes annual per Plaintiff restitution in these amounts:

Year	Annual IRS Portion per-PTIN Restitution	Annual Accenture Portion per-PTIN Restitution[26]
2011–2015	$36.38[27]	$0.97
2016–2017	$19.39[28]	$1.94

Equivalently, if every PTIN holder files a claim, including the United States' prior concessions, the Court ordered restitution for fiscal years 2011–2017 totals $167,766,068 (i.e., IRS portion restitution of $161,354,097 plus Accenture portion restitution of $6,411,971). ECF No. 256 (Notice).[29]

The United States further requests that the Court strike Exhibit 2, Buckley's Cost Analysis.

(*Signatures on next* page)

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[26] ECF No. 257 (Rogers Decl., ¶¶ 11–12 (providing calculated annual Accenture restitution and annual PTIN count)).

[27] ECF No. 270-2 at 6 (using 2010 Model, Exhibit 1, column I (Eye) total of $36.38).

[28] ECF No. 270-3 at 1 (using 2015 Model, Exhibit 2, column G total of $19.39).

[29] The United States reserves its right to seek review of the any award beyond the concession amounts and the denial of the claims for offset.

Dated: May 1, 2024

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