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 TO VACATE CHALLENGED AGENCY ACTIONS [ECF 279]

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I. Introduction

Nearly ten years in, after several downward revisions to the PTIN fee, over $100 million in conceded illegal exactions, extensive litigation and discovery, and an unknown number of vendor contracts, the IRS still cannot explain with any reasonable precision how much of the PTIN fees paid for the costs of generating PTINs and maintaining a database of PTINs. The IRS's work on remand is disappointingly short on substance and does not satisfy the requirements of the Administrative Procedure Act. The IRS's response to Plaintiffs' motion to vacate suffers the same defect. Rather than respond substantively to Plaintiffs' arguments, the IRS accuses Plaintiffs of "unsubstantiated hyperbole" and "bang[ing] on the lectern," and describes well-worn tenets of administrative law as "meaningless mantras" and "hollow quips."[1]

The IRS fails to distinguish the cases cited by Plaintiffs and offers no defense for its conclusory assertions other than an equally conclusory and unfounded claim that it has done all that is required. Its only responses to Plaintiffs' criticisms about specific line items are incomplete. It does not respond to Plaintiffs' critique of the IT refunds, and its only response to Plaintiffs' criticism that all of its partial operational support refunds were set at an unexplained 33.3% is to correct Plaintiffs' math (i.e., the refund is 33.3% of 75% rather than 33.3% of 100%). This misses the point, of course.

Similarly, it never even attempts to reconcile its paltry 8.6% refund of the Accenture fee with the Court's finding that there was no 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." *Steele*, 657 F. Supp. 3d at 44. And the IRS's only response to Plaintiffs' challenge that the IRS's sentence-counting approach to

[1] Remarkably, even though this Court held that it is "reviewing an agency action . . . under the APA," *Steele v. United States*, 657 F. Supp. 3d 23, 49 (D.D.C. 2023), the IRS makes one fleeting reference to the APA on Page 26 of its Brief.

the Accenture-fee refund calculation is facially arbitrary and capricious is an unfounded claim that it is due extra deference as a result of the lack of available data. That argument misreads the relevant case law and ignores that the IRS's choice to fund part of the return preparer program through unlawful user fees prescribed by a private no-cost contract created the data scarcity to begin with. The IRS offers no response to Plaintiffs' argument that the Accenture fee was unauthorized entirely because it was not set by regulation, other than to say—incorrectly—that Plaintiffs admitted they had waived that argument. Plaintiffs made no such admission.

There is no basis for letting the IRS's remand calculations stand, let alone one put forth by the government in defense of its work. The appropriate course, therefore, is as Plaintiffs requested in their opening brief—vacate the IRS's actions in setting the fees, and refund the fees in full.[2]

II. The Court should vacate the 2010 and 2015 regulations setting the PTIN fees, and the IRS's requirement that return preparers pay a portion of the PTIN fee to Accenture.

The IRS claims it is "unclear what Agency Actions Plaintiffs are seeking to vacate as they never say." Opp. to Ps.' Mot. to Vacate, ECF 280 at 1 n.2. But Plaintiffs are quite clear on this point: "the IRS's actions setting the fees should be vacated under the APA and the fees should be refunded in full." Ps.' Mot. to Vacate, ECF 279 (sealed), ECF 276 (redacted) at 24.[3] The agency actions setting the PTIN fees were the 2010 PTIN-fee regulation, the 2015 PTIN-fee regulation, and in the case of the Accenture fee, the ultra vires charging of a fee without a regulation. With this remand, the IRS has now had several opportunities since 2010 to demonstrate that the PTIN

[2] Co-counsel Allen Buckley is separately responding to Defendant's Motion to Strike. Class counsel consents to his filing.

[3] Defendant improperly includes two pages of argument on class-member distribution procedures and attorneys' fees in its brief. ECF 280 at 24–26. The arguments are premature because no final judgment has been entered. They are further improper because they are presented without citation to legal authority and without developed argument or reasoning. The proposed procedures, including the proposed claims procedure, are inconsistent with this Court's prior rulings, and are unnecessary here where the government has the data necessary to enable a claims administrator to distribute refunds. ECF 82 at 3. Plaintiffs request an opportunity to brief these issues at the appropriate time.

fees charged in the 2010 PTIN-fee regulation, the 2015 PTIN-fee regulation, and the Accenture fees were the product of reasoned decisionmaking. ECF 279 at 2–4. They have failed every time. The agency actions setting the fees are arbitrary and capricious and must be vacated.

III. The Court has authority to determine whether the IRS's determinations on remand are the product of reasoned decisionmaking.

In its order setting deadlines for Plaintiffs' challenge to the IRS's work on remand, the Court ordered Plaintiffs to "set forth any legal basis for further action by this Court." ECF 269 at 2. Plaintiffs did so at ECF 279 at 6-7, 13-14, 20, 24-25. Defendant has provided no legal authority to the contrary.

Defendant instead argues that its actions on remand are entirely insulated from review for two reasons, both of which mischaracterize Plaintiffs' challenge and the law. The IRS argues that Plaintiffs are attempting to relitigate issues already decided by the Court, and that Plaintiffs are impermissibly challenging the IRS's quantitative calculations on remand. Neither is correct.

A. Plaintiffs are not relitigating issues decided by the Court on summary judgment.

The Court provided detailed guidance for some of the categories at issue, but provided only higher-level guidance and examples for the remaining categories, while directing the IRS to disaggregate the costs of "providing private benefits to return preparers" from the costs of providing an "independent benefit to the agency and the public at large." *Steele*, 657 F. Supp. 3d at 41. The Court recognized that because the metes and bounds of certain activities, specifically compliance and support activities, and their costs were "unclear from the record," it would be incumbent upon the agency to determine the scope of those activities and assign costs to them. *Id.* at 48; *see also id.* at 40–41, 43.

In response, the IRS misleadingly informs the Court that it has calculated an additional $57,444,051 in refunds on remand. ECF 280 at 5. That claim is misleading because it overstates

the amount of refunds calculated on remand for additional activities not previously conceded. Most of the amounts refunded on remand are for fiscal years 2014 and 2015, for which the IRS had previously conceded *nothing* while it waited for a determination as to whether it should use the 2010 cost model or the 2013 cost model to calculate the refunds for 2014 and 2015. On remand, the IRS calculated an additional refund of 0.9% of fees paid in 2011-2013 and an additional 30.6% of fees paid in 2016 and 2017.

Although the IRS partially conceded a portion of support activities for 2011-2013 in its summary judgment briefing, it made no further refunds of those activities on remand, and critically, did not explain why it was only refunding 33.3% or why it was not refunding anything further in response to the Court's order. It conceded none of the 2014-2015 support costs during summary judgment, and on remand simply applied its concessions from 2011-2013 to 2014 and 2015, again *without explanation*. Certain components of RPO's support costs have not been refunded *at all*. *See, e.g.*, ECF 270-2 at Rows 98–100. Because the 2015 cost model allocated costs by department and employee rather than task or function, the IRS's unexplained percentages for 2016 and 2017 are even less informative than the boilerplate percentages for 2011 through 2015.

B. Plaintiffs are not making a quantitative challenge to the IRS's calculations.

Plaintiffs' challenge is not quantitative. They are not challenging the amount of salaries and benefits, the number of people required to perform a given activity, the cost of the computer equipment needed for the activity, or the cost of any lawfully includable activity. Nor is their challenge an attempted relitigation of this Court's qualitative determinations. Plaintiffs are not challenging the Court's determinations—to the extent it made such determinations—as to whether certain activities may be lawfully included. They are not challenging whether the costs of certain ghost-preparer enforcement activities may be included, or whether some support costs or some compliance costs may be included.

C. Because the IRS has not shown its work it is impossible to determine if the recalculated PTIN fees are the product of "reasoned decisionmaking."

Plaintiffs' challenge is that the IRS has not shown its work as required. Far from a "meaningless mantra[]," or "hollow quip[]," ECF 280 at 11, the requirement that an agency explain its reasoning is a fundamental principle of administrative law. *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016) ("[T]he requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result."). "[J]udicial review can occur only when agencies explain their decisions with precision, for '[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action.'" *Am. Lung Ass'n v. Env't Prot. Agency*, 134 F.3d 388, 392 (D.C. Cir. 1998) (second alteration in original) (quoting *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947)); *see also Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) ("Where the agency has failed to provide a reasoned explanation . . . we must undo its action."); *Stringfellow Mem. Hosp. v. Azar*, 317 F. Supp. 3d 168, 184 (D.D.C. 2018) ("[C]onclusory statements will not do; an agency's statement must be one of *reasoning*."); *AARP v. U.S. Equal Emp. Opportunity Comm'n*, 267 F. Supp. 3d 14, 34 (D.D.C. 2017) ("Courts may not 'simply accept whatever conclusion an agency proffers merely because it is the agency's judgment.'" (quoting *Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)). When an agency fails to explain its reasoning, no one—members of the public, litigants or the court—can tell whether the agency's action is reasonable.

Yet that is precisely what the IRS has done here. For 2011 through 2015, it simply supplied conclusory statements of percentages of work done with respect to various activities without any reasoning whatsoever. The lack of explanation is an even bigger problem for the 2016 and 2017 refunds. The cost model for those years is broken down by department and employee rather than

function as in the 2010 cost model. *See* ECF 270-3; ECF 177-27. The IRS's refund "calculations" for those years then are even more opaque than the "calculations" for 2010. The IRS is refunding 60% of the Office of the Director and Strategy & Finance, 48.8% of Communications, 38.1% of Vendor Processes and Business Requirements, 28% of Compliance, and 96.2% of Competency and Standards. ECF 270-3. Those percentages are presented without explanation. Whose salaries do they represent? What work were those employees performing? Are partial salaries being refunded? If so, how was that determination made? The Court should not accept the IRS's position of "just trust us."

The IRS's argument about Plaintiffs' improper "quantitative" challenges continues to "blur[] the lines between the type of activity performed and the cost of carrying out that activity," an approach rejected by the Court on summary judgment. *Steele*, 657 F. Supp. 3d at 38. Plaintiffs' challenge is not that 33.3% is too small a refund for any of the activities being partially refunded, or that the arithmetic of the partial refunds is incorrect. It is instead that the IRS has not explained its reasons for choosing to refund 33.3% of costs as a universal refund amount for all activities that are partially refunded. ECF 270-2 at Rows 6–8, 11, 17, 65–66, 78–82, 84–97. Nor has it explained its reasons for not refunding any part of certain activities, including, for example, "Inquiry Response – TAS [Taxpayer Advocate Service]" (*id.* at Row 4), "Programmatic Executive Management / Oversight" [Return Preparer Office Director] (*id.* at Rows 69–70), and "Administrative Support" (*id.* at Rows 98–100); *see also id.* at Rows 72–77 ("Vendor / IT Management and COTR [Contracting Officer Technical Representative]). Because it has only provided conclusory percentages without any explanation, the IRS has failed to identify the impermissible activity that underlies the percentage chosen. It has 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." *Steele*, 657 F. Supp. 3d at 38.

Defendant relies on *Central & Southern Motor Freight Tariff* in support of its argument that its work on remand is essentially insulated from all review.[4] *See* ECF 280 at 14–15. But in that case, the D.C. Circuit held that the ICC's "estimated operational overhead expenses and its estimated tariff processing costs" were "arbitrary" because the agency "provided no evidence to justify . . . reducing arbitrarily the total costs of the Tariff Branch by 30 percent," and to "avoid the pitfall of arbitrariness," the agency was "obligated to set forth a more thorough and reasoned explanation of the Tariff Branch's costs." *Cent. & S. Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722, 739 (D.C. Cir. 1985). It then remanded the case to the agency for "a more thorough justification." *Id.*

Central & Southern Motor Freight Tariff is thus consistent with *Engine Manufacturers* and *NCTA II*, cited by Plaintiffs in support of their argument that the IRS has provided insufficient explanation of its assumptions and calculations on remand. *See, e.g.*, ECF 270 at 9. Although Defendant tries to distinguish both of those cases, both attempts fall flat. First, it claims *NCTA II* differs from this case because there the court needed "sufficient information to determine whether the value to the recipient standard was met." ECF 280 at 15. But the Court faces the same task here. As the D.C. Circuit further explained, "[i]t is our view that the Commission is authorized to charge fees for those services that provide a value to identifiable recipients" (the so-called value to the recipient standard) and "the FCC is required to show the particular costs which they are assessing against the recipients so as to assure them that they are paying only for the specific

[4] Twice, the IRS quotes language from the case that describes the petitioner's challenge as "quibbling over trifles," but there the amount in dispute was approximately $200 out of a total of $7,600. Here, the dispute is over tens of millions of dollars out of hundreds of millions of dollars of user fees.

expenses which are incurred in connection with the service of granting them their operating authority." *Nat'l Cable Television Ass'n v. Fed. Commc'ns Comm'n*, 554 F.2d 1094, 1103-05 (D.C. Cir. 1976). Here, the Court must determine if the PTIN fee includes only the "specific expenses which are incurred in connection with the service" provided to PTIN-holders and identified by the court in *Montrois*: "protect[ing] the confidentiality of their personal information" by "generating PTINs and maintaining a database of PTINs." *Steele*, 657 F. Supp. 3d at 32–33 (alteration in original) (quoting *Montrois v. United States*, 916 F.3d 1056, 1062–67 (D.C. Cir. 2019)).

The IRS attempts to distinguish the cost models[5] used to set the 2010 and 2015 PTIN fees from the tables used to calculate the user fees in *Engine Manufacturers Ass'n v. Environmental Protection Agency*, 20 F.3d 1177, 1181–82 (D.C. Cir. 1994), but the two are similar in one key respect: they "provide[] no basis for a number of key assertions," *id.* at 1182. Here, as in *Engine Manufacturers*, the agency only "conclusorily" stated the percentage of expenses recoverable through fees. *Id.* The D.C. Circuit found that deficiency to require a remand to the agency for further explanation. *Id.* at 1183. One critical difference, though, between that case and this, is that there the agency had not had several chances to calculate its fees correctly and to explain its reasoning. Here, the IRS has had many.

[5] The IRS asserts that "[t]he Court accepted the information from the declarations and spreadsheets to determine that the IRS's restitution calculations are reasonable." ECF 280 at 13. The IRS assumes the answer to the very questions in front of the Court—are the calculations reasonable and can that determination be made using the declarations and spreadsheets provided by the IRS? Not surprisingly, the assertion is made without citation.

IV. The IRS actions setting the 2010 and 2015 Accenture fees should be vacated and the fees refunded in full.

A. Neither the IRS nor Accenture can determine an appropriate refund for the Accenture portion of the fee and any further remand would be fruitless.

The IRS responds to Plaintiffs' challenges by doubling down on its sentence-counting approach as a "reasonable method" the IRS created to "estimate the restitution for the Accenture portion of the fee." ECF 280 at 20. The IRS devised an approach that involved *counting the number of sentences*[6] in the Accenture contracts, arbitrarily deciding which sentences were for permissible activities, and dividing the total number of sentences by the number of sentences the IRS deemed permissible. ECF 279 at 17-20. The IRS does not dispute that it gave each sentence equal weight, nor does it address any of the errors Plaintiffs identified in their Motion,[7] including the instances of double or triple counting. It provides no further justification for its "method," stating only that it is "reasonable," "fully disclosed,"[8] and within "the agency's discretion to determine." ECF 280 at 20. As the D.C. Circuit has explained, when "an agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring . . . we can declare with confidence that the

[6] The IRS refers to the sentences as "CLINs" to create a false air of formality and authority, but they are not. There are detailed requirements applicable to CLINs that do not apply to the sentences identified by the IRS, or the categories identified by Accenture in its Declaration. *See, e.g.*, *Line Item Guide*, Dep't of Def. (Apr. 18, 2023), https://perma.cc/WH56-FR5H.

[7] The IRS states "Plaintiffs err because they do not quote the final Accenture contract, but mistakenly quote an earlier version." ECF 280 at 20 n.22. This is incorrect. ECF 177-11, cited by Plaintiffs, is the initial Accenture contract, TIRNO-10-C-00022. ECF 258-3, cited by the IRS, is a modification to that contract. *See* ECF 258-3 at 642 (stating that it is Amendment/Modification No. 0002 to TIRNO-10-C-000222). Regardless, there are no contract line items in either document, let alone ones based on the sentences in the contract. This is because CLINs are used when the *government* is purchasing a good or service, but here the government paid nothing to Accenture. Tax-return preparers were (unlawfully) forced to foot that bill.

[8] It is unclear what "fully disclosed" refers to given that nearly all of the information relating to the Accenture portion of the fee in the IRS's Notice of Refund Estimation was either redacted or filed under seal. This further highlights the deficiencies in the Accenture portion of the fee. Not only did the IRS fail to conduct notice-and-comment rulemaking, but it continues to shield this information from the public notwithstanding the fact that the "interest of the public and press in access to civil proceedings is at its apex when the government is a party to the litigation." *Hyatt v. Lee*, 251 F. Supp. 3d 181, 184 (D.D.C. 2017).

agency action was arbitrary and capricious." *Select Specialty Hosp.-Bloomington, Inc. v. Burwell*, 757 F.3d 308, 312 (D.C. Cir. 2014).

There is no basis for deference here where the IRS has exercised no technical subject-matter expertise or any expertise as to its own internal resources or processes, and where it is applying a statute of general application rather than an agency-specific statute. Yet the IRS claims deference is especially appropriate here because it faces a "data-poor environment." ECF 280 at 20 n.19 (citing *Sw. Airlines Co v. Transp. Sec. Admin.*, 650 F.3d 752, 756 (D.C. Cir. 2011)). This argument mischaracterizes the holding in *Southwest Airlines*. In that case, the agency was afforded heightened deference not because of the "data-poor environment," but because the agency exercised its technical expertise in filling the evidentiary gaps and was operating subject to an agency-specific statute. *Sw. Airlines Co.*, 650 F.3d at 756 ("Our deference is particularly strong here because the statute says that the fee is based on the amount TSA 'determined' the airlines paid in 2000."). This is consistent with other cases in which agencies have been afforded deference where they used their own expertise to fill evidentiary gaps. *See, e.g.*, *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 140 (D.D.C. 2018).

Here, by contrast, the IRS counted and categorized sentences which required an application of this Court's summary judgment opinion, but no technical expertise either as to its area of expertise (taxes) or its own internal procedures and resources. In addition, the IOAA is a statute of general applicability and a "court does not defer to an agency's interpretation of a statute that it is not charged with administering." *Del. Riverkeeper Network v. Fed. Energy Regul. Comm'n*, 857 F.3d 388, 396 (D.C. Cir. 2017); *Sierra Club v. Fed. Energy Regul. Comm'n*, 827 F.3d 36, 49 (D.C. Cir. 2016) ("The Court owes no deference to an agency's interpretation of NEPA because NEPA is addressed to all federal agencies and Congress did not entrust administration of NEPA to any

one agency alone." (cleaned up)). Deference under these circumstances—where the statute is one of general application, and the agency has in fact not exercised any expertise—is not appropriate.

The Accenture fee presents the unusual situation in which no exercise of agency expertise, additional studies or additional fact-gathering will plug the evidentiary holes. Extensive discovery was taken in this case. Accenture produced nearly 30,000 documents (over 176,000 pages), a sworn declaration as to its costs, and a corporate representative who sat for a seven-hour deposition. After all that, both the IRS and Accenture maintain that they do not have the cost data necessary to parse the Accenture fees into the components required by this Court's opinion. The IRS has admitted it "does not have access to Accenture's exact costs," ECF 258 ¶ 30, and Accenture has also stated "[redacted]" ECF 258-5 at 14-15; *see also* ECF 280 at 18 ("Accenture did not provide a breakdown of its costs."). Simply put, it did not keep its records that way. In its Declaration, Accenture explained:

ECF 258-5 at 15; *id.* at 15-16 ([redacted]. The breakdown provided by Accenture is not consistent with the Court's categorization of permissible (chargeable) and impermissible (non-chargeable) activities. With the possible exception of [redacted] the categories provided by Accenture include both chargeable and non-chargeable activities and cannot be used to disaggregate the cost of permissible activities from the cost of impermissible activities. Given that the necessary data

does not exist and no amount of expertise can cure the problem, the IRS cannot comply with this Court's Order, and the Accenture fee should be vacated and refunded in full.[9]

B. The Accenture fee was charged unlawfully, without regulation, and there is insufficient cost data as a result.

The lack of a notice-and-comment regulation cannot be divorced from review of the Accenture fee. The APA's requirements are more than procedural niceties. The requirement of notice and comment is designed to enhance the quality of judicial review and avoid these empty-administrative-record situations. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."); *Chamber of Com. of U.S. v. Sec. & Exch. Comm'n*, 443 F.3d 890, 900 (D.C. Cir. 2006) ("By requiring the 'most critical factual material' used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review."). The dearth of usable information to reverse engineer a method of calculating a fee refund is directly attributable to the IRS's failure to properly enact the regulations. The IRS chose to enter a no-cost contract with Accenture, rather than a firm fixed-price contract, and, in so doing, forewent the precision of contract-line-item pricing. Had the IRS instead entered a firm fixed-price contract

[9] The IRS misstates Plaintiffs' position as believing the Accenture refund should be 35% of the Accenture fee. ECF 280 at 21-22. Plaintiffs referenced the 35% reduction of the 2010-2015 Accenture fee when compared to the current Accenture fee as additional evidence of the fact that the IRS's proposed 8.6% refund is arbitrary and capricious. For the avoidance of doubt, Plaintiffs' position is that the Accenture fee should be refunded in its entirety.

with Accenture in which it paid Accenture directly for its services, it would now have the benefit of actual CLINs which could have aided in the disaggregation of the costs of providing an independent public benefit from the costs of providing the preparer-benefitting activities. *See generally Line Item Guide,* Dep't of Def. (Apr. 18, 2023), https://perma.cc/WH56-FR5H. Instead, it has only a no-cost contract which lists the full vendor portion of the registration and renewal fees as the only CLINs. To try to solve this data problem of its own making, the IRS made up "CLINs" and claims its fictional CLINs are entitled to "especially high" deference from this Court. ECF 280 at 18 n.19.

The IRS does not contest that Accenture fee was not included in any regulation—or that the renewal fee for 2011 through 2015 was not even disclosed in the preamble—but instead erroneously claims "Plaintiffs admit that they waived the argument." *Id.* at 19 n.20 (citing ECF 279 at 22). This is not so. Plaintiffs, in their opening brief, unequivocally stated "the issue was properly raised and ***not*** waived." ECF 279 at 22 (emphasis added). Moreover, the IRS's action on remand—its first ever attempt to justify the Accenture fee—is properly subject to attack now.

The IRS is clearly emboldened by how well it has been able to shield its fee-setting from public review, continuing to argue its actions require no justification. The Accenture fee was unlawful from the start, as Plaintiff has consistently argued. Because "Congress 'expressly require[ed] in the IOAA that fees be prescribed by regulation,'" *Steele*, 657 F. Supp. 3d at 39 (quoting *New Eng. Power Co. v. U.S. Nuclear Regul. Comm'n*, 683 F.2d 12, 16 (1st Cir. 1982)), the Accenture fee is unlawful and, as further described in Plaintiffs' Opening Motion, ECF 279 at 22-23, Plaintiffs' Summary Judgment Opposition, ECF 185 at 19-20, and Plaintiffs' Summary Judgment Reply, ECF 207-4 at 16-17, must be vacated and refunded in its entirety. *See, e.g.*,

Alyeska Pipeline Serv. Co. v. United States, 624 F.2d 1005, 1010 (Ct. Cl. 1980) (finding fees to be "invalid" as they were "not in accordance with or authorized by the [IOAA]").

V. Conclusion

For the reasons set forth above and in Plaintiffs' Motion to Vacate, the Court should refund the PTIN fees in full.

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Respectfully submitted,

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