**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| Adam Steele and Brittany Montrois, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>United States of America,<br><br>Defendant. | Civil Action No.: 1:14-cv-01523-RCL |
| Wallace G. Dickson, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>United States of America,<br><br>Defendant. | Civil Action No.: 1:14-cv-02221-RCL |

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CONSOLIDATION OF RELATED ACTIONS AND APPOINTMENT OF MOTLEY RICE LLC AS INTERIM CLASS COUNSEL**

**REPLY BRIEF**

**1.** In our motion to appoint Motley Rice interim class counsel, we explained why the team we have assembled to prosecute this litigation is "best able to represent the interests of the class" under Rule 23(g). It is hard to imagine a group better suited for the task:

- Counsel from the Motley Rice firm, one of the nation's most well-respected plaintiffs' firms, have extensive first-chair-trial and settlement-negotiation experience in some of the largest and most complex class actions in recent memory. They are ideally positioned to manage the litigation, direct counsel's efforts, handle discovery, retain experts, and (if necessary) try or settle the case.
- Counsel from Gupta Beck, a Washington, D.C. firm specializing in appellate and complex litigation, have served as sole counsel to a nationwide class of all federal bankruptcy judges in a suit against the United States and obtained a $56 million judgment on their behalf—just one of numerous cases the lawyers have litigated in which the federal government was a party. They are ideally positioned to take on a large role in briefing the case, assessing legal issues concerning litigation against the federal government, and handling any appeals that may arise.
- Christopher Rizek of Caplin & Drysdale, a D.C.-based tax boutique, has extensive experience litigating tax and tax-related matters and successfully represented the plaintiff in *Ridgely v. Lew*, No. 1:12–cv–00565 (D.D.C. 2014), in which this Court held that the IRS's statutory authority to regulate the "practice" of taxpayer "representatives" before it did not authorize regulations banning CPAs from charging contingent fees.
- And Allen Buckley, a tax lawyer and CPA with an LL.M in taxation, has a deep understanding of the income-tax system and the tax-return-preparation industry, and has

spent more than four years and 1,000 hours investigating the claims in this case. Were it not for his efforts, the case would not even exist. He and Attorney Rizek are ideally positioned to provide expertise about the relevant IRS regulations and other applicable authorities.

Hausfeld and Boies Schiller do not contest any of this. They make no attempt whatsoever even to *argue* (let alone establish) that their group—three lawyers at general-purpose class-action firms, plus two other lawyers whose proposed roles are a mystery—should prevail over our group on *any* (let alone a majority) of the required Rule 23(g) factors: (1) the work done in identifying or investigating the potential claims, (2) relevant experience, (3) knowledge of the applicable law, or (4) resources. To the contrary, Hausfeld and Boies Schiller all but concede that when all counsel on each side are considered, the Motley Rice Group wins handily.

So the Hausfeld Group instead asks this Court to create a new rule—a rule that now forms the premise on which their entire opposition and competing motion precariously rest: that the experience of any lawyer not formally designated as lead counsel is "irrelevant to the Rule 23(g) inquiry," and thus the Court may not even consider the experience or proposed contributions of counsel outside the Motley Rice firm, "since only Motley Rice seeks a leadership role here." Opp. 2; *see also id.* at 8 (arguing, without citation, that courts "must" choose lead counsel based only on "the work, experience, knowledge, and resources of the class counsel applicants *themselves*"). That proposed rule contravenes the plain text of Rule 23(g), has not been adopted by a single court, and has little to recommend it as a policy matter.

Start with the rule's text, which the Hausfeld Group ignores. Rule 23(g)(1)(B) expressly permits this Court to consider, in addition to the four required factors, "*any other matter pertinent* to counsel's ability to fairly and adequately represent the interests of the class." (Emphasis added.) The proposed involvement of the other counsel in the Motley Rice Group—and the wealth of

relevant knowledge, experience, and expertise they would bring to bear on the case—is unquestionably "pertinent" to the firm's proposed representation. It is also pertinent to the ultimate question before the Court: Which proposed class counsel is "best able to represent the interests of the class"? Fed. R. Civ. P. 23(g)(2). If the Court appoints the Motley Rice firm, the class will receive the benefit of extensive first-chair-trial and settlement-negotiation experience in complex class actions (from Motley Rice); brief-writing and appellate expertise and significant experience litigating numerous cases involving the federal government (from Gupta Beck); and intimate familiarity with the relevant IRS regulations and other applicable authorities (from Rizek and Buckley). The Hausfeld Group, by contrast, would not provide the class with any of these benefits. *See* Hausfeld Mot. 7 (arguing that it is "unnecessary" for lawyers outside Hausfeld and Boies Schiller to take on a significant role). That difference is obviously "pertinent" to the Rule 23(g) inquiry, and thus this Court may consider—indeed, should consider—the qualifications and proposed responsibilities of *all* counsel under the Rule's plain language.

Lacking support in Rule 23 itself, the Hausfeld Group's only authority for its proposed rule is an unreported Illinois decision that it claims (at 5) stands for the proposition that "the work, experience, knowledge, and resources" of "associated counsel" may not be considered in appointing lead class counsel. Opp. 5 (citing and attaching *In re Honey Transshipping Litig.*, No. 13 C 2905 (N.D. Ill. 2013)). But that decision stands for no such thing. The court in that case found that one proposed lead counsel clearly outweighed the other based on Rule 23(g)'s factors, and declined to allow the experience and expertise of a paid hourly consultant (Professor Robert Blakey) to make up the deficit. Ex. A to Pizzirusso Decl., at 3. The court did not hold that Rule 23(g) requires courts to focus blindly on the lawyers formally proposed as lead counsel—and no

one else—without regard to how the case would actually be litigated going forward. Nor, to our knowledge, has any court ever so held.[1]

Nor would such a rule make for good policy. Quite the opposite: If courts were powerless to consider the proposed contributions of anyone other than lead counsel, that would encourage all lawyers on a given team to propose themselves as co-leads, creating just the sort of "ungainly counsel structure" that courts are supposed to be "alert to" and avoid when exercising their discretion to appoint class counsel. Fed. R. Civ. P. 23(g)(2) & advisory committee's note to 2003 amendments. And that, in turn, would lead to "wasteful, duplicative work product, excessive billing, and internal conflicts," all of which would harm the class. *Boggs v. Chesapeake Energy Corp.*, 286 F.R.D. 621, 624 (W.D. Okla. 2012).

Fortunately, that is not the law. Rule 23(g)(2) not only permits but encourages courts to consider all pertinent factors in appointing class counsel, including the relevant work, experience, knowledge, and resources of the whole team—not just the firm seeking to lead it. If anything, a single-firm leadership structure should be an advantage, not a drawback. It "avoid[s] the inevitable inefficiency and expense resulting from an inappropriate multiple lead counsel arrangement," thereby allowing for greater efficiency in managing the class action and more effective decision-making and work-allocation. *In re Milestone Scientific Securities Litig.*, 187 F.R.D. 165, 177 (D.N.J. 1999); *see also Kubiak v. Barbas*, No. 3:11–cv–141, 2011 WL 2443715, at *2, n.11

[1] Although the Hausfeld Group (at 5, 8) tries to dismiss the other lawyers in the Motley Rice Group as mere "paid consultants" akin to Professor Blakey, that characterization is inaccurate. Each of the proposed lawyers has entered an appearance in this case as counsel, is actually performing work on the litigation, and intends to devote substantial time and resources to representing the class should Motley Rice be appointed. Indeed, Allen Buckley LLC—unquestionably the most knowledgeable member of either group when it comes to PTIN-user-fee issues—entered into a joint co-counsel agreement with Motley Rice on December 18, 2015, before the *Dickson* litigation was even filed. *See* Buckley Decl., dated Feb. 5, 2015, at ¶ 22. Similarly, the Gupta Beck firm has taken on a significant role in drafting the briefing on these motions and, like Motley Rice and Allen Buckley LLC, is "handling this case on a contingency basis." Opp. 8 n.14.

(S.D. Ohio June 14, 2011) (declining to appoint "a slew of attorneys as co-lead counsel" because "it is essential to have one voice," and lead counsel should "offer other firms the opportunity to work on this matter in a manner that maximizes the efficient prosecution of the claims"); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07–5944 SC, 2008 WL 2024957, at *1 (N.D. Cal. May 9, 2008) (refusing to appoint co-lead counsel because "a single firm will usually provide more effective and efficient representation than a group of two or more firms"). The Hausfeld Group has given no reason why the class would benefit from forgoing that structure here, and certainly no reason why the Group should be rewarded for overstaffing at the top. That's because there is no reason. The Motley Rice Group could have easily proposed a top-heavy, multiple-lead structure in this case, and the Hausfeld Group would have no response. Instead, Motley Rice has proposed an efficient leadership structure that is in the best interests of the class rather than the lawyers. It should not be penalized for doing so.

**2.** Once the Hausfeld Group's lead-lawyer-only theory goes by the wayside, so too does its bid to become class counsel. But even were that not so, and this Court were forced to shut its eyes to the relevant contributions and qualifications of the other members of the Motley Rice Group, Hausfeld and Boies Schiller still have not shown that they are the counsel best able to represent the class. None of the lawyers they have proposed to lead this case appears to have any first-chair trial experience—in stark contrast to the lawyers from the Motley Rice firm, as detailed in William Narwold's declaration (at ¶¶ 2–3). Seeking to make up for this shortcoming, the Hausfeld Group continues to place great weight on the Boies Schiller firm's representation of former AIG executive Hank Greenberg in *Starr International Co. v. United States*, No. 1:11–cv–00779 (Fed. Cl.). The Group claims (at 1–2) that this single matter gives it "deep knowledge and experience in class action litigation . . . against the federal government." That is so, the Group says, because Scott Gant "spent more than 1,200 hours on the matter during 2014," and other

lawyers at the firm—none of whom the Group contends will have any role here—"devoted hundreds of hours developing a vast amount of work product on illegal exaction claims." Opp. 7.

It is puzzling that the Hausfeld Group asks this Court to consider the experience of lawyers who have *no intention of working on this case* as part of the Rule 23(g) inquiry, while at the same time asking the Court to ignore the experience of lawyers who have entered their appearances and have already spent (and plan to spend) significant time working on the case. But setting that irony aside, the bigger problem for the Hausfeld Group is that Mr. Gant's role in *Starr* remains murky. He has not submitted a declaration, leaving this Court to speculate about his precise contributions to that case and their relevance to this one. We do not even know if he stepped foot in the courtroom or worked on any issues relevant to this case. And even the most charitable assumptions would not explain the need to include the Hausfeld firm as a co-lead.

Grasping for any possible edge, the Hausfeld Group fixates on physical location, arguing that because "all their lead lawyers are based here in the District of Columbia," they "can litigate this case more cost effectively" because "the lawyer Motley Rice proposes should run the case works in Connecticut." Opp. 9. This borders on the trivial. *See, e.g.*, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. MDL 05–1720, 2006 WL 2038650, at *2 (E.D.N.Y. Feb. 24, 2006) ("The fact that Milberg Weiss has its main office in New York has little if any weight: I assume that counsel in other cities can and will be equally responsive to the needs of the court and the plaintiffs, and in light of the enormous stakes potentially at issue in the litigation I cannot imagine that the additional travel burdens to be borne by other attorneys will have any significant impact on the plaintiffs' interests."). For one thing, this case is unlikely to require extensive depositions or court appearances. For another, flights are routinely available between Hartford and Washington (via JetBlue) for as little as $34 each way. That said, there have been

cases in which class members have been asked to pay huge sums in travel expenses.[2] To take the issue off the table, the Motley Rice firm is willing to take responsibility for the cost of all travel from Connecticut to D.C., without seeking reimbursement from the class.

**3.** A few lingering points: First, should the Court appoint the Motley Rice firm lead counsel, the firm will exclude Rizek and Buckley (both of whom have paid PTIN user fees) from the class definition. Second, although the Hausfeld Group continues to stress the government's assertion of a venue defense in *Steele v. United States*, *see* Opp. 4 & 10, there is no venue issue in that case. Venue for the APA claim is proper under 28 U.S.C. § 1391(e), and venue for the Little Tucker Act claim (28 U.S.C. § 1346) is proper under the doctrine of pendent venue. *See Reynolds v. U.S. Dep't of Justice*, 10 F. Supp. 3d 134, 145–46 (D.D.C. 2014). In any event, as the Hausfeld Group acknowledges (at 10–11), consolidation of the *Steele* and *Dickson* cases will eliminate any claimed venue issue. The same goes for the last point: the Hausfeld Group's assertion (at 4) that it "elected to chart [its] own distinct course with a complaint asserting separate legal claims and seeking different relief." Post-appointment, interim lead counsel can assess which approach, or combination of approaches, best serves the class, and then file a consolidated amended complaint.

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[2] In *O'Bannon v. NCAA*, No. 4:09–cv–3329 (N.D. Cal.)—a case that Hausfeld and Boies Schiller tout in their motion (at 10) as an example of their leadership in class actions and their "proven ability to work together" to ensure "efficient prosecution" of litigation—the two firms submitted a nearly $400,000 travel expense tab (attached as Exhibit A) in which their lawyers routinely charged airplane tickets costing thousands of dollars for flights between Washington and San Francisco where the case was pending, including one flight that almost topped $4,000. More broadly, it says something if Hausfeld and Boies Schiller view that case as a paradigm of efficiency. They enlisted 33 other law firms to assist them in the litigation, generating a total attorney-fee lodestar of some $45 million and expenses of almost $6 million dollars. *See O'Bannon* Dkt. 341. Jon King, a former partner at Hausfeld and the lead attorney in *O'Bannon* during the first four years, has claimed that Hausfeld engaged in a "scheme" of "overstaffing this case, resulting in massive inefficiency and a stunning amount of attorney time being spent." *King v. Hausfeld*, No. 13–0237 (N.D. Cal.), Dkt. 1 at ¶55.

* * *

In the end, even if the Hausfeld Group were to draw even with the Motley Rice firm on the Rule 23(g) factors, the first-to-file tiebreaker would kick in and Motley Rice should still be appointed lead counsel because it is counsel to the plaintiffs in *Steele*.[3] But the real deciding factor here is not who filed first but who has proposed the team best able to represent the class. Hands down, the answer is Motley Rice.

Dated: March 9, 2015

Respectfully submitted,

By: *s/ William H. Narwold*

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[3] The Hausfeld Group's claim that *it* in fact filed first because Attorney Bassin (who is not a lead counsel, if that should mean anything) physically filed the *Steele* complaint before switching teams fails the "chutzpah" test. Bassin filed the *Steele* complaint as local counsel for Allen Buckley, as explained in Buckley's March 9 declaration (which also notes inaccuracies in the declarations of James Pizzirusso and Stuart Bassin). *See* Buckley Decl., dated Mar. 9, 2015, at ¶ 7.

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*Attorneys for Plaintiffs Adam Steele, Brittany Montrois, and the Proposed Class*

**CERTIFICATE OF SERVICE**

I, William H. Narwold, declare that I am over the age of eighteen and not a party to the entitled action. I am a member of the law firm MOTLEY RICE LLC, and my office is located at 20 Church Street, 17th Floor, Hartford, CT 06103.

On March 9, 2015, I caused to be filed the following in the above-captioned case:

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CONSOLIDATION OF RELATED ACTIONS AND APPOINTMENT OF MOTLEY RICE LLC AS INTERIM CLASS COUNSEL**

**DECLARATION OF ALLEN BUCKLEY IN SUPPORT OF PLAINTIFFS' MOTION FOR APPOINTMENT OF MOTLEY RICE LLC AS INTERIM CLASS COUNSEL**

with the Clerk of Court using the Official Court Electronic Document Filing System, which served copies on all interested parties registered for electronic filing, and by email upon the following counsel of record for the plaintiff in *Dickson v. United States*, No. 1:14-cv-02221-RCL (D.D.C.):

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 9, 2015

Respectfully submitted,

By: *s/ William H. Narwold*
William H. Narwold
MOTLEY RICE LLC

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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|---|---|
| ADAM STEELE and BRITTANY MONTROIS, on behalf of themselves and all other similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>United States of America,<br><br>Defendant. | Civil Action No.: 1:14-cv-01523-RCL |
| WALLACE G. DICKSON, on behalf of himself and all other similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>United States of America,<br><br>Defendant. | Civil Action No.: 1:14-cv-02221-RCL |

DECLARATION OF ALLEN BUCKLEY
IN SUPPORT OF PLAINTIFFS' MOTION FOR APPOINTMENT
OF MOTLEY RICE LLC AS INTERIM CLASS COUNSEL

I, Allen Buckley, declare as follows:

1. I make this declaration mainly to note certain inaccuracies in the declarations of James J. Pizzirusso and Stuart J. Bassin dated February 27, 2015.

2. I spoke to James J. Pizzirusso on the telephone only on November 21, 2014. I met with Mr. Pizzirusso only once, on December 5, 2014. The only other communications I had with Mr. Pizzirusso were via email.

3. Contrary to what is stated in paragraphs 5-7 of the Pizzirusso declaration and paragraph 11 of the Bassin declaration, on the telephone on November 21, 2014, Mr. Pizzirusso told me that he did not know that I was co-counsel or lead counsel in *Steele v. United States,* and stated that he vaguely recollected Mr. Bassin informing him that someone else was involved, but he had "no impression [of anyone else being involved] other than someone who had helped out a little." He also told me that he and Attorney Jeffrey Kaliel would send me a proposal to serve as co-counsel in the *Steele* case. A copy of my notes from that conversation, which were written by me during the conversation, is attached as Exhibit 1.

4. At the December 5, 2015 meeting with Mr. Pizzirusso and Mr. Kaliel, we discussed, among other things, work to be done and how any potential fee recovery in the case would be shared. Mr. Pizzirusso and Mr. Kaliel wished to share fees solely based on the number of hours worked. Based on my discussions with other lawyers with whom I consulted, I did not believe I could trust the Hausfeld firm to treat me fairly and respect the significant investment I had already made in the case. As a result, I told them I would work only on a percentage split basis. I did so in order that my contribution would be recognized, irrespective of the number of hours that the Hausfeld firm (and Mr. Kaliel's firm) ultimately billed. I stated that I had already worked a tremendous number of hours on the PTIN user fees issue over the past four years. In response, Mr. Kaliel stated that disputes over hours spent could be resolved. He provided an example of someone who billed 50 hours for writing a letter. He said those hours could be negotiated down to a reasonable number. I responded that I had no interest in negotiating or arguing about such things. My concern was heightened by their statements that the case would require substantial discovery, a position with which I did not agree.

5. While the quoted language in paragraph 14 of the Pizzirusso declaration and paragraph 12 of the Bassin declaration are accurate excerpts from the very end (immediately preceding the conclusion) of the first (49-page) brief that I filed in my pro se case, they do not reflect the overall tone and substance of the briefs that I filed. The briefs thoroughly analyze the legal basis why it is unlawful for PTIN fees to be charged. These briefs show that I have done very substantial work "identifying or investigating potential claims" in *Steele*—the first matter to be considered under Fed. R. Civ. P. 23(g)(1)(A). See Opening and Reply Briefs of Petitioners-Appellants Allen Buckley and Allen Buckley LLC, *Buckley v. United States*, No. 14-10424 (11th Cir. Mar. 5, 2014 and May 19, 2014).

6. Contrary to what is stated in paragraph 12 of Mr. Bassin's declaration concerning the reasons for deterioration of our working relationship, there were never any contentious disagreements (or disagreements whatsoever) regarding my alleged "insistence on including overtly political argumentation and hyperbole in our filings comparable to the language included in the briefs [I] had filed in the Eleventh Circuit." While I have strong views on the limits of the Executive Branch of the federal government, those view are consistent with my views of the legal issues in this case (i.e., that the Treasury Department does not have the statutory or other authority to annually assess user fees of tax return preparers to fulfill an identification requirement designed to help the IRS). Regarding why I terminated my relationship with Mr. Bassin on November 21, 2014, the following excerpt from an email I sent to Mr. Bassin on December 14, 2014 provides:

> I terminated our relationship primarily for a few reasons. They all come down to my belief that I have a different belief on how co-counsel should be treated. Some examples: After several times stating that I wished to call defendant's counsel to introduce ourselves and trade some information, I asked if you wished to be in on a joint call to the defendant's counsel. Instead of replying yes and asking what time worked for me, you tried to set up a call on one of two days and a certain time (not

> knowing if I would be free then). As I said a few weeks ago, I would not have done so. A number of things like that occurred. . . . Finally, I came to suspect that you were talking to the large firms (that we agreed you would talk to about entering the case—months ago) and leading them to believe you were sole counsel or something along those lines. My first phone call to James Pizzirusso confirmed that suspicion. At that point, I decided enough was enough.

7. Mr. Bassin filed the complaint in *Steele* because I had not yet been admitted *pro hac vice* at the time of the submission. A court clerk recommended to me on the telephone that Mr. Bassin file and I file for pro hac vice admission soon thereafter. Following the clerk's advice, a motion for admission pro hac vice was filed for me two days after the complaint filing. I later filed the motion for class certification and related brief and materials on October 2, 2014. I have actively worked on the *Steele* litigation since its filing, including having several phone conversations and many email exchanges with counsel for the United States.

8. On page 12 of Plaintiffs' Motion for Consolidation of Related Actions and Appointment of Motley Rice LLC as Interim Class Counsel, it states I "contributed hundreds of pro bono hours on behalf of the tax-return preparers in *Loving v. IRS*." That sentence should have stated "approximately 50-100 hours."

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 5, 2015.

Allen Buckley

# EXHIBIT 1

James (202) 540-7154 11/21/14
Pizzirusso

Jeffrey Kaliel — other guy who met
proposal - Tycko & Zavareei

know he had co-counsel? — vaguely recollect
— no impression other than someone who had
helped out a little

jpizzirusso@hausfeld.com
joint proposal - the 2 firms were going
to make
he'll send

**Exhibit 1**