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 ALLEN BUCKLEY'S MOTION TO BE NAMED SOLE LEAD CLASS COUNSEL

Five years ago, this Court appointed Motley Rice LLC "as Interim Class Counsel on any and all classes in the above-captioned actions." ECF No. 38. It ordered that "Motley Rice LLC will be responsible for the overall conduct of the litigation"—including supervising the proceedings, signing all filings on behalf of the class, determining the class's position in all case-related matters, delegating and organizing all tasks necessary to perform case-related work, and "any other such duties Interim Lead Class Counsel deems appropriate." ECF No. 38. The Court later certified a nationwide class of all people who have paid a fee for a Preparer Tax Identification Number (or PTIN), and ordered that "Motley Rice LLC is appointed as class counsel." ECF No. 63.

In the five years since, Motley Rice has devoted a substantial amount of time and resources to discharge its fiduciary obligations and represent the interests of the hundreds of thousands of absent class members. To ensure that the class is well represented, Motley Rice assembled and has overseen a small team of attorneys from several law firms, each of whom has brought to the case a

different and complementary area of expertise: Gupta Wessler PLLC, a plaintiff-side litigation boutique with deep expertise in administrative law and appellate issues; Christopher Rizek of Caplin & Drysdale, a former Treasury and Justice Department tax lawyer with extensive familiarity of the relevant IRS regulatory regime; and Allen Buckley, a solo-practitioner tax lawyer, estate planner, and CPA who originally filed this case after bringing two unsuccessful challenges (the second pro se) to the same fee challenged here. This team has served the class well to date.

Mr. Buckley now asks this Court to upset the status quo. He has filed a motion asking the Court to remove Motley Rice as class counsel and to substitute himself as "sole lead class counsel" under Rule 23(g). In making this unusual request, Mr. Buckley does not identify any "exceptional circumstances" of the kind that would be required before a court would take the extraordinary step of removing lead class counsel this many years into a case. *In re: Gen. Motors LLC Ignition Switch Litig.*, No. 14-MD-2543, 2016 WL 1441804, *6 (S.D.N.Y. Apr. 12, 2016). As this Court has explained: "Removal of Class Counsel at this stage would be an extreme action that should not be taken lightly." *Pigford v. Veneman*, 217 F. Supp. 2d 95, 99 (D.D.C. 2002). It "would be appropriate only if the Court were to find that it was absolutely necessary to preserve the integrity of the adversary process." *Id.* Mr. Buckley does not even attempt to make such a showing. Nor does he discuss any of the Rule 23(g) factors—even those that this Court "must" consider in appointing class counsel—let alone try to explain how Motley Rice has failed to adequately represent the interests of the class or why he would be a better choice as class counsel than the team that has served the class well for the last five years. To the contrary, he never once mentions the class or its interests, and asserts that he "does not anticipate significant changes to how things are handled" if he were to become class counsel, except that "Allen Buckley LLC would do all court filings." Mem. 3.

This is not the first time that Mr. Buckley has filed something out of the ordinary in this litigation. In the appeal to the D.C. Circuit, he filed an unsolicited motion to "supplement" the class's brief after it was filed, and beyond the word limit, because it "did not include some comments made by [him]." Doc. 1724795, at 2, in *Montrois v. United States*, No. 17-5204 (D.C. Cir). He filed his motion, moreover, even though class counsel had attempted to accommodate his views to the extent possible—subject to space constraints, sound legal judgment, and ethical obligations to the class and to the court—and had expressly directed him not to try to file his supplemental brief on behalf of the class, while indicating a willingness to file an amended brief with limited changes. *See* Doc. No. 1724929, at 2. He then submitted multiple unusual subsequent filings, one of which divulged highly sensitive attorney-client privileged material that discussed internal confidential communications going to the relevant merits of the claims then pending before the D.C. Circuit, necessitating an emergency motion to seal, Doc. No. 1725182 (attached as Ex. 1), which the D.C. Circuit granted, Doc. No. 1775497. *See also* Doc. No. 1725510 (attached as Ex. 2). Thus, far from providing any "evidence of a conflict of interest or the potential misuse of privileged information by Class Counsel," as the law requires him to do to justify removing class counsel, *Pigford*, 217 F. Supp. 2d at 99, it is actually Mr. Buckley who has misused privileged information.[1]

With all due respect to Mr. Buckley, it would not be in the best interests of the class to appoint him lead class counsel. Nor would Rule 23(g) authorize such an appointment. Rule 23(g)(2)

[1] Nor was that even the first time in this litigation that Mr. Buckley became dissatisfied with his co-counsel and took destructive action. In 2015, when Motley Rice was seeking appointment as class counsel against a competing motion by Boies Schiller and Hausfeld, Mr. Buckley submitted a declaration saying that, within a just a few weeks of filing the case, his "working relationship had become difficult" with his co-counsel, so he terminated that relationship. ECF No. 28-2, ¶ 16.

provides: "When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class." Rule 23(g)(1), in turn, sets forth four factors that a court "must consider" in appointing class counsel: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class."

None of these factors supports Mr. Buckley's motion. They would not support his motion even if this Court were deciding the question in the first instance, and they certainly do not provide the "exceptional circumstances" necessary to remove Motley Rice as lead class counsel.

First, this Court "must consider" "the work counsel has done in identifying or investigating potential claims in the action." Fed. R. Civ. P. 23(g)(1)(A). The only claim left in this case is an excessiveness claim—a fact-intensive claim that asks, in a nutshell, whether the PTIN fee exceeds the costs of providing a PTIN and storing and maintaining the PTIN database, and (if so) by how much. No law firm in this case has done more work on that claim to date than Motley Rice. Over the last five years, Motley Rice and the other co-counsel to the class—all of whom support this opposition—have devoted a considerable amount of time and resources to researching and developing this claim. Collectively, they have spent many hundreds if not thousands of hours on this claim alone. And that is to say nothing of the time they have spent on related issues, including class notice and discovery. Thus, although there is no doubt that Mr. Buckley spent many hours researching the legality of the PTIN fee before the class filed an amended complaint in 2015, the

relevant question at this juncture is who has spent more time, as of 2020, identifying and investigating the fee's excessiveness. The answer to that question is Motley Rice.

Second, the Court "must consider" "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action." *Id.* This factor is not close. Motley Rice is regularly recognized as one of the nation's top plaintiffs' firms. It routinely handles class actions and complex litigation and has secured some of the largest verdicts and settlements in American history. *See* ECF No. 28-1, at 14–17. The lawyers working on this case, moreover, have extensive personal experience serving as lead class counsel, prosecuting similar complex litigation against the government, and representing the government on the other side of the courtroom. William Narwold, for example, is the head of Motley Rice's class-action practice and has first-chaired over 25 matters to verdict, judgment, or arbitration award. *Id.* at 15–16.

On the other side of the ledger, Mr. Buckley is a solo practitioner with virtually no class-action experience, whose "practice has focused primarily on tax law as well as employee benefits, estate planning, and business law." ECF No. 28-2 (Buckley Decl.), ¶ 3. We are not aware of any case in which he has been appointed class counsel under Rule 23(g). And this case—with hundreds of thousands of class members, potentially voluminous discovery, and the federal government as the defendant—would not be a suitable case to be his first. By his own admission, Mr. Buckley has recognized that he "needed to add a large plaintiffs' class action law firm to [his] team to make sure [he] would be able to handle the case," and thus set out "to find co-counsel with the resources and class action expertise necessary to adequately represent the class," eventually entering into an agreement with Motley Rice for that reason. *Id.* ¶ 14, ¶ 17; *see also id.* ¶ 22. Even now, he concedes that, given his lack of experience and relative competence, "Motley Rice LLC will be the proper

co-counsel member to try the case," and "[i]ts expertise would be heavily utilized in all other areas, including issuing any refunds to be issued to class members." Mem. 3.

Finally, this Court "must consider" "counsel's knowledge of the applicable law" and "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). These factors are not close either. The applicable substantive law is the law governing excessive user fees, while the applicable procedural law is the law governing discovery and trial in class actions. Motley Rice and Gupta Wessler are currently co-lead class counsel in another excessive-user-fees case against the federal government in this same district court, *see* ECF No. 32 in *Nat'l Veterans Legal Servs. Prog. v. United States*, No. 16-745 (D.D.C. Jan. 24, 2017), and they have acquired a deep body of knowledge in this area of the law. And Motley Rice has a wealth of knowledge in conducting discovery and prosecuting class actions to a verdict or settlement. Motley Rice has also committed considerable resources to representing the class, and Mr. Buckley does not contend otherwise. Just the opposite: Here, too, he concedes that the class will have to rely on Motley Rice's resources—not his—to cover litigation expenses, conduct discovery, retain any experts, try the case, administer any settlement or judgment fund, and distribute any refunds to class members. Mem. 3. But he tries to use this to his advantage by claiming that he "is qualified to be class counsel" because "Motley Rice LLC will fully fund the costs of the litigation and jointly work the case." Mem. 2.

Rather than discuss the Rule 23(g) factors or point to any extraordinary circumstances, Mr. Buckley places almost exclusive focus on his preexisting relationships with two of the three named plaintiffs. "But the suggestion that class counsel should be selected based solely on the views of a single plaintiff" (or even two) "is misplaced. The Court must also look to the qualifications of counsel in making this decision." *In re Endosurgical Prods. Direct Purchaser Antitrust Litig.*, No. 05-8809,

2008 WL 11504857, *11 (C.D. Cal. Dec. 31, 2008); *see also Cullen v. N.Y. State Civil Serv. Comm'n*, 566 F.2d 846, 849 (2d Cir. 1977) ("Since absent class members are conclusively bound by the result of an action prosecuted by a party alleged to represent their interests, the court's selection of counsel for the absent class should be guided by the best interests of those members, not the entrepreneurial initiative of the named plaintiffs' counsel."). Here, there is no basis, either in the text of Rule 23 or anything else, for upsetting the status quo.

Nor is there any basis for appointing Mr. Buckley as co-lead class counsel. He has not asked for this, and it would only harm the class by creating exactly the sort of "ungainly counsel structure" that courts are supposed to avoid under Rule 23(g). Fed. R. Civ. P. 23(g)(2) & advisory committee's note to 2003 amendments. A "single-firm leadership structure," as we pointed out in our original Rule 23(g) briefing, is "an advantage, not a drawback." ECF No. 32, at 5. It "avoid[s] the inevitable inefficiency and expense resulting from an inappropriate multiple lead counsel arrangement," thereby allowing for better decision-making and work allocation. *In re Milestone Scientific Sec. Litig.*, 187 F.R.D. 165, 177 (D.N.J. 1999); *see Kubiak v. Barbas*, No. 3:11–cv–141, 2011 WL 2443715, at *2, n.11 (S.D. Ohio June 14, 2011) (declining to appoint multiple "attorneys as co-lead counsel" because "it is essential to have one voice"). This Court agreed then, and it should do the same now.

If anything, the last five years have only vindicated the wisdom of this approach. Allowing for multiple lead counsel would be particularly problematic here because it is already clear that Mr. Buckley disagrees with some of the filings and decision-making of the other three firms. This does not mean, however, that denying his motion and preserving the status quo will exclude Mr. Buckley from the decision-making process or deprive him of the ability to provide input. To the contrary, Motley Rice will continue to listen to his views and incorporate them as appropriate.

CONCLUSION

Allen Buckley's motion to be named sole lead class counsel should be denied.

Respectfully submitted,

/s/ William H. Narwold

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February 6, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2020, I electronically filed this opposition through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ William H. Narwold
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