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

REPLY TO RESPONSE OF MOTLEY RICE LLC TO MOTION OF ALLEN BUCKLEY LLC TO BE NAMED SOLE LEAD CLASS COUNSEL

The response of Motley Rice LLC, while impressive, misses the boat. The motion did not ask that Motley Rice be eliminated as class (co) counsel. It simply asked that Allen Buckley LLC be named sole *lead* class counsel, a position Motley Rice has held for approximately five years.

As specified in the Court's order of June 30, 2015 (Doc. 37), class counsel is composed of three firms: Motley Rice LLC, Gutpa Wessler PLLC and Allen Buckley LLC. The January 23rd motion did not ask for a change in this regard. These three firms were appointed over the Boies Schiller & Flexner LLP Group (BSF Group). The 2015 order stated that my work was the differentiating factor of the competing groups, thereby causing our group to win the fight.[1]

The Rule 23(g) factors heavily relied upon in the response of Motley Rice were relevant in deciding who would be class counsel. Our group was chosen; that fight is done. They are not

[1] The Court stated regarding the Rule 23(g) factors which were heavily emphasized in Motley Rice's reply: "While three of the four factors set forth in Rule 23(g)(1)(A) would support either group of attorneys, the Court finds that due to Mr. Buckley's extensive work laying the groundwork that made these cases possible, his group is the most qualified to further the interests of all putative class members." The Court also discussed actions taken by me in 2011 and 2012, well before Motley Rice was involved.

relevant here. They would be relevant if Allen Buckley LLC was attempting to eliminate or replace co-counsel. There are no such plans—the three firms appointed class counsel will remain the same. Thus, *Pigford v. Veneman* case (217 F. Supp. 2d 95, D.D.C.), cited on p. 2 of the response, is inapplicable. The other case cited, *In re: General Motors LLC Ignition Switch*, No. 14-MD-2543 (S.D.N.Y. April 12, 2016), is a minor opinion with distinguishable facts. It carries less weight than *Williams v. General Electric Capital Auto Lease, Inc.* 159 F. 3d 266 (7th Cir. 1998). If the motion is approved, I plan on working heavily with attorneys for Motley Rice to finish the case.

As far as the "law" regarding appointment of *lead* counsel (i.e. not class counsel), I have found none. Nothing was found in any U.S. statute, the Federal Rules of Civil Procedure or the local rules of the U.S. District Court for the District of Columbia regarding the matter. While the matter is covered in some articles, etc., there appears to be no pertinent law. Thus, naming of lead counsel in a case such as this one is more a "housekeeping" type matter, to keep things orderly by having only one lawyer or firm speak for the firms representing the plaintiffs. In this regard, I agree with the point in the first full paragraph on p. 7 of the response that co-lead counsel is not desirable. But, for reasons specified below, I believe it would be in the best interest of the class to change the lead counsel to my firm, as requested in the motion.

According to the response of Motley Rice, Motley Rice is a great firm, everything is fine, Allen Buckley LLC is unqualified to be lead class counsel and the class representatives are powerless.[2] This first may be true. But, for the reasons noted below, the others are not true.

Everything's Fine. Concerning everything being fine, an analysis of what led to the motion of January 23rd leads to a contrary conclusion. Unsurprisingly, there is a long history that has led to

[2] While the undersigned attempts to be humble, I don't recall conceding a "lack of experience and relative competence," as stated at the bottom of page 5 of the Motley Rice's response. A copy of my résumé is attached.

this rather drastic step. Past breach of trust acts by Motley Rice and a few examples of things experienced explain why the motion was filed (and why I believe it should be granted).

Breach of Trust Actions. The original agreement between Motley Rice LLC and Allen Buckley LLC called for roughly equal (i.e. 50/50) splitting of any attorney fees ultimately recovered, major funding of case costs by Motley Rice, and full reimbursement to both firms of costs incurred. Shortly after being brought into the case, without my knowledge and in blatant breach of the agreement between the two firms, Motley Rice brought the firm of Deepak Gupta (then, Gupta Beck PLLC) into the case, and granted it 20 percent of any fees recovered. Also without my knowledge, it retained the services of Christopher Rizek of Caplin & Drysdale. *Res ipsa loquitur*. For Motley Rice to claim (as it does on pp. 1-2 of its response) that it brought me into the case, as part of its assembly of its team, is a pure misrepresentation of the facts.

As noted in the memorandum of January 23rd, Motley Rice LLC and Allen Buckley LLC were supposed to be "co-lead counsel," with joint decision-making powers, etc. (I could not ethically and would not "turn over" the case to any lawyer(s).) In the process of trying to fight off the takeover bid in 2015, without asking me, Mr. Narwold inserted Motley Rice as interim lead counsel in one or more documents. On March 4, 2015, shortly after Mr. Narwold's action to bring Deepak Gupta's firm into the case, I sent an email to Mr. Narwold, asking him to "[p]lease confirm that the terms of our December 14, 2014 agreement will continue to apply regardless of who is named lead counsel in the case." Mr. Narwold replied:

> These kind of emails are not helpful to our relationship. We have an agreement and we intend to honor it. That is how we work. I do not plan to confirm it every few months. As I wrote to you after we retained GB and CD, I would like to discuss our refining that agreement, if our group is appointed lead. However, unless we mutually agree to modify our existing agreement, it will remain in effect.

The email exchange is attached. Despite the above assurance to me, since that time, Mr. Narwold has taken the position that Motley Rice (with him as partner in charge of the case) is in control.

I've been a lawyer for almost 35 years. I've never experienced anything similar to the things described in the two preceding paragraphs. (But, I had not previously worked with plaintiffs' lawyers.) Had I known these things would happen, I would not have brought Motley Rice into the case. Motley Rice's position is contracts with existing class representatives and the contract it signed with Allen Buckley LLC don't matter. Rather, once it got "in" to the case, it could do whatever it wanted to do, as long as it believed it was in the best interest of the class. For the benefit of law in general, one can only hope such is not the law.[3] The things done were wrong, and they could have impaired my duties. Professionalism and trust are important to a co-counsel relationship.[4]

Examples of How Class Would be Better Served. Some examples of how the class would have been, and would be, better served with Allen Buckley LLC as sole lead class counsel, follow.

Delay. While it would be unjust for the plaintiffs to not be able to receive an interest award in this case (fee charges began in 2010), plaintiffs might not be able to recover interest. Therefore, the sooner excess payments are recovered, the better for the class. On two occasions noted below, I have had to heavily pressure Motley Rice to prevent lengthy delays in case resolution.

Early in 2018, Mr. Narwold sent me an email, stating he was going to seek a 30-day extension to file a response brief in the U.S. Court of Appeals. I contacted the clerk's office and inquired as to the impact. I was told that a 30-day extension would push the oral argument back four months. I so informed Mr. Narwold, and told him such a deferral was not beneficial. Two of

[3] Motley Rice's position is akin to the argument recently made by Alan Dershowitz in the Trump impeachment trial (that as long as the president believes it is in the best interest of the country that he is re-elected, he can do whatever he wishes to be re-elected). If that's correct, then Motley Rice (or any plaintiffs' firm) could enter any class action lawsuit and push out existing class counsel, as long as it can prove it is better under Rule 23(g).

[4] Previously, I was co-counsel in three class action lawsuits. All eventually settled. In those cases, co-counsel worked cordially and in good faith as a team for a common goal. I anticipated the same when I signed the agreement with Motley Rice LLC in December 2014. (Silly me.) Perhaps Motley Rice does not ordinarily work true co-counsel cases. But, the contract it signed is for such.

the class representatives, Adam Steele and Brittany Montrois, informed me that they did not want to experience such a delay. I again contacted the clerk, and inquired as to the longest extension period that would not push back the oral argument date. I was told that one week was the longest period. I so informed Mr. Narwold. At that time, it was known that the Government would also seek a week's extension, and a draft one-week extension request noting the Government's anticipated one-week additional request and stating that no contest would be made thereto, was circulated by one of my co-counsel. I immediately objected, knowing case resolution would be extended by four months if approved. Through a tremendous amount of push on my part, Mr. Narwold agreed to the one week (instead of 30-day) extension.

Last October, after very little had been produced by the Defendant in the discovery process (and discovery was scheduled to end in late November), counsel for the Defendant asked for a *one-year* extension with respect to discovery. Mr. Narwold initially said he wished to go along. I made a *herculean* effort to prevent such from happening. I am certain that a one-year extension could not possibly have been in the best interest of the class.[5] I told Mr. Narwold that I thought an extension of three months was enough. The matter was ultimately resolved after a conference call with counsel for the Defendant, in which it was decided that a 3-month extension would be jointly sought from the Court, with a proviso that an additional extension would later be sought, based on what was uncovered during the 3-month extension period. Accenture has used this potentially lengthy extension period as part of its argument why it should not be required to disclose PTINs cost information. (Doc. 112, p. 7).

[5]A lawyer for Motley Rice LLC (Ms. Oliver) told me that the Government did not want to drag things out, because it has to pay Accenture Federal Services, LLC ("Accenture") while it is not collecting fees. I told her (being a CPA) that any costs that must be paid to Accenture are "sunk costs," and thus are irrelevant for decision-making purposes. (So, the Government wants to drag things out.) She disagreed. (The Defendant could charge valid fees going forward.)

One might argue: You were successful in cutting a combined 16-month delay down to a 3+ month delay, so "the system worked." It's true that the reduction occurred, but it took an incredible amount of effort on my part. If named sole lead counsel, the undersigned will press the Government to timely meet its discovery obligations (for the benefit of the class).[6]

Appeals. At the U.S. Court of Appeals, I tried to have important major points and ideas incorporated into the brief that was being prepared. The points would mainly address the identity theft argument made by the appellant, thoroughly cover the *Brannen* case, and make a correction. Ineffective teeth-pulling type efforts were made by me. Although with the help of class representative Adam Steele (i.e. he called Mr. Narwold), I was able to get the order of arguments reversed so the winning argument in this Court was made first, the firms of Motley Rice and Gupta Wessler otherwise held the brief (i.e. played "keep-away") and did not attempt to make reasonable important changes requested by me. My comments were "blown off." So, claims on p. 3 of the Motley Rice response that it attempted to accommodate my views are nonsense.

The March 31, 2018 brief that was filed by my co-counsel addressed identity theft in a footnote, briefly covered the *Brannen* case and did not correct that factual error that I had twice pointed out. To address the matters for the benefit of the class, I filed a motion to supplement and a supplemental brief on Monday, April 2, 2018. (A copy of the brief is attached.) Notwithstanding my informing Mr. Narwold that there was no such thing as lead counsel, etc. at the D.C. Court of Appeals, on April 3, 2018, Motley Rice LLC objected to my filing, claiming it was "sole Class Counsel under Federal Rule of Civil Procedure 23(g)." I responded the next day,

[6] In this regard, the Defendant received all discovery requested of the Plaintiffs, including depositions of all three class representatives, in 2015. Most of the discovery requests of the Defendant were made in 2015. For many years, Defendant has known what was sought. The original discovery schedule that was established was favorable to the Defendant. Given the March 1, 2019 opinion date of the Court of Appeals, Defendant is solely to blame for failing to timely produce requested information.

noting the history (including some past problems) and the fact that Motley Rice's appointment as lead counsel was trumped by the email exchange noted above. The Appellant then objected to my motion. Exhibit 2 of the Motley Rice response is a filing I made in reply to the Appellant's motion that my supplemental brief not be considered. Ultimately, my motion and supplemental filing were accepted by the Court of Appeals.

On p. 3 of its response, Motley Rice claims I divulged highly sensitive attorney-client privileged information at the Court of Appeals, thus inducing it to file an emergency motion to seal. The allegation is untrue. Query what type of highly sensitive attorney-client privileged information could possibly exist in a case such as this one? How fees were paid? For obvious reasons, I fully expect Motley Rice will file for the same with respect to this matter.

On March 1, 2019, the D.C. Court of Appeals ruled that the IRS could charge for the costs of issuing PTINs and maintaining the PTIN database. Its opinion, which is contrary to three U.S. Supreme Court decisions (*Nat'l Cable Tel. Ass'n Inc. v. U.S.*, 415 U.S. 336 (1974), *Fed. Power Comm'n v. New England Power*, 415 U.S. 349 (1974) and *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)), was based on an identity theft protection rationale. I told my co-counsel that I thought the class would be best served by filing a certiorari petition with the Supreme Court. They did not want to participate. I filed one on my own. In it, I explained how the Court of Appeals had failed to follow *Nat'l Cable TV*, *New England Power* and *Chenery*, and instead cited its own precedents to find for the appellant. A copy of the petition that was filed, without exhibits, is attached.

While, ultimately, my efforts were in vein, making them was in the best interest of the class. Try to "duck" identity theft, when the Government had raised it and the panel was known to be a pro-Government panel that would be looking for any way to find for the Government (and existing Supreme Court precedent in the form of the *Chenery* case was on our side), was (in my opinion) not the right call. While this might be considered to be a judgement call, there was no good faith

effort to discuss the matter. Rather, Motley Rice and Gupta Wessler held the brief, and then announced the final draft, without willingness to make changes. If Allen Buckley LLC is appointed lead counsel, such matters will be thoroughly hashed out and all points considered.

Not Accepting Input. The straw that broke the camel's back came on January 7th. The Court had asked whether the motion to compel with respect to Accenture was moot due the issuance of the December 23, 2019 protective order. The simple answer was (and is) "no," because PTIN cost information is needed, the Government doesn't have the information, and Accenture has it (because it issued PTINs) or can get it. During the afternoon of January 6th, Ms. Oliver of Motley Rice sent a relatively short memorandum to co-counsel, asking for comments, while stating she wished to file the document on the 7th. The draft memorandum didn't answer the question. On the morning of January 7th, I pointed out a few potential grammar errors, and asked that one four-sentence "big picture"/background type paragraph be added, to simply answer the question posed. Although I pressed several times to have it added, I was told it would not be added (and it was not added). The next day, after talking to the clerk, I considered making a one paragraph filing with the Court to make the simple point that answered the question. When I told co-counsel about the possible filing (and supplied a draft), Mr. Narwold warned against such a filing, making a number of end-of-the-world type claims as to impact (i.e. lack of unity/split in counsel that could lead the BSF Group back into the case, etc.). So, again, Motley Rice did things its way, with me put in the position of making a potentially unappreciated filing with the Court or (again) taking it, with the class potentially losing if the Court did not get the point. (I called the clerk on the morning of the 9th to relay the point over the phone, noting it was included in the prior filings, although not necessarily in one place. She said she would take note.) While this may seem like a minor point,

the need to relay the answer was very important (as the information was, and is, needed).[7] If I was sole lead counsel, the question would have been specifically answered.

Discovery of Costs. Now, the complex, time-intensive discovery phase of the case requires discovering the costs of issuing PTINs and maintaining the database of PTINs. As a CPA with cost accounting knowledge and experience, one would think my significant involvement would be a natural thing. I've taken depositions in the past, including a two-day, 71 exhibits deposition in 2013 of a CPA minority shareholder who kept the books of a closely-held business with respect to which my client was a minority shareholder.[8] Significant involvement by me is needed.

Regarding Motley Rice's heavy dealing in the current cost issues and my lack thereof, until this week, other than me reviewing documents and sending comments that largely received no response, I had little involvement. This week, after I sent two emails stating we needed to discuss documents recently disclosed by the Defendant, two constructive conference calls took place with Mr. Narwold and Ms. Oliver. If the motion is approved, these efforts will become commonplace.[9]

Going Forward. *Very importantly*, I have pressed co-counsel to cover two important issues, in addition to recovery of excess fees. First, the pertinent statutory authorities (subsections (a)(4) and (c) of 26 U.S.C. §6109) only allow the IRS to (one time) issue an identification number

[7] One might argue such a matter is merely stylistic. While the undersigned would disagree because the question was not clearly answered, if it is such, why not make a reasonable compromise with co-counsel? Instead of doing so, the standard "our way or the highway" response was given.

[8] My experience as a tax return preparer is also helpful. For example, as noted in the Supreme Court petition, return preparers must report their name, address, PTIN, phone number, etc. on prepared returns. And, the IRS updates its records when a change of address occurs.

[9] In the second call, I suggested perhaps I might take some depositions. I anticipated a howling laughter response akin to that received by Cinderalla from her evil evil stepmother and stepsisters, when she asked to try on the glass slipper. Although Mr. Narwold originally said that Ms. Oliver and he would take depositions, to my surprise, he said I could take some of them. Query whether the détente is attributable to this filing (that was pending at the time of the call—hopefully not)?

(PTIN), and to request only information necessary to issue a PTIN.[10] Thus, I have said we need to seek an order that so limits the power of the IRS. Second, I have also said that we need to seek an order of the Court that provides that future PTIN charges will be limited to those determined under parameters set by the Court in this case. In this regard, in response to the *Loving* opinion of the D.C. Court of Appeals that *eliminated licensing power*, the IRS initially reduced the combined IRS/Accenture fee for renewals of PTINs by only 20.6 percent. While Motley Rice has generally shown zeal in seeking to recover excess fee charges, it has shown little interest in these other (also) important matters. Simply put, I don't have confidence that it will take on these additional important things that the class deserves to have addressed here. I don't wish to rely on another herculean effort (by me) to get it to do so, particularly if the matters are left to be handled at the end of the case. If my motion is approved, I will file a motion to amend the complaint to cover these issues, and request rulings on them from the Court. If my firm is not made lead counsel and the matters are not addressed, the class will have been shortchanged, as bringing another lawsuit to cover such matters would be painful (and illogical, when the matters should be handled here).[11]

Qualification of Allen Buckley LLC. Allen Buckley LLC is qualified to serve as (sole) lead class counsel. Motley Rice LLC has contractual and ethical obligations to jointly work the case. Gupta Wessler PLLC has similar obligations. As a team, we are qualified to be class counsel. Individually, things are less clear. But, that's not the issue. The issue is whether Allen Buckley LLC is qualified to be lead counsel. For all the reasons specified in the January 23rd memorandum, herein, and in previously filings made in this case, it is so qualified. As noted in the January 23rd

[10] In this regard, prior to the licensing system, when PTINs were voluntarily acquired, the IRS requested (one time) name, Social Security Number, date of birth and address.

[11] When the undersigned raised the issue of getting orders as to these two matters, the responses of Mr. Narwold supplied little comfort with respect to my concerns. Given the experience of a mere 20.6 fee reduction in light of the *Loving* case, I think the Defendant cannot be trusted to do the right thing. It is in the class's best interest to cover the matters in this case.

memorandum that supported the motion, it is anticipated that Motley Rice would be heavily involved in remaining aspects of the case, including a trial, if a trial is necessary.

The Power and Desires of the Class Representatives. The class representatives who brought this case are certified public accountants (CPAs). To pass the CPA test, one must be intelligent. And, the issue they have been called on with respect to (i.e. lead class counsel) is not a complex legal issue beyond their realm of comprehension. Contrary to the position of Motley Rice (that is inconsistent with the 7th Circuit legal authority cited in the memorandum of January 23rd), clients bring cases and are the people with skin in the game; lawyers simply fight for their cause. In this case, the matter is particularly sensitive, as dealing with the IRS on behalf of clients is part of what the class representatives do for their livelihood. They've stuck their necks out. Their desires as to who will represent them as lead counsel should be honored.

Other Important Considerations. Motley Rice's statement that I had previous difficulty with my initial co-counsel, in an attempt to claim I'm simply difficult to get along with, is not helpful to its credibility. Mr. Narwold knows why I terminated that relationship. The reasons are largely set forth in Docs. 28-2 and 32-1. (I came to believe my co-counsel was attempting to sell the case, etc. to plaintiffs' lawyers.) Similarly, its statement on p.4 of its response that "the other co-counsel to the class—all of whom support this opposition . . ." is, as evidenced by this filing, wrong. And, it shows the root of the problem: Motley Rice does not recognize Allen Buckley LLC as co-counsel.

Motley Rice's response would lead one to infer that a "cast of thousands" of its lawyers are working on this case. Two of its lawyers regularly work the case: Ms. Oliver and Mr. Narwold. Like other co-counsel and the undersigned, there is no doubt that they have worked hard on the case.

Since January 7th, I have tried to work things out. Mr. Narwold and I traded emails. The first sentence of a paragraph in an email he sent me on January 15th sums up why my efforts

were/are in vain: "Allen, we intend to continue as we always have." For the benefit of the class, I ask the Court not to allow such.

For five years, Motley Rice has had its chance to be good and reasonable lead counsel. It has failed. In trying to work things out, Mr. Narwold told me that if my motion is rejected, it won't be "business as usual." Rather, I'll pay. The last line of the Motley Rice response is: ". . . Motley Rice will continue to listen to [my] views and incorporate them as appropriate." Translation: Motley Rice will remain in control, and do what it wants, regardless of the contract it signed, the better ability of co-counsel with respect to an area, and the desires of the class representatives. In contrast, if my firm is named sole lead counsel, in spite of all I have been put through by co-counsel, I will work in good faith with co-counsel to finish the case to the best of my ability for the benefit of the class—while treating co-counsel with respect. **In other words, if the motion is denied, they'll substantively freeze me out. If the motion is granted, I'll work with them.**

From bringing the *Brannen* case in 2011, to drafting a *Tax Notes* article regarding the licensing system and fees in 2012, to bringing my own case in 2013, and bringing this action in 2014, no one has fought the PTIN fees injustice more than I. The 2011 passion continues to exist. I believe lead counsel should have the passion and abilities I possess.

/s/ Allen Buckley

Allen Buckley LLC

LAW OFFICE OF ALLEN BUCKLEY LLC

Allen Buckley
ab@allenbuckleylaw.com
2727 Paces Ferry Road, Suite 750
Atlanta, GA 30339
Telephone: (678) 981-4689
Facsimile: (678) 981-4689

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