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

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

Defendant, the United States of America, hereby submits this brief in opposition to the Plaintiffs'[1] Motion to Compel dated February 22, 2022, requesting that the Court order the United States "fully respond to Plaintiffs' Third Set of Interrogatories." Doc. No. 167 at 1. As Plaintiffs admit, the United States has responded to Plaintiffs' Third Set of Interrogatories. *Id.* Plaintiffs are asking not for a response but for a *different* response.

This case was remanded to determine whether the amount of the PTIN fee charged by the Internal Revenue Service ("the Service" or "the IRS") is reasonable and consistent with the Independent Offices Appropriations Act (IOAA). *Montrois v. United States*, 916

[1] This motion was signed and filed by Allen Buckley, not by Class Counsel. This Court has ordered that "Motley Rice LLC will be responsible for the overall conduct of the litigation," including signing all motions and discovery requests on behalf of the class. Doc. No. 38 at 2–3. In the past, when Mr. Buckley has attempted to file on behalf of the class, Motley Rice has opposed these filings. Doc. No. 130. This time, however, the United States has received no indication from Motley Rice that they oppose this filing. Therefore, absent information to the contrary, the United States must assume that Allen Buckley speaks with the consent of Motley Rice LLC.

F.3d 1056, 1068 (D.C. Cir. 2019). The D.C. Circuit already determined, as the law of this case, the Service can charge "tax-return preparers a fee to obtain and renew PTINs," the PTIN fee is not contrary to law, and the "decision to charge the fee was not arbitrary and capricious." *Id.* at 1058, 1062, and 1068. The D.C. Circuit also recognized that the decision to charge a fee for a PTIN was not solely connected to the activities associated with *Loving* *Id.* at 1067 ("the IRS sufficiently rooted its decision to assess a PTIN fee in justifications independent of those rejected in *Loving*."). To reach this decision, the D.C. Circuit relied on the fact that the IRS "incurred costs associated with providing PTINs beyond the costs of the services invalidated in *Loving*." *Id.*

Since the D.C. Circuit has already determined that the decision to charge a fee is not arbitrary and capricious nor was the decision contrary to law, the issue for this Court to decide on remand is whether the fee amount is reasonably connected to the costs incurred providing the service of a mandatory unique identifying number: the PTIN and the renewal of a PTIN. *Id.* at 1062, 1068.

Before Plaintiffs began their discovery requests, the United States provided declarations of current and former Service employees to detail the employees' tasks and job responsibilities, including an attempt to allocate their time spent on each task. In addition to the declarations, Plaintiffs deposed these declarants and served written discovery requests. Plaintiffs Third Set of Interrogatories, numbered 18 through 24, included multiple subparts to each of the interrogatories requesting the names of individuals in the Service who performed specific jobs and "the percentage of the Work Time of such individual(s)" for various tasks. Doc. No. 167-3.

The United States objected to these requests as duplicative, overbroad and unduly burdensome, beyond the scope of discovery obligations under the Federal Rules of Civil Procedure, asking for information not relevant to any party's claim or defense, and as exceeding the number of interrogatories permitted under the Federal Rules of Civil Procedure. Doc. No. 167-4. Notwithstanding these objections, the United States responded to each of these requests by directing the Plaintiffs to information previously provided, including the nine declarations of current and former directors of the IRS Return Preparer Office ("RPO") and the twenty depositions taken by Class Counsel, as permitted under Fed R. Civ. P. 33(d). *Id.* The information, to the extent that it is available, was provided to the Plaintiffs through numerous sources, including:

1. Cost Models for 2013, 2015, 2017, and 2019 which contain the names, positions, grades, and departments for each RPO employee,
2. A March 2021 declaration of Amy Goudey (current Director of Vendor Processes and Business Requirements ("VPBR") in the RPO),
3. Estimated time allocations for tasks attributable to each employee in VPBR provided by Amy Goudey in September 2021,
4. A two-day deposition of Amy Goudey in September 2021,
5. A March 2021 declaration of Lisa Hernandez (former Director of VPBR in the RPO),
6. A deposition of Lisa Hernandez in September 2021,
7. A deposition of Carol Campbell (current Director of the RPO) in November 2021,
8. A deposition of David Williams (former Director of the RPO) in December 2021,

9. A December 2020 declaration of Leann Ruf (former Director of Communications in the RPO),
10. A deposition of Leann Ruf in October 2021,
11. Estimated time allocations for tasks attributable to each employee in Communications provided by Leann Ruf in December 2020,
12. A May 2021 declaration of Wilbrena Lyons-Thomas (current Director of Enrolled Agent Policy and Management ("EAP&M") in the RPO),
13. A deposition of Wilbrena Lyons-Thomas in October 2021,
14. Estimated time allocations for tasks attributable to each employee in EAP&M provided by Wilbrena Lyons-Thomas in May 2021,
15. A March 2021 declaration of Kelly New (current Director of Strategy & Finance in the RPO),
16. A deposition of Kelly New in August 2021,
17. Estimated time allocations for tasks attributable to Strategy & Finance provided by Kelly New in March 2021,
18. A deposition of Christopher Kreg Kurtz (a current Frontline Manager Budget Analyst in RPO) in October 2021, plus a recall of Mr. Kurtz for deposition in January 2022,
19. A deposition of Robert Reichstine (a former Budget Analyst and Team Lead for Budget and Finance in RPO) in September 2021, and
20. A letter sent to Plaintiffs on February 1, 2022.

See, generally, Doc. No. 167-8. Not satisfied with the United States' responses, Plaintiffs followed up with a letter expressing their displeasure at the produced information and asking for more. In response, the United States explained:

> Interrogatories 18 through 24 requested information related to the percentage of time employees spent on each task. To the extent that information exists, we have already provided it to the Plaintiffs in the declarations and depositions of Internal Revenue Service employees. As we have indicated numerous times before, the Internal Revenue Service did not track an allocation of time spent on each activity for each employee. The percentages we have provided are estimates based on the information we have available. In instances where we have not provided percentages, those percentages have been impossible to estimate with any degree of certainty.

Doc. No. 167-6 at 1.

Still not satisfied, Plaintiffs filed the current Motion. As described more fully below, Plaintiffs' brief contains a lengthy discussion of why they believe the information is necessary to support their narrow reading of the D.C. Circuit *Montrois* decision. Putting aside the erroneous nature of Plaintiffs' case theory, Plaintiffs never put forward any support for the conclusion that the government is withholding information from them. In short, Plaintiffs have the available information responsive to their requests.

I. Plaintiffs' Third Set of Interrogatories, as written, are not Relevant to Plaintiffs' Claims or Defenses.

The party moving to compel "must demonstrate that the information sought to be compelled is discoverable." *Breiterman v. U.S. Capitol Police*, 324 F.R.D. 24, 30 (D.D.C. 2018) (citations omitted). Plaintiffs failed to meet that burden.[2]

[2] The United States objected to all these requests on various grounds: the requests were duplicative, overbroad and unduly burdensome, beyond the scope of discovery obligations under the Federal Rules of Civil Procedure, asking for information not

A. Plaintiffs' justification and reading of *Montrois* is too limited as the law of this Circuit does not require an exact accounting.

To support the relevance of their requests, Plaintiffs point to *Montrois* to argue "the Court ruled costs chargeable are only those incurred 'generating and maintaining a database of PTINs.'" Doc. No. 167-9 at 2. The D.C. Circuit *Montrois* decision cannot hold the weight Plaintiffs ask it to. The issue before and decided by the *Montrois* Court was whether the Service has the statutory authority to charge a fee for the PTIN Program. *Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019). The Court concluded it did for three reasons. First, the Court found that the IRS provides a service in exchange for the fee. *Id.* ("The provision of a PTIN, *and the associated functions*, constitute the provision of a service." (emphasis added)). Second, the PTIN confers a specific benefit. *Id.* ("the PTIN helps protect tax-return preparers' identities by allowing them to list a number on returns other than their social security number.").[3] Third, the IRS provides the service and the benefit to "identifiable recipients." *Id.* at 1066 ("Tax-return preparers as a group qualify

relevant to any party's claim or defense, and as exceeding the number of interrogatories permitted under the Federal Rules of Civil Procedure. Doc. No. 167-4. Aside from relevance, Plaintiffs do not attempt to address any of these objections. Doc. No. 167-9. Thus, Plaintiffs have not met their burden to prove that the information they seek is discoverable. *Breiterman v. U.S. Capitol Police*, 324 F.R.D. 24, 30 (D.D.C. 2018).

[3] The D.C. Circuit also considered, but did not decide, whether the ability to prepare tax returns for compensation was a specific benefit. *Montrois*, 916 F.3d at 1064 (explaining that the confidentiality protection alone justified the fee and therefore it did not need to consider other justifications). The D.C. Circuit noted that the permissible amount of the fee would remain the same regardless of whether it is justified based on confidentiality protection or instead based on the need to satisfy the agency-imposed requirement to obtain a PTIN.

as identifiable recipients for purposes of justifying a fee assessed under the [IOAA]."). As a result, the Service acted within its authority, under the IOAA, to charge a PTIN fee. *Id.*

Next, the D.C. Circuit found that the Service's decision to charge a fee was neither arbitrary nor capricious, nor contrary to law. *Id.* at 1067 ("the IRS sufficiently rooted its decision to assess a PTIN fee in justifications independent of those rejected in *Loving*."). To reach this decision, the D.C. Circuit relied on the fact that the IRS "incurred costs associated with providing PTINs beyond the costs of the services invalidated in *Loving*." *Id.* And while the D.C. Circuit noted that some costs paid for by the PTIN fee could raise questions "about whether they range beyond the IRS's authority after *Loving*," *id.*, this is a far cry from Plaintiffs' claims that the D.C. Circuit limited the IRS to recovery of activities related to costs associated with the Accenture contract. In any case, the fee was valid. And "tax-return preparers' concerns that the justifications for the PTIN fee might encompass functions deemed in *Loving* to fall outside the IRS's regulatory authority can be addressed on remand." *Id.* at 1068. As a result, the D.C. Circuit remanded for the district court to examine only "whether the amount of the fee is reasonable and consistent with the [IOAA]." *Id.*

Plaintiffs' contentions about the scope of the D.C. Circuit's remand contradict the controlling caselaw and the holdings of this circuit as to the costs recoverable in user fees. *Steele v. United States*, 159 F. Supp. 3d 73, 78 (D.D.C. 2016) (citing *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996) ("[T]he measure of fees [imposed under § 9701] is the cost of the government of providing the service, not the intrinsic

value of the service to the recipient.")); *see also*, *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985).

B. Plaintiffs' Third Set of Interrogatories impermissibly seek a minute-by-minute accounting of costs.

Plaintiffs generally seek data about the exact amount of time each Service employee spends on specific tasks. Doc. No. 167-9 at 2–5. That information is not relevant to determine whether the fee is reasonable. Plaintiffs claim, "The answers to the third set of interrogatories are relevant to the ways of calculating Defendant's fees that may be chargeable." *Id.* at 2. But Plaintiffs misinterpret the Court's holding in *Montrois*: neither the Plaintiffs nor the Court have been charged to determine the *precise* cost of each of the Service's activities, only whether the fee is reasonable. *Montrois*, 916 F.3d at 1068. Plaintiffs' motion claims that they need "information relating to the costs of Defendants in overseeing Accenture and working with Accenture to issue and renew PTINs." Doc. No. 167-9 at 8. They incorrectly believe that the *Montrois* opinion only allows the Service to recover costs associated with administering the Accenture contract. *Id.* This narrow interpretation is incorrect.

The D.C. Circuit held it need not address whether the PTIN provided a different or additional benefit to the return preparer industry: "We thus can rest on the confidentiality-protection rationale alone as conferring a specific benefit for which a PTIN fee may be assessed."[4] *Id.* at 1064. That justification alone supports the fee for the PTIN. Moreover, the D.C. Circuit held "the permissible *amount* of the fee would remain the same

[4] Plaintiffs concede the existence of this benefit as support for the fee. Doc. No. 167-9 at 7.

regardless of whether it is justified based on that rationale or instead based on the need to satisfy the agency-imposed requirement to obtain a PTIN." *Montrois*, 916 F.3d at 1064. This is consistent with this Court's earlier ruling. *Steele v. United States*, 159 F. Supp. 3d 73, 78 (D.D.C. 2016) (citing *Seafarers Int'l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179, 185 (D.C. Cir. 1996) ("[T]he measure of fees [imposed under § 9701] is the cost of the government of providing the service, not the intrinsic value of the service to the recipient.")). The D.C. Circuit took great pains to find that the Service can assess a fee for "PTIN-related services," aside from those costs related to *Loving*. *Id.* at 1063.

For the issues the Court will decide on remand, the review is narrow. *Cent. & S. Motor Freight Tariff Ass'n, Inc. v. United States*, 777 F.2d 722, 729 (D.C. Cir. 1985). The fee schedule is "entitled to more than mere deference or weight." *Id.* (quoting *Am. Trucking Ass'n, Inc. v. United States*, 627 F.2d 1313, 1320 (D.C. Cir. 1980). The fees should be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Id*. Plaintiffs cannot ask this Court to substitute the Plaintiffs' or the Court's judgment for that of the Service. *Id.* As the D.C. Circuit stated in *Central & Southern Motor Freight Tariff Ass'n*, "We do not sit as a board of auditors, steeped in accountancy and equipped to second-guess an estimate which seems on its face to be reasonable." 777 F.2d at 738. In that case, the D.C. Circuit characterized the Plaintiffs' approach here as

"quibbling over trifles at its worst." *Id.* Discovery related to an exact accounting is not relevant.[5]

II. The United States has fully Responded to Plaintiffs' Third Set of Interrogatories.

As described, above, the United States provided the information Plaintiffs seek well before Plaintiffs served their Third Set of Interrogatories.[6] As stated earlier, Plaintiffs generally seek granular and irrelevant data about the percentage of time each Service employee spends on each task, specifically the time related to Accenture contracts. Doc. No. 167-9 at 2–5.

But even if the information were relevant and discoverable, the United States has produced all available information. Some of the requested data does not exist while the remaining requested data has already been provided to the Plaintiffs in the declarations and depositions of Service employees. Doc. No. 167-6 at 1. As the United States explained to Plaintiffs, the Service did not keep records of the information Plaintiffs seek regarding time spent on various activities. Some employees provided estimates of their time allocations, while others could not. Doc. No. 167-6 at 1. The information Plaintiffs seek simply does not exist. As Plaintiffs admit, "There may be instances when no information exists, such that none need be provided." Doc. No. 167-9 at 1; *see also U.S. ex rel. Fago v. M*

[5] To further support the conclusion that Plaintiffs' reading is far too narrow, as described more fully below, is the fact that government agencies don't track the type of information that Plaintiffs claim is essential.

[6] Of note, Plaintiffs appear to seek responses to all requests included in their Third Set of Interrogatories. Doc. No. 167-9 at 1. Yet Plaintiffs admit that the United States did provide answers they deem acceptable to at least some of their requests. *Id.* at 6.

& T Mortg. Corp., 235 F.R.D. 11, 19 (D.D.C. 2006) (denying a motion to compel when the requested information did not exist). Beyond the information already provided, this is that instance.

Plaintiffs' oversimplification of the solution to "just ask the employees" ignores the reality of the situation. The activities in question occurred over the last ten years. To ask current, former, and retired employees to specifically account for this time by memory alone is ludicrous. The United States has repeatedly informed Plaintiffs that not all Service employees kept contemporaneous time allocations for work activities. Doc. No. 167-6. After this case was remanded, the United States agreed to produce declarations of current and former directors of the IRS Return Preparer Office. Far from "not making an effort," these declarations discuss, in detail, the costs and work done by each directors' department. These were not simply based on the memories of these employees, but (as explained in the declarations and at depositions) also contemporaneous documents, interviews with other employees, and a review of the IRS systems and procedures. The government produced information that was reliable, corroborated, and verifiable to provide Plaintiffs with the most comprehensive information available. Plaintiffs ignore this herculean task and conclude that the government "did not [feel] like making the effort to supply answers." Doc. No. 167-9 at 5. Plaintiffs' conclusion that "The information exists in the brains of IRS employees and former employees" is an understatement of the effort it took to produce the information that Plaintiffs dismiss as incomplete. The United States produced employees and former employees for 20 depositions; if Plaintiffs believed that all that is needed is to ask for the information, they

had ample opportunity to do so. The employees who can recall this information have provided it. *Id.* at 1–2.

The United States responded to Plaintiffs' Third Set of Interrogatories. Doc. No. 167-4; Doc. No. 167-8. The United States' responses to Plaintiffs' Third Set of Interrogatories were sufficient. *Equal Rts. Ctr. v. Post Props., Inc.*, 246 F.R.D. 29, 33 (D.D.C. 2007) (finding it proper for plaintiffs to respond to interrogatories by identifying known facts and documents and that "it is sufficient for a party to answer an interrogatory by stating that it is presently unable to provide the information sought"). Aside from the information already provided to the Plaintiffs, additional responses would be highly speculative, inaccurate, and, again, irrelevant to the litigation.

III. Conclusion

The information sought by Plaintiffs is not relevant to any claims or defenses in this matter. Therefore, the information is not discoverable under Fed. R. Civ. P. 26. Even so, the United States has provided all available responsive information to the Plaintiffs and Plaintiffs' motion is moot. Any attempt to provide more information would be fruitless and not lead to reliable information.

(Signature block on following page)

Dated: March 8, 2022

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONSE IN OPPOSITION TO MOTION TO COMPEL was filed with the Court's ECF system on March 8, 2022, which system serves electronically all filed documents on the same day of filing to all counsel of record.

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