

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

**SEH AHN LEE, IRINA RYAN, AHMAD
NARIMAN, and MARK PEACH, on behalf of
themselves and all other individuals similarly
situated,**

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Case No.15-1555C
(Judge Charles F. Lettow)

FIRST AMENDED CLASS ACTION COMPLAINT

NATURE OF THE CASE

1. Seh Ahn Lee, Irina Ryan, Ahmad Nariman, and Mark Peach bring this action against the United States of America on behalf of themselves (“Plaintiffs”) and all other persons who are similarly situated (“Class Members” or “Members of The Class”).

2. For many years, Plaintiffs and Class Members have provided services directly to the Board of Broadcasting Governors (“BBG”) under supposedly independent contracts. In the words of the BBG, Plaintiffs and Class Members were “vendors” under various types of “purchase orders” with materially identical terms.

3. The BBG represented on the face of the purchase orders that the vendors were providing “*non*-personal” services, and further, that the BBG was not obligated to provide the benefits, employer-side tax contributions, and higher rates of pay that the law mandates for those who perform *personal* services for the federal government.

4. These representations were deliberately misleading. The BBG did not want Plaintiffs and Class Members to know that in fact they were providing “personal services” in the manner of federal employees, for which they were entitled to up to fifty percent more in compensation, according to the BBG’s own estimate of the underpayments at issue.

5. The Inspector General of the Department of State (“OIG”) recently uncovered this and other widespread illegalities in the BBG’s acquisition of personal services and issued a report on the BBG’s wrongdoings. In response to the OIG’s findings, the BBG *admitted* that the very *purpose* of mis-labeling the contracts was to underpay Plaintiffs and Class Members in *knowing* violation of law.

6. The BBG was consciously cheating Plaintiffs and Class members out of the incomes and benefits they deserved while exploiting their faithful and sometimes dangerous service to the United States on the cheap. According to certain internal memoranda, the BBG knew that the more openly “we treat contractors like federal employees” in accordance with their actual service, “the greater the chance we will have to withhold and pay taxes as if they are employees, and that *they can claim rights to . . . federal employee benefits such as health insurance.*”

7. The BBG also knew that if the mis-labeling of the contracts was uncovered, “[p]otential liabilities may arise from the possible establishment of an ‘employer-employee’ relationship between the Agency and each individual contractor.”

8. The “employer-employee” relationships are now conceded, and the “potential liabilities” that the BBG was dodging are a given. The only remaining issue is damages. The BBG’s own estimate sets the floor at approximately \$200 million.

9. The BBG first estimated that if it properly labeled the Plaintiffs' and Class Members' contracts for "personal services," their compensation should increase by "a minimum of 15.2%," due in part to the contributions to payroll taxes that *were admittedly required all along*, but unlawfully withheld. Of course, the BBG could not re-label the contracts to acknowledge the acquisition of personal services, because federal agencies must acquire personal services by employment, and not by contract, except to the extent of a Congressional authorization. Here, approximately 660 Plaintiffs and Class Members were providing personal services by contract at any given time, as compared to Congress's authorization for 60: hence, the deliberate mis-labeling. Further, the BBG was withholding the same "minimum of 15.2 %" from even the *authorized* contractors. In short, every Plaintiff and Class Member, under every contract at issue, was *admittedly* entitled to at least 15.2 percent more compensation.

10. Meanwhile, there was a perfectly lawful way to acquire personal services from the 600 or more Plaintiffs and Class Members on unauthorized and mis-labeled contracts, if only the BBG was not so determined to cheat them out of still greater compensation. As explained in the BBG's internal memoranda, the "BBG *has the authority* to hire employees on a term appointment basis for up to 4 years." The BBG candidly explained why it never did so. "Employees on term appointments receive all of the benefits of federal employment. . . . In most cases, equivalent employees cost the Agency significantly more than contractors, even in base salary. Add federal employee benefits to that, and this becomes an effective but expensive solution -- estimates tend toward 30-50% additional cost per person or \$12M-\$18M annually," which is \$20,000 to \$30,000 per contractor per year of service.

11. That comes to approximately \$200 million of under-compensation during the period at issue. Pending discovery, it appears that these numbers might understate the damages by half, meaning total damages could be closer to \$400 million, and rising.

12. The underpayments are ongoing. Some Plaintiffs and Class Members are still working on mis-labeled contracts and suffering the same damages. Others have been converted to equally invalid “subcontracts,” under a new program that nominally places a “staffing agency” between the BBG and its former “vendors.” These subcontracts do not cure any of the admitted underpayments for personal services, because the BBG continues to receive personal services under its direct supervision, while the staffing agencies do essentially nothing except process the ongoing underpayments. All Plaintiffs and Class Members who are still on the job are being underpaid, whether they are serving under a mis-labeled contract or one of the new subcontracts.

13. All of these contracts were invalid when issued or became invalid as administered over time, at least with respect to their provisions for compensation. *As the BBG explained, “contractors . . . were working without a valid contract.”* With or without a valid contract, Plaintiffs and Class Members were admittedly entitled to compensation that is commensurate with their provision of personal services in the manner of federal employees, including benefits, higher rates of pay, and employer-side contributions to payroll taxes. This compensation is due by grant of statute and regulation; by the required terms of contracts that were in fact for personal services; by separate contract, whether express or implied, for personal services at reasonable rates of pay; or in the absence of any contract at all, under a *quantum* theory by virtue of the government’s acceptance and retention of the value of the services.

14. Under any legal theory, the Plaintiffs' and Class Members' compensation cannot be less than what the BBG admittedly should have been paying all along, and no contrary term of an invalid contract can limit the recovery of that compensation.

15. As shown below, the proposed Class includes every person who has provided personal services to the BBG through the time of judgment and within the period of limitations, whether the services were provided under a purchase order, blanket purchase agreement, personal services contract, subcontract, or any other arrangement besides employment.

16. Plaintiffs demand back pay for the wrongfully withheld benefits, tax payments, and wages and salaries, for themselves and Class Members, pursuant to 5 U.S.C. § 5596 and as damages for breach of their express or implied contracts for the provision of personal services.

JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to 28 U.S.C. § 1491 (the "Tucker Act") and 5 U.S.C. § 5596 (the "Back Pay Act"), under which an agency employee can seek restitution whenever an "appropriate authority" has found that an "adverse personnel action" has affected the employee. The BBG and the OIG are appropriate authorities under the Back Pay Act, and both authorities have determined that Plaintiffs and Class Members suffered the adverse effects of under-compensation for personal services.

18. This Court has jurisdiction under the Tucker Act, the Back Pay Act, and money mandating statutes that provide actionable claims for payroll tax contributions, benefits, and just wages that the BBG has wrongfully withheld from Plaintiffs and Class Members.

19. This Court has jurisdiction under the Tucker Act to hear claims for breach of contracts for personal services, whether those contracts were express, implied in fact, or based on a theory of *quantum meruit*, which is a species of implied-in-fact contract.

20. In accordance with the applicable statute of limitations, this action is brought within six years of the date when Plaintiffs and Class Members knew or should have known that their claims existed and/or when their damages became ascertainable.

PARTIES

21. Defendant BBG is an independent federal agency that oversees all government-supported, civilian, international broadcasting. The BBG's stated mission is to inform, engage, and connect people around the world in support of freedom and democracy. The BBG reaches a worldwide audience of more than 175 million people in 59 languages, via radio, television, and the Internet, through the International Broadcasting Bureau (the "Broadcasting Bureau") and its broadcasting services, including the Voice of America (the "VoA"), the Office of Cuba Broadcasting, and similar services, with offices in the District of Columbia, New York, and elsewhere around the world. As used herein, the term "BBG" excludes its "grantees," such as Radio Free Asia and Radio Free Europe, which acquire personal services under materially different contracts and which actually provide to its personal services contractors many of the same benefits and tax contributions that the BBG simultaneously withholds from Plaintiffs and Class Members. The BBG's Broadcasting Bureau supports day-to-day operations and provides transmission and distribution services and technical support for all of the relevant broadcasting services. Each entity within the Broadcasting Bureau includes "language services" that produce content such as radio and television programs for particular regions and in particular languages.

22. Plaintiff Seh Ahn Lee is a native of South Korea. He has contracted for nearly 13 years with various services of the VoA, including the Korean service and the Director of the East Asia and Pacific Division for the office of the Research and Information Center ("RIC"). RIC covers ten language services: Burmese, Cambodian (Khmer), Mandarin, Cantonese, Korean,

Indonesian, Thai, Tibetan, Laos (Lao), and Vietnamese. Plaintiff Lee is an adult resident of Germantown, Maryland and a naturalized citizen of the United States. He received a Ph.D. in sociology from the University of Chicago. He has over 30 years of experience in research in the social sciences, including more than twelve years in the field of news and media research. He has been providing personal services to the BBG since 2003 under a series of supposedly independent contracts, including purchase orders and blanket purchase agreements. He continues to provide personal services directly to the BBG under the subcontract that was issued to him on or about June 1, 2015, by Technologist, Inc., which is a staffing agency that nominally serves as a prime contractor to the BBG. Each of his arrangements with the BBG satisfies the test that the OIG applied, and that the BBG accepted as appropriate, to determine whether contractors were providing personal services in the manner of federal employees.

23. Plaintiff Irina Ryan is a native of Russia. She contracted for a total of nine years, over multiple tenures, with several services within the VoA, including the Russian Service, the Media Asset Management Service, and the Technology, Services and Innovation Department. She is an adult resident of Virginia and a naturalized citizen of the United States. She has a Bachelor's degree in Russian Language and Literature from Herzen State Pedagogical University of Russia and 15 years' experience in journalism and multimedia. She has provided personal services to the BBG at various times from 2000 to 2015 under a series of supposedly independent contracts, including purchase orders. She continues to provide personal services directly to the BBG under a sub-contract that was issued to her by CTS-Computer Technology Services, Inc., which is a staffing agency that nominally serves as a prime contractor to the BBG. Each of her arrangements with the BBG satisfies the test that the OIG applied, and that the BBG

accepted as appropriate, to determine whether contractors were providing personal services in the manner of federal employees.

24. Plaintiff Ahmad (Afshin) Nariman is a native of Iran. He contracted with the Persian Service of the VoA for six years. He is an adult resident of Virginia and a naturalized citizen of the United States. He has a Bachelor's degree in Microbiology from Azad University of Tehran and eight years' experience in editing and producing television news programming. He provided personal services to the BBG from June, 2007 to May, 2013 under a series of supposedly independent contracts, including purchase orders. His arrangement with the BBG satisfied the test that the OIG applied, and that the BBG accepted as appropriate, to determine whether contractors were providing personal services in the manner of federal employees. His service to the VoA, and to the security interests of the United States, has put his personal safety at risk, and made it difficult or impossible for him to return to his native country, because he was in front of the camera for the "OnTen" program, which took a critical view of the Iranian government's policies and the political, social, and economic conditions in Iran. Any person engaged in such activity is unable to return to Iran for fear of imprisonment and worse. In addition, he went to Iraq twice, and to Syria once, to prepare reports for VoA programs. He and his team, consisting entirely of contractors like himself, were placed in grave danger and received little security from the Persian service.

25. Plaintiff Mark Peach is a native and citizen of the United States and an adult resident of Denton, Maryland. He has been contracting for eight years with VoA Broadcasting Operations as a Television Studio Lighting Director. He graduated from Archbishop Curley in Baltimore and has 35 years' experience in the field of lighting. He has been providing personal services to the BBG from 2007 to the present, under a series of supposedly independent

contracts, including purchase orders. Each of his arrangements with the BBG satisfies the test that the OIG applied, and that the BBG accepted as appropriate, to determine whether contractors were providing personal services in the manner of federal employees.

**THE RULES FOR PERSONAL SERVICES, TENURES,
AND CORRESPONDING COMPENSATION**

26. The OIG audited the Plaintiffs' and Class Members' contracts to determine if they were for the provision of personal services in actual fact, notwithstanding the BBG's representations to the contrary, and whether the BBG's acquisitions of any such services were in accordance with well-established rules. As shown, the BBG mis-labeled the contracts at issue to conceal violations of the rules and the resulting liabilities for under-compensation.

Acquiring Personal Services

27. Congress authorized the BBG to staff its activities in three different ways:
- a. The BBG is permitted to use purchase orders to procure supplies, personal property, and services that are *not* personal in nature. 22 USC § 6204(a)(10).
 - b. The BBG is authorized to appoint staff subject to the provisions of Title 5 of the United States Code and to fix their compensation in accordance with the scale of the General Schedule ("GS"). 22 USC § 6204(a)(11). In the BBG's own words, this includes "the authority to hire [Plaintiffs and Class Members as] employees on a term appointment basis for up to 4 years."
 - c. Finally, the BBG can issue up to 60 contracts for personal services for a duration no longer than two years, in accordance with a Congressional authorization, outside of which, it could acquire personal services only by appointment to federal service. Pub. L. 107-228, Div. A, Title V, § 504, Sept. 30, 2002, 116 Stat. 1393.

28. According to the OIG's research, the authorized hiring of personal services contractors began in 2002, under the Personal Services Contracting Pilot Program, which was

enacted “for the purpose of hiring . . . personal services contractors, *without regard to Civil Service and classification laws*” Providers of personal services beyond the authorization, such as Plaintiffs and Class Members, are protected by the full range of “Civil Service and classification laws.”

29. As found by the OIG, the authorization is subject to four conditions, and the “BBG violated each of the[m],” including the limits on the number and duration of contracts.

30. When the BBG contracts for personal services within the limits and conditions, “the terms and conditions of a contractor's work . . . are outlined in . . . their individually-negotiated contract, which *[still]* must be consistent with the Federal Acquisition Regulations (FAR).” The terms of contracts issued beyond the authorization cannot limit the contractor’s right to compensation commensurate with federal employment.

31. In addition to the United States Code (“U.S.C.”), the acquisition and provision of services to the federal government is governed by the Code of Federal Regulations (“C.F.R.”) and the Federal Acquisition Regulations (“FAR”) which is codified in Title 48 of the C.F.R.

32. A personal services contract is defined in 48 C.F.R. § 2.101 as “a contract that, by its express terms or as administered, makes the contractor personnel appear to be, in effect, Government employees.”

33. 48 C.F.R. § 37.104(a) states that “a personal services contract is *characterized by the employer-employee relationship it creates* between the Government and the contractor’s personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.” (emphasis added)

34. 48 C.F.R. § 37.104(c)(1) states that *the employer-employee relationship under a services contract occurs when*, as a result of “the manner of its administration during performance, contractor personnel are subject to *the relatively continuous supervision and control of a Government employee.*” (emphasis added) The OIG identified government supervision as the primary indicator of personal services under an employer-employee relationship. Courts and administrative agencies have held the same.

35. 48 C.F.R. § 37.104(d) identifies six factors, including the degree of government supervision, for assessing whether a contractor is providing personal services:

- a. performance on site;
- b. principal tools and equipment furnished by the government;
- c. services that are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission;
- d. services that are comparable to or that meet needs comparable to those performed in the same or similar agencies using civil service personnel;
- e. a reasonably expected need for the type of service in excess of one year; and
- f. an inherent nature of the service, or the manner in which it is provided, that reasonably requires direct or indirect government direction or supervision of contractors in order to —
 - adequately protect the Government’s interest;
 - retain control of the function involved; or
 - retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

36. As a matter of law, the analysis turns upon the facts and circumstances of the work, and not upon the characterizations that the BBG wrote into the contracts. According to the OIG, “[m]erely changing words without changing the relationship between BBG and the contract employees does not resolve the issue of whether these contracts are [for personal services].”

37. The BBG “chang[ed] words without changing the relationship.” More precisely, it falsified records to obscure the relationship; the falsifications included terms for unlawfully low compensation.

Compensating Service Providers in Accordance with Tenure

38. All Plaintiffs and Class Members were entitled to greater pay, benefits, and contributions to their payroll taxes, whether their employment was “intermittent” or on a “regular tour of duty.”

39. According to the Office of Personnel Management (“OPM”), the line between intermittent employment and a regularly scheduled tour of duty is two years. 5 C.F.R. §§ 304.102 & 103(c)(1). The distinction is relevant to calculating the underpayments at issue.

40. **First**, the BBG has authority under 22 U.S.C § 6204(a)(15) to “procure *temporary and intermittent personal services . . .*” (emphasis added) Temporary and intermittent providers of personal services are exempt under 5 U.S.C. § 5102 and are not inextricably linked to the GS scale. 5 C.F.R. § 511.201 & 48 C.F.R. § 31.205-6. Instead, provisions of the C.F.R. required the BBG to consider particular factors in setting the initial rate of basic pay: (1) the level and difficulty of the work to be performed; (2) the qualifications of the expert or consultant; (3) the pay rates of comparable individuals performing similar work in federal or non-federal sectors; and (4) the availability of qualified candidates. 5 C.F.R. § 304.104(b).

41. “[T]hose [Plaintiffs and Class Members who were] employed on an intermittent basis d[id] not earn leave and are not entitled to paid holidays,” 5 CFR § 304.106(g), but other benefits of federal employment were still owed, and are collectible in this action.

42. Every Plaintiff and Class Member who provided temporary or intermittent personal services is entitled to back pay for the difference between actual pay and what was to be provided under the foregoing provisions.

43. **Second**, “those experts and consultants with a regularly scheduled tour of duty (*i.e.*, not intermittent) are entitled to sick and annual leave in accordance with chapter 63 of title 5, United States Code, and to [holiday] pay” 5 C.F.R. § 304.106(g). Plaintiffs and Class Members on regularly scheduled tours of duty are also entitled to pay corresponding to the GS scale. 5 C.F.R. § 304.105. Underpayments of these benefits and rates of pay are collectible in this action.

44. Most Plaintiffs and a large majority of Class Members worked full-time on regular tours of duty, and often for longer periods than co-workers who were appointed to the federal service. These Plaintiffs and Class Members are entitled to wages commensurate with the GS scale and to benefits commensurate with their regularly scheduled tours of duty, including sick, annual, and holiday leave.

THE OIG FOUND, AND THE BBG ADMITTED, THAT CONTRACTS WERE MIS-LABELED AS IF TO PROVIDE “NON-PERSONAL SERVICES”

45. The OIG’s audit compared the contracts labeled for “non-personal services” to the Congressionally authorized contracts labeled for “personal services,” and found that there was no difference in the services provided.

46. As the audit was underway, the BBG was forced to admit the essential facts of this case: every contract at issue was for personal services, “creat[ing]” an “employer-employee relationship” with the government under 48 C.F.R. § 37.104(a); Plaintiffs and Class Members were undercompensated, no matter the type of contract that they were issued; and once the underpayments were uncovered, the BBG would be liable for back pay.

The Purpose and Conduct of the Audit

47. The purpose of the audit was to determine whether the BBG was in compliance with federal regulations for acquisitions, including provisions discussed above. The OIG conducted fieldwork from June 2013 to December 2013 at the BBG's Office of Contracts, which is responsible for the planning, management, and implementation of the BBG's acquisitions.

48. The BBG contracts directly with many hundreds of professionals and talented individuals, including writers, stringers, announcers, and others. As the BBG explained to the OIG, "[t]he agency requires assistance from individuals with a wide variety of technical and journalistic talent – many of whom are native speakers of the languages in which we broadcast and knowledgeable about the markets we serve. . . . Thus, the BBG . . . ha[s] greatly benefitted from the broad range and diverse mix of contractors supporting these programs."

49. In 2010, the BBG issued an updated version of what is commonly referred to as the "POV Handbook," which purports to be an authoritative statement of procedures for legally acquiring *non*-personal services from independent contractors, who are referred to within the BBG as "purchase order vendors."

50. Congress authorized the BBG to acquire *personal* services from no more than 60 contractors for tenures of not more than two years. Beyond these limits, the BBG was required to acquire personal services by employment.

51. To determine whether the BBG was contracting for personal services in excess of its authorization, the OIG evaluated the Plaintiffs' and Class Members' contracts and actual services under the six criteria of 48 C.F.R. § 37.104(d); compared contracts labeled for "personal services" with those for "non[-]personal services;" and interviewed officials.

The Findings and Admissions

52. The OIG found “ultimately that *an employee/employer relationship existed*” with respect to nearly all of the contracts labeled for non-personal services:

- a. “For example, the vast majority of the contracts we selected called for the contractor to report to work, on site, during specified hours and perform work as directed by a BBG employee.”
- b. “[T]he contractors [on contracts labeled for ‘non-personal services’] were performing almost identical job requirements as those labeled for personal services. . . .”
- c. “Further, when comparing services contracts labeled as personal or non[-]personal services, we found that, although the contract language differed, the manner in which the contracts were administered was identical.”

53. Under the six criteria of the FAR, the OIG found that:

- a. in the overwhelming majority of sampled purchase orders, the contractors performed work on site at either the VoA Headquarters in Washington, DC, the Office of Cuba Broadcasting in Miami, FL, or a regional BBG office;
- b. equipment and programming were provided by BBG;
- c. “all” of the work was in furtherance of the international broadcasting mission;
- d. similar tasks were performed by civil service employees hired by BBG;
- e. the average length of the contractor service was 5 years, ranging from one to 13 years; and
- f. in the generally dispositive test for personal services, government employees directly supervised the work performed by the contractors.

54. The OIG determined that 14 of 16 sampled contracts were mis-labeled for “non-personal” services. The OIG could not determine whether the two remaining contracts were

appropriately labeled, and in the end, the OIG could not confirm that even one sampled contract was validly issued.

55. The OIG reported that, “[i]n addition to our analysis, a [Broadcasting Bureau] official stated that the BBG had approximately 660 services contracts that may have been personal in nature,” as compared to a Congressional authorization of 60. “Based on BBG’s improper labeling of 14 (88 percent) of the 16 contracts in our sample, statements made by various BBG officials, and work performed by another Federal agency, OIG concluded that *the overwhelming majority* of BBG’s [660] services contracts were likely personal in nature. OIG determined that BBG had routinely exceeded its statutory authority to enter into [personal services contracts]” with so-called “purchase order vendors” to avoid lawful employment relationships, which would require substantially more compensation.

56. The OIG also found that:

- a. positions filled by vendors, such as Plaintiffs and Class Members, *should have been filled by full-time employees*;
- b. none of the contracting officers interviewed during the audit “could elaborate on a difference in treatment between personal and non[-]personal services contractors, or full-time employees;”
- c. BBG contracting officials did not know the difference between personal and non-personal services contracts, which indicated a lack of awareness of the controlling statutes;
- d. the Government exercised relatively continuous supervision and control over the vendors;
- e. the BBG allowed vendors to perform inherently governmental functions;
- f. contracting officers were sometimes pressured by senior officials to award purchase orders that they knew were not in accordance with the FAR;

- g. personal services contracts were routinely awarded above the statutory limit;
- h. *vendors' services were regularly accepted before the contract was awarded or signed;*
- i. the BBG allowed contractors to work without having any contract at all;
- j. vendors' services were accepted before funds were secured, and in a few instances, when funding was simply not available;
- k. agency officials admitted that *"contractors may not have been aware that they were working without a valid contract;"*
- l. there was little evidence that acquisition planning occurred;
- m. there was limited to no evidence that contract oversight was performed;
- n. selected contracting officials had limited training and some officials signed documents that were not in accordance with federal procurement regulations; and
- o. by acquiring personal services in excess of Congressional authorization, the BBG had a reportable violation of the Anti-Deficiency Act.

57. Among the inherently governmental functions performed by contractors was the administration of the contracts at issue; in fact, a "vendor" on a mis-labeled "purchase order" was for a time in charge of administering the other mis-labeled purchase orders, in violation of the most basic limitation on the authority of a contractor for "non-personal" services. That contractor was later made a full time employee.

58. The OIG determined that the BBG did not follow the FAR during the pre-solicitation, pre-award, or contract administration phases; did not provide adequate oversight of the acquisition process; and did not have contracting officers who met training requirements.

59. *The OIG specifically cited the "willingness" of the BBG's "leadership" to "disobey the law."* For example, the Senior Procurement Executive "admitted to OIG that he

had signed contracts that did not comply with the FAR, and stated that his actions were due to pressure he received from program offices.”

60. The OIG also cited systemic shortcomings in the BBG’s contracting practices, including but not limited to the absence of leadership in promoting an effective procurement process, a lack of accountability for noncompliance, and an environment in which some contracting officials were not able or willing to award contracts in accordance with regulations. Together, corrupt leadership and bad practices led to the prolonged illegality at issue.

61. The BBG admitted the OIG’s essential finding of illegally treating providers of personal services as independent contractors. An agency official estimated that only 44 of approximately 660 contracts appropriately distinguished personal from non-personal services. Those 44 are the authorized personal services contracts, which *still* undercompensated Class Members, and then became invalid as they passed their authorized tenures, as explained below.

62. The BBG admitted that it deliberately mis-labeled contracts as if providing non-personal services in knowing violation of law to avoid paying the compensation that was due to Plaintiffs and Class Members as providers of personal services. In the words of the BBG, “contractors may not have been aware that they were working without a valid contract,” and the BBG’s leadership was all too eager to exploit this lack of awareness. In fact, Plaintiffs’ and Class Members’ contracts periodically lapsed, and the BBG often failed to issue new contracts for months at a time, extracting personal services during the interval without any contracts at all.

63. OIG asked officials why the use of mis-labeled contracts continued to occur, and found that it had been a long-standing practice that *never changed, even when it was identified as a problem*. BBG officials stated that they examined alternatives to breaking the law, but *each*

lawful alternative would likely increase costs more than 30 percent. Given a choice between breaking the law or paying the cost of complying, the BBG's leaders preferred law-breaking.

64. The BBG knew all along that it would be liable for the "increase[d] costs" that it was avoiding: "[O]ur current strategy of using hundreds of contracts with individuals to meet these needs *creates significant liabilities* for the Agency *and equity issues for the contractors.*" The BBG's real strategy was to dodge that liability until caught.

65. OIG asked officials to explain the difference between contracts marked for personal services and contracts marked for "non-personal services." The answer was universal: there was no difference in the nature of the work.

66. During interviews with various program officials, OIG asked why contractors were hired to fill positions that should have been filled by full-time employees. Officials represented to the OIG that the agency did not have authorization to fill full-time employee positions. The BBG took a very different position in its internal memoranda, where officials concluded that "**BBG has the authority to hire employees** on a term appointment basis," but chose to contract unlawfully to avoid the costs of employment.

67. In response to the OIG's findings, the BBG ultimately agreed to transition away from acquiring personal services under falsely labeled contracts. As such, the BBG attributed ultimate significance to the OIG's findings, making them all the more relevant under the Back Pay Act.

68. In the BBG's own words, "[t]he Agency concurs [with the OIG] that it cannot employ personal service contractors in excess of those authorized. . . [and has decided upon] a large scale move away from the contracting vehicle which currently is most frequently utilized . . . [T]o mitigate the risks [of liability for wrongfully withheld compensation, as] identified by

the OIG, the Agency has sought authority from the Congress to employ up to ‘700 United States citizens or aliens’ as personal service contractors.”

Similar Findings by Other Authorities

69. Other authorities have found that contractors working for the BBG in the manner of Plaintiffs and Class Members were providing personal services.

70. As recorded in the BBG’s internal memoranda, “The IRS undertook a 2010 tax audit of BBG’s use of [vendors] and concluded that BBG should have treated [them] as employees for tax reporting purposes, including by withholding income and Social Security taxes” That audit was in response to a complaint from Plaintiff Peach. It caused the BBG to admit in its internal memoranda that its contributions to payroll taxes were required all along, but unlawfully withheld. Despite its admission, the BBG is *still* not paying its share of payroll taxes.

71. In a memorandum dated November 22, 2013, the IRS found that the BBG “exercised or had the right to exercise such control over the workers [on mis-labeled contracts] . . . as was necessary . . . to establish the relationship of employer and employee.” The IRS concluded that certain contractors should have been treated as employees for tax purposes.

72. In a case alleging employment discrimination, where an employer-employee relationship was an element of the claim, the United States District Court for the District of Columbia found that the most important factor in determining an employment relationship is the employer’s right to control the worker’s performance. The court held that the plaintiff, with whom the VoA contracted as a purchase order vendor, was performing the work of a federal employee and was entitled to the corresponding rights under the statutes at issue.

EVERY PLAINTIFF AND CLASS MEMBER PROVIDED PERSONAL SERVICES ACCORDING TO THE TEST APPLIED BY THE OIG

73. Every Plaintiff and Class Member satisfies the test that the OIG applied, and that the BBG accepted as appropriate, to determine whether vendors were providing personal services in excess of the BBG's authorization.

74. Under his prior purchase orders and his current subcontract, Plaintiff Lee has worked on site at the VoA's headquarters in Washington, DC. The BBG has provided him the equipment and programming that he uses in his job. He has worked regular hours scheduled by the BBG. All of his work has been in furtherance of the international broadcasting mission. Civil service employees have been performing similar tasks. The BBG's need for the services was expected to last more than one year, and in fact, his service has lasted approximately 13 years thus far. Most importantly, government employees supervise his work.

75. Under her prior contracts and her current subcontract, Plaintiff Ryan has worked on site at the VoA's headquarters in Washington, DC. She has worked regular hours scheduled by the BBG. The BBG has provided her the equipment and programming that she has used in her job. All of her work has been in furtherance of the international broadcasting mission. Civil service employees perform similar tasks. The BBG's need for the services was expected to last more than one year, and in fact, in the longest of her tenures she served a total of eight years, and she continues to serve. Most importantly, government employees supervise her work.

76. Plaintiff Nariman worked on site at the VoA's headquarters in Washington, DC and in their offices in New York City. He worked regular hours scheduled by the BBG. The BBG provided him the equipment and programming that he used in his job. All of his work was in furtherance of the international broadcasting mission. Civil service employees performed

similar tasks. The BBG's need for the services was expected to last more than one year, and in fact, his service lasted six years. Most importantly, government employees supervised his work.

77. Under all of his contracts, Plaintiff Peach has been working on site at the VoA's headquarters in Washington, DC. The BBG has provided him the equipment and programming that he uses in his job. He has worked regular hours scheduled by the BBG. All of his work has been in furtherance of the international broadcasting mission. Civil service employees have been performing similar tasks. The BBG's need for the services was expected to last more than one year, and in fact, his service has lasted approximately eight years thus far. Most importantly, government employees have supervised his work.

78. As shown below, the proposed Class includes any person who has provided personal services to the BBG, according to the test applied by the OIG, at any time through judgment and within limitations, under any arrangement other than employment.

THE BBG HAS UNDER-COMPENSATED PLAINTIFFS AND CLASS MEMBERS UNDER THE MIS-LABELED CONTRACTS, UNDER THE PROPERLY LABELED CONTRACTS, AND NOW, UNDER THE NEW SUBCONTRACTS

79. Every Plaintiff and virtually every Class Member served for at least a time under mis-labeled contracts that denied them benefits, higher rates of pay, and employer-side payments of payroll taxes. Plaintiff Peach and approximately three hundred Class Members are continuing to serve under mis-labeled contracts. Their under-compensation is ongoing.

80. The under-compensation cannot be less than the BBG's own estimate, which is up to \$30,000 per Plaintiff and Class Member per year of service. The BBG based that estimate on the compensation that is due when personal services are lawfully acquired by term appointment. Discovery is likely to show that the under-compensation is double the BBG's estimates.

81. The BBG also undercompensated those Class Members who worked for a time on authorized contracts labeled for personal services by failing to provide employer-side payments of payroll taxes and other benefits and higher rates of pay. The amount of additional compensation to which they were due cannot be less than the BBG's own estimate, which is an additional 15.2 percent. That amounts to \$10,000 to \$15,000 per contractor per year of service.

82. Approximately one and one-half years ago, the BBG realized that the 40 or so authorized contracts for personal services were no longer valid for having exceeded their authorized tenures. To "cure" the resulting illegality, the BBG moved these contractors onto mis-labeled contracts for "non-personal services," even though the BBG knew that using mis-labeled contracts was unlawful. At that point, the former personal services contractors began suffering damages of up to \$30,000 per year as "vendors," as estimated by the BBG and as explained above.

83. Finally, approximately 300 Class Members, along with Plaintiffs Lee and Ryan, have been put on subcontracts under staffing agencies that, in turn, hold general contracts with the BBG. These subcontracts have not cured any of the defects of the mis-labeled contracts, as the workers continue to serve in the same way and for similarly insufficient compensation. In fact, the BBG explained in its internal memoranda that the key to using staffing agencies to avoid claims for under-compensation is to ensure that the agencies form employment relationships between themselves and the former "BBG contractors." In most instances, the agencies never formed such relationships. Plaintiffs and Class Members continue to provide personal services under the direct supervision of federal employees, and the BBG remains liable to compensate them as such. For these and other reasons, damages continue to accrue under the

new subcontracts at the same rate as under the mis-labeled contracts, or up to \$30,000 per “subcontractor” per year, as estimated by the BBG.

84. All told, at any given time, the BBG has been under-compensating approximately 660 Plaintiffs and Class Members for their provision of personal services in the manner of federal employees. Every contract at issue was invalid in whole or in part, either when issued or as administered over time, and at least with respect to any term purporting to limit compensation below the appropriate amount that is due to providers of personal services. The BBG ratified invalid contracts by accepting and benefitting from the contractors’ personal services, or otherwise entered new contracts for personal services at reasonable rates of pay, whether those new contracts were express or implied; and in any event, the BBG obligated itself to compensate Plaintiffs and Class Members appropriately for the services provided.

THERE ARE RELEVANT MEASURES OF COMPENSATION TO BE USED IN CALCULATING THE COLLECTIBLE UNDER-PAYMENTS

85. The minimum compensation due to Plaintiffs and Class Members is the package of wages, benefits, and tax payments that the BBG included in its own estimates of the underpayments. The U.S.C., C.F.R., FAR, and the example of other federal agencies provide additional proxies for determining reasonable compensation which includes but is not limited to:

- a. Determinations of proper rates of pay (5 C.F.R. §§ 304.104 & 105, 5 C.F.R. 511.201, and 5 U.S.C. §§ 5301 & 5331 *et seq.*);
- b. Annual salary fixed at the specific GS-equivalent;
- c. Premium pay (5 C.F.R. § 304.106(b), 5 C.F.R. § 551.501, 5 U.S.C. § 5541 *et seq.*, and 29 U.S.C. § 207);
- d. Paid leave (5 C.F.R. § 304.106(g), 5 U.S.C. § 6301 *et seq.*, and 5 U.S.C. § 5551 *et seq.*);

- e. Paid holidays (5 C.F.R. § 304.106, 5 U.S.C. § 6301 *et seq*);
- f. Severance pay;
- g. Compensation for work injuries (5 U.S.C. § 8101 *et seq*);
- h. Retirement benefits (5 U.S.C. §§ 8301 & 8401 *et seq*);
- i. Unemployment compensation (5 U.S.C. § 8501 *et seq*.);
- j. Life insurance (5 U.S.C. § 8701 *et seq.*);
- k. Health insurance (5 U.S.C. § 8901 *et seq.*);
- l. Enhanced dental benefits (5 U.S.C. § 8951 *et seq.*);
- m. Enhanced vision benefits (5 U.S.C. § 8981 *et seq.*);
- n. Long-Term care insurance (5 U.S.C. § 9001 *et seq.*);
- o. Payroll Tax contributions (21 U.S.C. § 3101 *et seq*);
- p. Cost of living adjustment;
- q. Injury, disability, and death benefits;
- r. Cash awards and incentive program benefits;
- s. Allowances and differentials on the same basis as federal employees;
- t. Medevac coverage;
- u. Training allowance; and
- v. Transit benefits.

86. The FAR requires the following language in any contract for personal services:
“The Government shall pay the Contractor for the services performed by the Contractor, as set forth in the Schedule of this contract, at the rates prescribed . . .” 48 C.F.R. § 52.232-3. The agencies can modify their contracts to provide additional clarity, but at a minimum, all providers of personal services to the federal government have the right to be paid on a wage schedule.

87. Under 5 C.F.R. § 304.104(b)(3), every agency must consider the rates paid for similar work across the federal sector. The BBG has published rules (codified in 48 C.F.R. § 1900 *et seq.*) and a Broadcasting Administration Manual (“BAM”), each of which provides guidelines for administering personnel, but neither provides a schedule of wages or benefits, let alone a schedule reflecting rates paid in the federal sector. As noted above, a so-called purchase order vendor was in charge of administering all the other purchase orders under the BAM.

88. Related agencies do include wage and benefit schedules in their supplemental rules, manuals, handbooks, and contracts for acquiring personal services. There is a government-wide standard for compensating providers of personal services, who receive the same wages and benefits from one agency to the next, with the BBG being the lone, lawless exception. The BBG’s failure to follow this standard does not limit its payment obligations, which in the absence of authorized contracts for lesser pay, must equal the pay that would be due to federal employees.

89. The BBG’s sister and parent agencies, including the United States Agency for International Development (“USAID”) and the State Department, have drafted their own rules and manuals supplementing the FAR. Each agency lists the benefits to which its contractors are entitled, with wages that mirror the GS scale.

90. The rules of the Department of State (“DOSAR”) provide personal services contractors with every or nearly every benefit listed above. The DOSAR also clarify that backpay is allowable if required by a negotiated settlement, order, or court decree; this Court has jurisdiction to award backpay for the failure to provide the benefits listed above.

91. The rules for the United States Agency for International Development (“AIDAR”) provide personal services contractors with every or nearly every benefit listed above. The

benefits listed in AIDAR are referenced on the agency's website, are listed on the Personal Service Contractor Association's website, and are described in the provisions of the contracts issued to the personal service providers. Even the personal service providers for the BBG's grantee programs, Radio Free Europe and Radio Free Asia, receive the benefits listed above.

92. Both the Department of State and USAID widely publicize the rates and benefits to which personal service providers are entitled. The BBG purposefully fails to provide guidance as to the rates and benefits to which its personal service contractors are entitled in order to continue acquiring personal services on the cheap.

93. All providers of personal services to the federal government are entitled to the benefits typically provided by other agencies, wages commensurate to the GS scale, and employer-side tax contributions.

MONEY-MANDATING STATUTES ENTITLE PLAINTIFFS AND CLASS MEMBERS TO WAGES, BENEFITS, AND TAX CONTRIBUTIONS

94. The Back Pay Act provides monetary relief for an "employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee."

95. Under 5 C.F.R. § 550.803 an "appropriate authority" is an entity having authority to correct or direct the correction of an unjustified personnel action, including the head of the employing agency or a delegate. At all times, the BBG had the relevant authority to correct the denial of pay, allowances, and differentials to the Plaintiffs and Class Members.

96. The findings of the OIG and the responding admissions and actions of the BBG are the required administrative determinations of an appropriate authority.

97. Under 5 C.F.R. § 550.803 an “unjustified or unwarranted personnel action” includes a failure to confer a benefit.

98. The OIG and the BBG determined that the Plaintiffs and Class Members were improperly denied the rights, protections, benefits and other compensations due to providers of personal services in amounts determined by the BBG. Plaintiffs and Class Members suffered another unwarranted personnel action when the BBG failed to pay them the amount of the under-compensation immediately upon determining it.

CLASS ALLEGATIONS

99. Plaintiffs file this complaint on behalf of themselves and the Class Members.

100. The BBG and the OIG have rendered final decisions that all Members of the Class were providing personal services and were entitled to greater compensation.

101. The Class consists of all persons who provided “personal services” to the BBG, as that term was applied by the OIG in its audit, under any contractual arrangement other than by appointment, through the time of judgment and within limitations.

102. While the exact number of Class Members can only be ascertained through discovery, approximately 660 persons have been providing personal services by means other than by federal appointment at any given time, including at present. The total number of such contractors over time is probably close to 2,000, given turnover.

103. The Members of the Class are so numerous that joinder is impracticable.

104. This Complaint involves common questions of law and fact, including:
- a. Whether the Class Members provided personal services to the BBG; and
 - b. Whether Class Members are entitled to greater compensation commensurate with the provision of personal services to the federal government, including at a minimum every type of compensation that the BBG included in its estimates of the costs that it was avoiding by declining to employ Class Members.

105. The named Plaintiffs will adequately and fairly protect the interests of the Class. They are represented by sophisticated legal counsel who have successfully litigated complex actions and will adequately represent the Class.

106. The actions of the United States, working through the BBG, have generally affected the entire Class, making final relief appropriate for the Class as a whole. Common questions of law and fact predominate over individual questions, if any.

107. This class action is the superior method for fair and efficient adjudication of the controversy because it permits numerous persons to prosecute their common claims jointly in a single forum that avoids unnecessary duplication and the potential for inconsistent rulings. A class action provides an efficient and manageable method to adjudicate fairly Plaintiffs' and the proposed Class Members' rights. Given the OIG's findings that nearly all of the BBG's contractors were providing personal services, a class action is preferable to individual lawsuits.

COUNT I
**(Back Pay for the Monetary Value of Wages, Benefits,
and Tax Contributions Wrongfully Withheld)**

108. Plaintiffs incorporate by reference all prior paragraphs as if set forth in their entirety here.

109. Plaintiffs and Class Members were providing personal services to the BBG at all relevant times.

110. The BBG was the appropriate authority to grant pay, allowances, and differentials to Plaintiffs and Class Members. Even after determining that it was obligated to grant them compensation for their personal services in amounts in excess of what it was actually granting, and admitting that it was in violation of that obligation for many years, it continues to evade its obligations.

111. As the appropriate authority, the BBG determined that the cost of fulfilling its obligations to Plaintiffs and Class Members would range from \$10,000 to \$30,000 per Plaintiff and Class Member per year of service, depending in part upon the type of contract at issue.

112. The BBG wrongfully withheld from Plaintiffs and Class Members higher rates of pay, benefits, and contributions to payroll tax obligations that they should have received for providing personal services to the BBG in amounts that are at least equal to, if not greater than, the BBG's determination.

113. Plaintiffs and Class Members were negatively affected by the BBG's failure to confer rights, protections, pay and benefits due for personal services.

114. The wages and salaries due to Plaintiffs and Class Members were to be determined by provisions of U.S.C., C.F.R., and FAR as detailed in foregoing paragraphs to the complaint.

115. As detailed in paragraph 85, and fully incorporated herein, the compensation and benefits wrongfully withheld include, but are not limited to:

- a. Determinations of proper rates of pay (5 C.F.R. §§ 304.104 & 105, 5 C.F.R. 511.201, and 5 U.S.C. §§ 5301 & 5331 *et seq.*);
- b. Annual salary fixed at the specific GS-equivalent;
- c. Premium pay (5 C.F.R. § 304.106(b), 5 C.F.R. § 551.501, 5 U.S.C. § 5541 *et seq.*, and 29 U.S.C. § 207);

- d. Paid leave (5 C.F.R. § 304.106(g), 5 U.S.C. § 6301 *et seq.*, and 5 U.S.C. § 5551 *et seq.*);
- e. Paid holidays (5 C.F.R. § 304.106, 5 U.S.C. § 6301 *et seq.*);
- f. Severance pay;
- g. Compensation for work injuries (5 U.S.C. § 8101 *et seq.*);
- h. Retirement benefits (5 U.S.C. §§ 8301 & 8401 *et seq.*);
- i. Unemployment compensation (5 U.S.C. § 8501 *et seq.*);
- j. Life insurance (5 U.S.C. § 8701 *et seq.*);
- k. Health insurance (5 U.S.C. § 8901 *et seq.*);
- l. Enhanced dental benefits (5 U.S.C. § 8951 *et seq.*);
- m. Enhanced vision benefits (5 U.S.C. § 8981 *et seq.*);
- n. Long-Term care insurance (5 U.S.C. § 9001 *et seq.*);
- o. Payroll Tax contributions (21 U.S.C. § 3101 *et seq.*);
- p. Cost of living adjustment;
- q. Injury, disability, and death benefits;
- r. Cash awards and incentive program benefits;
- s. Allowances and differentials on the same basis as federal employees;
- t. Medevac coverage;
- u. Training allowance; and
- v. Transit benefits.

COUNT II
(Breach of Contract)

116. Plaintiffs incorporate by reference all prior paragraphs as if set forth in their entirety here.

117. At all relevant times, Plaintiffs and Class Members were providing personal services to the BBG in the manner of federal employees under contracts, whether express or implied, for personal services, which contracts were either written or oral.

118. Alternatively, the actions of Plaintiffs and Class Members in providing personal services to the BBG in the manner of federal employees, as the BBG requested and instructed, and the actions of the BBG in requesting, supervising, accepting, and benefitting from those personal services with knowledge that Plaintiffs and Class Members expected compensation commensurate with the nature of the services provided, show that the Plaintiffs and Class Members served under implied-in-fact contracts.

119. At all relevant times Plaintiffs' and Class Members' contracts, whether express or implied, were for personal services.

120. The contracts contain every element that is required for their enforcement, including mutual intent, offer, acceptance, consideration, and the contracting officers' authority to contract on behalf of the BBG, or in the alternative to such authority, the BBG's subsequent ratification of the contracts by, *inter alia*, knowing acceptance of performance.

121. Under their contracts, the Plaintiffs and Class Members provided personal services as requested and instructed by the BBG, and the BBG was obligated in return to provide Plaintiffs and Class Members all of the benefits, tax payments, wages or salaries, and other considerations that were due to providers of such services, without regard to any written contract's provision for lesser compensation.

122. As detailed in paragraph 85, and fully incorporated herein, the compensation and benefits wrongfully withheld include, but are not limited to:

- a. Determinations of proper rates of pay (5 C.F.R. §§ 304.104 & 105, 5 C.F.R. 511.201, and 5 U.S.C. §§ 5301 & 5331 *et seq.*);

- b. Annual salary fixed at the specific GS-equivalent;
- c. Premium pay (5 C.F.R. § 304.106(b), 5 C.F.R. § 551.501, 5 U.S.C. § 5541 *et seq.*, and 29 U.S.C. § 207);
- d. Paid leave (5 C.F.R. § 304.106(g), 5 U.S.C. § 6301 *et seq.*, and 5 U.S.C. § 5551 *et seq.*);
- e. Paid holidays (5 C.F.R. § 304.106, 5 U.S.C. § 6301 *et seq.*);
- f. Severance pay;
- g. Compensation for work injuries (5 U.S.C. § 8101 *et seq.*);
- h. Retirement benefits (5 U.S.C. §§ 8301 & 8401 *et seq.*);
- i. Unemployment compensation (5 U.S.C. § 8501 *et seq.*);
- j. Life insurance (5 U.S.C. § 8701 *et seq.*);
- k. Health insurance (5 U.S.C. § 8901 *et seq.*);
- l. Enhanced dental benefits (5 U.S.C. § 8951 *et seq.*);
- m. Enhanced vision benefits (5 U.S.C. § 8981 *et seq.*);
- n. Long-Term care insurance (5 U.S.C. § 9001 *et seq.*);
- o. Payroll Tax contributions (21 U.S.C. § 3101 *et seq.*);
- p. Cost of living adjustment;
- q. Injury, disability, and death benefits;
- r. Cash awards and incentive program benefits;
- s. Allowances and differentials on the same basis as federal employees;
- t. Medevac coverage;
- u. Training allowance; and
- v. Transit benefits.

123. The minimum compensation that was due to Plaintiffs and Class Members is the compensation of a federal employee providing similar services. Pending discovery, the

minimum cash value of the difference between that compensation and the compensation that Plaintiffs and Class Members actually received was \$20,000 to \$30,000 per person per year of service, as estimated by the BBG. Discovery is likely to reveal that the amounts are twice that high.

124. The BBG breached its contractual obligation to compensate Plaintiffs and Class Members as providers of personal services working in the manner of federal employees.

125. The breaches have damaged Plaintiffs and Class Members.

126. Alternatively, and in the absence of contracts or otherwise, the BBG is liable to the Plaintiffs and Class Members under the implied-in-fact contract theory of *quantum meruit*, for the value of the personal services that the BBG knowingly accepted and retained, along with the Plaintiffs' and Class members' costs of performance and a reasonable profit. The minimum measure of the difference between the value of the services and the compensation that they received is estimated by the BBG to be in the range of \$10,000 to \$30,000 per person per year of service. Discovery is likely to show that the actual range is up to twice as large.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Court to certify the class as identified herein, enter judgment against Defendants, and award the following relief:

- a) back pay for damages, including but not limited to benefits, tax contributions, and wages in the approximate amount of \$400 million;
- b) interest, costs, and attorney's fees; and
- c) such other relief as the Court deems just and proper.

Dated: March 7, 2016

Respectfully Submitted,

THEMIS PLLC

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