IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADAM STEELE, ET AL., Plaintiffs, v. **UNITED STATES OF AMERICA**, Defendant.	)	**Civil Action No. 1:14-cv-01523-RCL**

NONPARTY ACCENTURE FEDERAL SERVICES, LLC'S MOTION TO STAY NONPARTY DISCOVERY AGAINST ACCENTURE FEDERAL SERVICES, LLC

Nonparty Accenture Federal Services, LLC ("AFS"), by and through undersigned counsel, respectfully moves this Court for a stay of any nonparty discovery against AFS, including a decision on Plaintiffs' Motion to Compel the Production of Documents from Nonparty AFS, Dkt. No. 101 ("Plaintiffs' Motion to Compel" or "Pls. Mot. to Compel"), until at least such time as document discovery among Plaintiffs and Defendant United States of America ("IRS" or "Government") is complete. The Court has the authority to issue the proposed Order pursuant to Federal Rule of Civil Procedure 26(b), which vests a trial judge with broad authority to dictate the sequence of discovery.

Plaintiffs' Motion to Compel is premature. One week after briefing on the Motion to Compel was complete, Plaintiffs and Defendant filed a Joint Motion for Modification of the Scheduling Order, requesting an "initial" extension of the fact discovery deadline from November 29, 2019 to February 28, 2020, and to "suspend the rest of the schedule." Dkt. No. 107 at 1 (Oct. 31, 2019) ("Joint Motion to Extend" or "Joint Mot. to Extend"). Plaintiffs apparently have received no document discovery from the Government, and therefore, admit they do not know what discovery may be necessary from AFS, if any. In seeking to compel

extraordinary discovery from ***Nonparty*** AFS, Plaintiffs have put the cart before the horse. There is no rational basis upon which to grant Plaintiffs' Motion to Compel at this stage of proceedings, or to require AFS to incur substantial (and unnecessary) cost that even the parties themselves are not incurring. Accordingly, AFS requests that the Court grant this Motion and defer any decision on Plaintiffs' premature Motion to Compel until at least such time as document discovery between Plaintiffs and Defendant – the actual parties in this litigation – is complete.

Pursuant to Local Rule 7(m), counsel for AFS states that it conferred with counsel for Plaintiffs regarding this Motion to Stay Nonparty Discovery on December 2, 2019 via electronic mail. Counsel for Plaintiffs stated that Plaintiffs oppose relief requested herein.

In support of this Motion, AFS states as follows.

STATEMENT OF POINTS AND AUTHORITIES

1. The litigation between Plaintiffs and the IRS involves a class of PTIN preparers who allege that the IRS fee collected for PTINs was, at least in part, improper and impermissible. AFS is not a party to the litigation. *See* 1st Am. Compl., Dkt. No. 41, at ¶¶ 39-50.

2. Plaintiffs filed the operative complaint in this case, the First Amended Complaint, on August 7, 2015. Less than three weeks after filing the First Amended Complaint, on August 26, 2015, Plaintiffs served a nonparty subpoena for the production of documents on AFS, requesting data and documents representing a wide-ranging foray into AFS' internal confidential and proprietary information. *See generally* Dkt. No. 101-1, Pls. Mot. to Compel Ex. 1, Subpoena. Plaintiffs had not received discovery from the Defendant before issuing the Subpoena to AFS, and now, has apparently agreed not to receive any document production from the Government until January 2020. *See* Joint Mot. to Extend at 9 ("On a rolling basis and no later than January 17, 2020, the United States will produce. . .").

3. Pursuant to Federal Rule of Civil Procedure 45, AFS responded to Plaintiffs' Subpoena on September 9, 2015, by serving responses and objections to each request. Pls. Mot. to Compel at 4. In December 2015, discovery was stayed until a decision on dispositive motions was reached. *See id*. After Plaintiffs were successful on a motion for summary judgment in this Court, the Government appealed to the United States Circuit Court for the District of Columbia ("D.C. Circuit"). On March 1, 2019, the D.C. Circuit remanded this matter to this Court for "further proceedings, including an assessment of whether the amount of the PTIN unreasonably exceeds the costs ***to the IRS*** to issue and maintain PTINs." *Montrois v. United States*, 916, F.3d 1056, 1058 (D.C. Cir. 2019) (emphasis added); *see also* Pls. Mot. to Compel at 4.

4. On June 24, 2019, AFS served First Amended Responses and Objections to Plaintiffs' Subpoena. *See generally* Dkt. No. 101-7, Pls. Mot. to Compel Ex. 7. As evidenced by the Amended Responses and Objections, AFS objected to the extremely overbroad and unduly burdensome requests for production. *E.g.* Pls. Mot. to Compel Ex. 7 at General Objection Nos. 6, 9-10, and 17. AFS further objected to Request Nos. 1-13, 15-20, and 23 based upon the *per se* reasonableness of AFS' price pursuant to Federal Acquisition Regulation § 15.403-1, the Prohibition on Cost or Pricing Data, and 10 U.S.C. 2306a. AFS also objected to Plaintiffs' Requests to the extent that the Requests seek highly proprietary business information or trade secrets that are not relevant to Plaintiffs' claims against the IRS. Pls. Mot. to Compel Ex. 7 at Responses to Request Nos. 1-13, 15-20, 23. Several rounds of correspondence and "meet and confers" between Plaintiffs and Nonparty AFS followed in an effort to resolve some of the outstanding Subpoena-related concerns, including on July 5, 2019, July 13, 2019, July 18, 2019, September 24, 2019, and September 27, 2019.

5. On October 1, 2019, Plaintiffs filed their Motion to Compel the Production of Documents against Nonparty AFS seeking the production of a massive amount of highly-sensitive and proprietary internal AFS data that are not relevant to the underlying litigation between Plaintiffs and the IRS. AFS timely filed its Opposition to Plaintiffs' Motion to Compel on October 15, 2019, Dkt No. 103 ("AFS Opposition" or "AFS Opp."), and Plaintiffs filed their Reply in Support of the Motion to Compel on October 22, 2019, Dkt. No. 105. [1]

6. Plaintiffs' Motion to Compel incorrectly argued that AFS' highly-sensitive internal cost and pricing data are relevant to the underlying litigation against the Government to determine, *e.g.*, "what was the IRS charging $50 for," and "what portion of the user fees received by the IRS. . .were for work outside 'the narrowed scope of remaining PTIN-related functions?'" Pls. Mot. to Compel at 9. As AFS previously explained in its Opposition, those questions can only be answered by the Defendant in the litigation, the IRS. *See* AFS Opp. at 11-15.

7. Plaintiffs have now conceded that they seek only "***information uniquely in AFS's control, not data and information that belongs to the government and can be produced by the government***." Pls. Reply in Support of Mot. to Compel at 5 n.2 (emphasis added). That represents a cardinal change from what Plaintiffs requested in their Rule 45 Subpoena to AFS, and further confirms that Plaintiffs are on an impermissible fishing expedition.

8. Then, just over one week after briefing on the Motion to Compel was complete, on October 31, 2019, Plaintiffs and Defendant filed the Joint Motion to Extend, which requests an

[1] Plaintiffs filed a Motion to Extend Time to File the Reply In Support of the Motion to Compel on October 17, 2019, Dkt. No. 104. Though Plaintiffs did not use the extended time, that Motion begs the question – if Plaintiffs are in such dire need for AFS' data, why would Plaintiffs seek to delay the briefing process even further, knowing that AFS has stated that it will not produce documents until the Motion to Compel is decided?

"initial" extension of the fact discovery deadline from November 29, 2019 to February 28, 2020, and to "suspend the rest of the schedule." Joint Mot. to Extend at 1.

9. The Joint Motion to Extend confirms what Nonparty AFS has suspected all along: (1) Plaintiffs' requests are premature in light of the fact that Plaintiff still has not received document discovery from Defendant, and (2) Plaintiffs do not even know what they will receive from Defendant, as negotiations between the Parties are apparently ongoing. *See* Joint Mot. to Extend at 9-10.

10. Moreover, the Joint Motion to Extend acknowledges that, "counsel for the United States drastically underestimated the volume of potentially responsive information as well as the time necessary to review the information in light of significant issues related to privilege, 26 U.S.C. § 6103, ***and vendor information***." *Id*. at 6 (emphasis added). Clearly, neither the Plaintiffs nor the IRS can predict what data may still be "needed" from AFS until the Government has completed its productions, which based on the IRS' own assertions, will include vendor information. *See id*.

11. Indeed, the Government was apparently able to decrease the overall universe from 2,079,000 records to 470,000 records by removing third-party information from the review universe. *See* Joint Mot. to Extend at 7 (noting in a footnote that the 470,000 document total "does not include third-party documents"). Therefore, it appears that the Government removed potentially responsive third-party documents from its review set – presumably to lessen the burden of review and production. It is not clear to Nonparty AFS why any nonparty would be required to produce documents where ***the Defendant has refused to review and produce third-party information in its possession because of burden and expense***.

12. Federal Rule of Civil Procedure 26 "vests the trial judge with broad discretion to tailor discovery narrowly and dictate the sequence of discovery." *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 82 (D.D.C. 2018).

13. When determining whether to compel disclosure during discovery, a district court "first must consider whether the discovery sought is relevant to a party's claim or defense in the underlying litigation. . . ." *BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F. Supp. 3d 347, 356 (D.D.C. 2018).

14. Courts must also review a Rule 45 subpoena for undue burden on the recipient. Several factors are relevant to the question of undue burden, including, "whether discovery sought is 'unreasonably cumulative or duplicative'"; (2) "whether discovery sought 'can be obtained from some other source that is more convenient, less burdensome, or less expensive'"; and (3) "whether the discovery sought is 'proportional to the needs of the case,' taking into account 'the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. . . ." *Id*. at 358 (citing Fed. R. Civ. P. 26(b)(1), (2)(C)).

15. As AFS previously demonstrated in its Opposition to Plaintiffs' Motion to Compel, Plaintiffs have not shown that AFS' highly confidential and sensitive internal cost or pricing data has any relevance to the litigation against the IRS. *See generally* AFS Opp. at 10-15.

16. Now, it is even clearer that Plaintiffs fail under each and every consideration enumerated in *Buzzfeed*. ***First***, it is impossible for Plaintiffs to demonstrate that the discovery requested from AFS is not "unreasonably cumulative or duplicative," because Plaintiffs have not seen any of the data that will be produced by the IRS, and will not even receive the initial production ***of***

the basic unredacted contract documents until early 2020. *See* Joint Mot. to Extend at 10. ***Second***, Plaintiffs cannot demonstrate that there is no less burdensome or less expensive source for the data that it seeks from AFS, because Plaintiffs have no idea what documents Defendant is going to produce. ***Third***, even more egregiously, Plaintiffs apparently agreed with Defendant's approach to impermissibly shift the discovery burden from Defendant to AFS and other nonparties by narrowing the review universe through the removal of least some portion of the third party information in Defendant's possession from Defendant's review and production set. ***Finally***, Plaintiffs cannot demonstrate that the discovery is "proportional to the needs of the case" when even the IRS, *i.e.,* ***the Defendant to the litigation***, which has significantly more stake in the outcome, refuses to review and ultimately produce potentially responsive third-party information in it is possession.

17. The Joint Motion to Extend demonstrates just how little Plaintiffs and Defendant know about the facts that will be required to resolve the underlying litigation, and whether evidence in support of those facts are in Defendant's possession. Plaintiffs and Defendants have not been able to come to an agreement on search terms, and have requested an ***indefinite extension*** of the remaining litigation schedule. *See* Joint Mot. to Extend at 7, 10. It is patently unreasonable that the Plaintiffs, who cannot agree to relevant search terms with the Defendant, *id*. at 7, would attempt to compel the production of documents ***from a nonparty without any legal justification to do so***.

18. In fact, as further evidence that Plaintiffs' Motion to Compel is premature, it is likely that the Government's productions of documents will make Plaintiffs' Motion to Compel entirely moot. As AFS has previously articulated, the only information relevant to Plaintiffs' claim against the IRS is in the IRS' possession. Until the Government makes its productions of

documents and data – including the production of responsive third-party and vendor information that Defendant concedes is in its possession – and Plaintiffs review those productions, it is impossible to know whether any "unique" information is "required" from Nonparty AFS.

19. Plaintiffs should not be permitted to short circuit the proper discovery process by requesting entirely duplicative or wholly irrelevant information from Nonparty AFS in advance of discovery from the IRS.

20. Accordingly, a stay on discovery against AFS, including a determination on Plaintiffs' Motion to Compel is appropriate, because the discovery Plaintiffs receive from IRS could moot, in whole or in part, Plaintiffs discovery requests to AFS.

CONCLUSION

For all of these reasons, Nonparty AFS respectfully requests that the Court grant its Motion to Stay Nonparty Discovery Against AFS and delay any determination on Plaintiffs' Motion to Compel the Production of Documents From Nonparty AFS, Dkt. No. 101, until such time that document discovery between Plaintiffs and Defendant has been completed.

Dated: December 2, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December 2019, I electronically filed the foregoing Nonparty Accenture Federal Services, LLC's Motion to Stay Discovery using the Court's NextGen CM/ECF system, which caused service on all counsel of record.

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