IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Adam Steele, Brittany Montrois, and Joseph Henchman, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. United States of America, *Defendant*.	Case No. 14-cv-01523-RCL

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

A month and a half ago, Accenture Federal Services, LLC ("AFS") opposed Plaintiffs' Motion to Compel Production of Documents from Non-Party Accenture Federal Services, LLC ("MTC"), ECF No. 101, arguing that it should not have to produce any documents. Now, AFS has filed a Motion to Stay Nonparty Discovery ("Motion to Stay"), ECF No. 112, arguing that compliance with Plaintiffs' subpoena (the "AFS Subpoena") should be deferred. Only one thing has changed since AFS opposed Plaintiffs' MTC in October: the parties have filed a Joint Motion for Modification of the Scheduling Order ("Joint Scheduling Motion"), ECF No. 107, seeking an extension of certain deadlines. The Joint Scheduling Motion does not affect AFS and does not provide a basis for a stay of compliance with the AFS Subpoena. AFS's arguments to

the contrary misconstrue representations made by the parties and misrepresent the status of party discovery.

AFS argues that "neither the Plaintiffs nor the IRS can predict what data may still be 'needed' from AFS until the Government has completed its productions," Mot. to Stay ¶ 10, and suggests this date is far in the future, based on the incorrect assumption that "Plaintiffs apparently have received no document discovery from the Government," *id.* at 1. First, in addition to material supplied in 2015, the Government has made two document productions since the parties filed their Joint Scheduling Motion, and Plaintiffs anticipate (based on the Government's representations) receiving multiple additional productions before the mid-January deadline set forth in the Joint Scheduling Motion. Second, the Government has already served discovery responses that identify several categories of information that it cannot produce because they are "exclusively in the possession, custody, or control of Accenture." MTC 3-4 (quoting United States' responses to interrogatories and requests for production); *see also* Resp. No. 20, U.S.' Resps. to Pls.' 1st Set of Reqs. for Admis. (Nov. 6, 2015) ("U.S. Resps."), ECF No. 105-1 (stating Government lacks sufficient knowledge or information to admit or deny request for admission that "Accenture has not allocated time spent or costs incurred between matters that relate exclusively to RTRPs and matters relating to all tax return preparers or matters relating to tax return preparers other than RTRPs"); *id.* at Resp. No. 21 (same for admission that "Accenture has not allocated time spent or costs incurred between matters that relate exclusively to issuance or renewal of PTINs and other matters"); *id.* at Resp. No. 22 (same for admission that "Accenture has not allocated time spent or costs incurred between matters that relate exclusively

to PTIN issuance and matters that relate to PTIN renewal"). There is no reason to delay production of relevant information that Plaintiffs cannot obtain from any source other than AFS.[1]

AFS also wrongly accuses the Government of removing AFS-related documents from its review set as part of its document collection and culling process "to lessen the burden of review and production." Mot. to Stay ¶ 11; *see also id.* ¶ 16 (incorrectly accusing the parties of agreeing "to impermissibly shift the discovery burden from Defendant to AFS and other nonparties by narrowing the review universe through the removal of least [sic] some portion of the third party information in Defendant's possession from Defendant's review and production set"). This mischaracterization of the Government's process relies on a single footnote taken out of context. *See id.* ¶ 11 (quoting footnote that states, in its entirety, "This amount does not include third-party documents."). That footnote simply means that documents produced by third parties will add to the "total volume of potentially responsive material" to be produced in the litigation. Those additional documents to be produced by third parties will have to be reviewed by both the Government and the Plaintiffs. This increased review burden on both parties provides an additional reason for the parties' joint request for an extension. Placing the footnote in context, it becomes clear that the Government was able "to reduce the volume of information needing review" not by removing potentially responsive third-party information from the review set, but by "utiliz[ing] the assisted review, categorization function within the Relativity e-discovery

[1] AFS suggests in its motion that time is somehow not of the essence. *See, e.g.*, Mot. to Stay ¶ 5 n.1. Plaintiffs are seeking to complete discovery as quickly and efficiently as possible. As the parties explained in their Joint Scheduling Motion, the extension proposed by the parties "will focus the parties' resources and ***shorten the amount of time necessary to complete fact discovery***." Joint Scheduling Mot. 10.

software," and by "us[ing] de-duplication functions to remove duplicates from a data set." Joint Scheduling Mot. 7. The parties' expectation remains that the Government will produce relevant, responsive third-party materials that it may have in its possession. This will not eliminate the need for production from AFS, however, because there are several categories of documents "exclusively in the possession, custody, or control of Accenture," as explained above.

The parties' filing of the Joint Scheduling Motion is the only thing that has changed since AFS opposed Plaintiffs' motion to compel in October. There was no basis to stay compliance with the subpoena then (and AFS did not ask this Court to do so), and there is none now. Other than the erroneous assumptions corrected above, AFS offers no reason for the requested stay. The information Plaintiffs seek is still relevant, and any burden imposed by the subpoena has not changed. AFS offers no information to the contrary. Not surprisingly, AFS also offers no legal support for its request. Litigants routinely conduct nonparty discovery concurrently with party discovery. *See* 9A Wright & Miller, Federal Practice and Procedure § 2452 n.11 (3d ed.) (noting Rule 45 subpoenas subject to same deadlines as other discovery).

As Plaintiffs have already explained in their MTC and their Reply in support thereof (ECF No. 105), the information that Plaintiffs seek from AFS relates directly to the central question on remand: whether "the amount of the PTIN fee is out of step with" "the service of providing tax-return preparers a PTIN." *Montrois v. United States*, 916 F.3d 1056, 1063 (D.C. Cir. 2019). Through its contract with the IRS, AFS "establish[ed] and maintain[ed] a system for on-line registration and renewal, user fee collection, and issuance of a unique identifying number for all paid tax return preparers." AFS Contract at FOIA_000032, ECF No. 101-2. Even though AFS is a nonparty, it "has been inextricably linked to the underlying facts of this lawsuit from the

beginning." *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 1:13-cv-1053, 2019 WL 5864595, at *3 (D.D.C. Nov. 8, 2019) (Lamberth, J.); *see also* MTC 2, 8–9 (detailing work required of AFS under contract with IRS). "Given Accenture's role in the PTIN system, the parties anticipate that Accenture will have a substantial volume of responsive documents." Joint Scheduling Mot. 6; *see also* Resp. No. 13, U.S. Resps. (admitting "Accenture has fulfilled its obligations under [the contract]"). This "responsive" information is relevant to Plaintiffs' claims and is therefore relevant for purposes of discovery. *Fairholme*, 2019 WL 5864595, at *3.

AFS also has not presented any new information in support of its argument that the subpoena requests are unduly burdensome. "[T]he undue burden test essentially considers the totality of the circumstances rather than focusing on any one particular factor." *Id.* at *2. The ultimate determination of whether a request creates an undue burden largely depends on the facts of the case. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 407 (D.C. Cir. 1984). When assessing whether a subpoena imposes an undue burden, courts balance any burden on a nonparty against other factors, including whether the information sought can be obtained from another more convenient source, the issues and amount at stake in the litigation, whether the nonparty is interested in the outcome of the litigation, and whether the nonparty was involved in the factual underpinnings of the case. *See Fairholme*, 2019 WL 5864595, at *2-4.

AFS's primary argument for a stay is that Plaintiffs can and should obtain the documents they seek from the Government instead of "Nonparty AFS." As explained above, the Government has agreed to produce responsive, relevant third-party information in its custody or control, but already has told Plaintiffs that certain categories of information are "exclusively in the possession, custody, or control of Accenture." MTC at 3-4 (quoting Answers 2, 4, 15, U.S.'

Answers to Pls.' 1st Set of Interrogs. (Nov. 16, 2015), ECF No. 101-5). That Plaintiffs seek information central to the dispute that can be obtained from no other source weighs in favor of compelling immediate production. *See In re Valeant Pharms. Int'l., Inc., Sec. Litig.*, No. 15-7658, 2019 WL 1578677, at *7 (D.N.J. Apr. 12, 2019) (denying motion to stay third-party discovery because third party's role in allegations meant that "documents from [third party] form an essential part of Class Plaintiffs' discovery and the failure to produce the documents may hinder Class Plaintiffs' discovery efforts as they prepare to depose a number of individuals").[2]

AFS emphasizes its nonparty status, but AFS "is far from a disinterested bystander." *Fairholme*, 2019 WL 5864595, at *4. As a paid contractor with sole responsibility to issue PTINs, it "has been involved with the underlying factual issues in this case from the beginning." *Id.* According to evidence received to date, AFS still has a PTIN-related contract with the IRS. *See* Business Performance Review FY2016–Quarter 4, at USA-000126 (IRS Nov. 4, 2016), attached as Ex. 1 ("The new PTIN registration contract was awarded to the incumbent contractor, Accenture, with an effective date of August 1, 2016. The contract including options is for 5 years."); *see also* Compliance Analyst Desk Guide Version 4.0 at USA-0002568 (IRS June 2019), attached as Ex. 2 (describing the TPPS system as the "PTIN registration system run by Accenture"). Because the outcome of this litigation could impact AFS's "PTIN registration contract," it remains an interested nonparty. When balancing Plaintiffs' need to obtain discovery

[2] Third-party discovery in *Valeant* was initially stayed, but as part of the standard discovery stay statutorily prescribed by the Private Securities Litigation Reform Act ("PSLRA"). A stay of discovery in PSLRA securities cases is the rule, not the exception, as it is in non-PSLRA cases. *See* 15 U.S.C. § 78u-4(b)(3)(B). Thus, the justification for an initial stay of third-party discovery in *Valeant* does not apply here.

from AFS against any burden imposed on interested nonparty AFS, AFS "has not met its 'heavy burden to show that the subpoena should not be enforced,'" *Fairholme*, 2019 WL 5864595, at *3, and has not demonstrated that a stay is appropriate. The Court should deny AFS's motion for a stay.

Respectfully submitted,

/s/ William H. Narwold

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December 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, I caused to be electronically filed Plaintiffs' Opposition to Nonparty Accenture Federal Services, LLC's Motion to Stay Nonparty Discovery Against Accenture Federal Services, LLC ("AFS") through this Court's CM/ECF system. I understand that notice of this filing will be sent to all parties and to AFS by operation of the Court's electronic filing system.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ William H. Narwold
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