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
REPLY IN SUPPORT OF ITS
MOTION TO STAY NONPARTY DISCOVERY

Plaintiffs' Opposition to Nonparty Accenture Federal Services, LLC's ("AFS") Motion to Stay Nonparty Discovery Against AFS, Dkt. No. 113 ("Opposition" or "Opp.") makes the same broad and conclusory arguments that they have made on at least three other occasions—namely, that the overly broad and unduly burdensome document requests issued to AFS in the Rule 45 subpoena are somehow relevant to Plaintiffs' litigation against the United States of America ("Government" or "IRS")—which the Parties acknowledge concerns "whether the amount of the PTIN fee unreasonably exceeds *the costs to the IRS* to issue and maintain PTINs[,]" Dkt. No. 107 at 2—and that the AFS records—which do not pertain to "the costs to the IRS"—must be produced even before the actual parties to this litigation complete their own document discovery. Plaintiffs have not explained ***how*** or ***why*** documents from AFS pertaining to *AFS'* costs (not the IRS') are relevant. Moreover, assuming *arguendo* such information is relevant, Plaintiffs have not explained why the Government, the Defendant in this litigation, cannot and should not produce them or why Plaintiffs should not wait to see what Defendant produces regarding the PTIN contract, before seeking to obtain additional documents from AFS. Indeed, the Parties' Joint Motion for Modification of the Scheduling Order acknowledges that the

Defendant intends to produce "[i]nformation related to Accenture, its contracts with the United States, and its work on the PTIN system" now that an appropriate protective order is in place. Joint Motion for Modification of the Scheduling Order, Dkt. No. 107 ("Joint Motion to Extend"), at 5. Thus, Plaintiffs' Motion to Compel discovery from AFS is at best premature, and, more likely, will be moot.

Accordingly, and for the reasons set forth below, AFS requests that this Court grant AFS' Motion to Stay Discovery, Dkt. No. 112 ("Motion to Stay"), and defer a decision on Plaintiffs' premature Motion to Compel Documents, Dkt. No. 101, until the completion of discovery between the actual parties to this litigation, Plaintiffs and the Government.

I. Plaintiffs' Opposition Does Not Address AFS' Arguments in the Motion to Stay

A. Plaintiffs Do Not Respond to AFS' Arguments that the Discovery Sought in Plaintiffs' Motion to Compel is Not Relevant to the Litigation Against the Government

It is well-settled in this Court that relevance is the threshold issue in deciding a motion to compel. *See BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F. Supp. 3d 347, 356 (D.D.C. 2018) ("[T]he district court first must consider whether the discovery sought is relevant to a party's claim or defense in the underlying litigation, as defined in Rule 26(b)(1)."); *see also* AFS Mot. to Stay at 6. It is also universally accepted that 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); *see also* AFS Mot. to Stay at 6. "Courts test relevance by looking at the law and facts of the case, not simply the expressed desires of a party to see certain information." *United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 36-37 (D.D.C. 2012) (Lamberth, C. J.). Yet here, Plaintiffs have failed to show how the discovery to be compelled from AFS is relevant to their litigation against the Government.

Specifically, Plaintiffs have not shown how AFS' cost or pricing data have any relevance to the questions Plaintiffs have articulated—namely, "whether the amount of the PTIN fee unreasonably exceeds *the costs to the IRS* to issue and maintain PTINs." *See* Joint Mot. to Extend at 2. Instead, Plaintiffs rely on statements and representations made by the Government in the Government's Responses and Objections to Plaintiffs—*not by AFS*—and Plaintiffs' and the Government's own joint assertion that AFS will have "responsive documents" to attempt to convince this Court that the discovery sought by Plaintiffs is "relevant." Pls. Opp. at 2-3, 5; *see also* Joint Mot. to Extend at 8. However those speculative statements, including the self-serving and entirely unsupported statement that "[g]iven Accenture's role in the PTIN system, the parties anticipate that Accenture will have a substantial volume of responsive documents[,]" do not demonstrate relevance. Plaintiffs have not shown how AFS' internal information will shed any light on "*costs to the IRS.*" Plaintiffs should not be permitted to use this Court for their impermissible fishing expedition into AFS' highly proprietary and confidential internal data.

Notably, Plaintiffs' Opposition does not even address the test set forth in *BuzzFeed, Inc.*, because it cannot. Indeed, Plaintiffs' feeble attempt to convince this Court to compel Nonparty AFS to produce (irrelevant) documents fails under every factor of the *BuzzFeed* test, because they have not demonstrated: (1) that the discovery sought to be compelled from AFS is not "unreasonably cumulative or duplicative"; (2) that there is no less burdensome or less expensive source from which the information could be sought; and (3) that the discovery is "proportional to the needs of the case" based on relevance and expense. AFS Mot. to Stay at 6-7 (quoting

BuzzFeed, Inc., 318 F. Supp. 3d at 358).[1] As Plaintiffs have failed to address AFS' arguments, this Court should deem those arguments conceded.

B. Plaintiffs Do Not Demonstrate Any Harm That Would Be Suffered If AFS' Motion is Granted and Discovery Against AFS is Stayed

Plaintiffs' Opposition also fails to identify any harm that Plaintiffs or the Government would suffer, if this Court were to grant AFS' Motion to Stay and defer a decision on Plaintiffs' Motion to Compel. As AFS noted in the Motion to Stay, the Parties filed their Joint Motion to Extend on October 31, 2019, *i.e.*, after the conclusion of the briefing related to Plaintiffs' Motion to Compel. *See* AFS Mot. to Stay at 6-8. AFS was not involved with the drafting, negotiating, or filing of the Joint Motion to Extend, which requests that the "remainder of the [discovery] schedule be *indefinitely suspended* at this time." Joint Mot. to Extend at 10 (emphasis added). The Joint Motion to Extend provides several purported reasons for the request for extension, including the "drastic" underestimations of the amount of potentially responsive data by counsel for the Government, *see id*. at 6, and the fact that the Plaintiffs and the Government could not agree on "an appropriate list" of search terms, *id*. at 7. It is clear that the Parties have a number of issues to negotiate before discovery from the Government will be completed. However, this apparent disagreement between Plaintiffs and the Government cannot mean that AFS should be forced into doing the Parties' work for them by making productions of documents that could be

[1] Plaintiffs assert that AFS has "not presented any new information in support of its argument that the subpoena requests are unduly burdensome." Pls. Opp. at 5. To be clear, AFS does not seek to relitigate the Opposition to Plaintiffs' Motion to Compel. AFS' Motion merely notes that the Joint Motion to Extend provides *additional* support for those arguments. Indeed, by requesting a broad discovery extension for themselves, the Joint Motion to Extend confirms that any decision on the Motion to Compel Nonparty AFS should be deferred until the Parties to the litigation—Plaintiffs and the Government—complete their discovery negotiations and document productions, before burdening AFS with requests for currently unknown and likely irrelevant/duplicative information.

duplicative and/or irrelevant depending on the agreements reached by the Parties and the documents ultimately produced by the Defendant, which the Parties have represented will include "[i]nformation related to Accenture, its contracts with the United States, and its work on the PTIN system." Joint Mot. to Extend at 5.[2]

Indeed, the Joint Motion to Extend asserts that the indefinite extension of the discovery schedule will "allow the parties sufficient time to *narrow* the scope of fact discovery." *Id*. at 9 (emphasis added). The parties should complete their negotiations regarding the scope of discovery *before* demanding expansive production from a nonparty, particularly where, as here, the discovery from Defendant will include information related to the nonparty. *See* AFS' Opp. to Pls. Mot. to Compel, Dkt. No. 103 ("AFS Opp. to Pls. Mot. to Compel), at 17 ("Plaintiffs' Subpoena to AFS contains *twenty-three* document requests, and seeks documents relating to numerous overly-broad topics, such as 'financial information' for the last *ten* years. Mot. Ex. 1 at 11 (seeking discovery from January 1, 2009 until the 'present').") (emphasis in original)). Staying discovery against AFS will not only limit the burden placed on Nonparty AFS, but also on Plaintiffs and the Defendant by decreasing production of potential duplicative data.

II. Because Plaintiffs Cannot Respond to AFS' Substantive Arguments, Plaintiffs Focus on Distinguishable Case Law

Plaintiffs' arguments in their Opposition focus on statements made about AFS *by the Government*, and distinguishable case law. *See* Pls. Opp. at 3-6. Specifically, Plaintiffs spend two pages of their six-page brief discussing a recent decision by this Court, *Fairholme Funds,*

[2] AFS made this same point in its Motion to Stay by quoting Footnote 2 in the Joint Motion to Extend, which states: "This amount does not include third-party documents." *See* AFS Mot. to Stay at 5. In response, Plaintiffs claim that Nonparty AFS takes that statement "out of context," *see* Pls. Opp. at 3, but AFS simply quoted the sentence in its entirety from the jointly drafted footnote.

Inc. v. Federal Housing Finance Agency, No. 1:13-cv-1053-RCL (Nov. 8, 2019), which is distinguishable from this matter.

In *Fairholme Funds*, the plaintiffs moved this Court to enforce a third-party subpoena served on the U.S. Department of the Treasury ("Treasury") to which Treasury objected as unduly burdensome, disproportionate to the needs of the case, and/or seeking documents available from other sources. *Fairholme Funds, Inc. v. Fed. Hous. Fin. Agency*, No. 1:13-cv-1053-RCL, 2019 WL 5864595, at *1 (Nov. 8, 2019) (Lamberth, J.). After first determining that the documents sought met the "threshold for relevance," *i.e.*, the first consideration in any motion to compel, this Court granted the plaintiffs' motion to compel. *Id*. at *2. In granting the motion, this Court reasoned that because Treasury (1) had "been involved with the underlying factual issues in this case from the beginning[,]" (2) had "played an important role in implementing" factual question at issue in the case, and (3) had been involved in a prior related litigation, that Treasury was "far from a disinterested bystander." *Id*. at *4. Moreover, the Court in *Fairholme Funds* stated that disclosure by a nonparty is generally favored "when the nonparty was substantially involved in the underlying transaction and could have anticipated that such transaction could potentially spawn litigation or discovery." *Id*. (quoting *Wells Fargo Bank, N.A. v. Konover*, 259 F.R.D. 206, 207 (D. Conn. 2009) (internal marks omitted). The facts in *Fairholme Funds* are clearly distinguishable from the factual record here.

First, as Nonparty AFS has demonstrated, Plaintiffs have not passed the threshold test of relevance. *See* AFS Opp. to Pls. Mot. to Compel at 10-16. ***Second***, unlike the nonparty in *Fairholme Funds*, AFS has *not* "been involved with the underlying factual issues" from the beginning. AFS submitted a proposal for a competitively-awarded, fixed-price commercial item contract, which it was awarded. AFS did not draft the solicitation; nor did AFS have input into

the eventual requirements under the contract. Nor has AFS been "substantially involved" in the issues that are the subject of the litigation. Indeed, whether Plaintiffs ultimately prevail (or not), AFS is entitled to be paid for the work it performs under the contract pursuant to the contract's terms (*i.e.*, it is entitled to a price for its services that the Government determined was fair and reasonable based on adequate price competition). ***Third***, for this reason, unlike Treasury, AFS is a disinterested bystander, and Plaintiffs' arguments otherwise, *see* Pls. Opp. at 6, confirm Plaintiffs' fundamental misunderstanding of the PTIN contract and the purported "relevance" of the discovery sought to be compelled from AFS. ***Fourth***, and finally, there can be no rational argument that AFS "could have anticipated" that the PTIN solicitation and eventual award could "potentially spawn litigation or discovery" by third parties against the Government a decade later based on "costs to the IRS." Thus, this Court's reasoning in *Fairholme Funds* does not apply here and provides no support for Plaintiffs' Opposition to AFS' request for a stay.

CONCLUSION

For all of these reasons, Nonparty AFS respectfully requests that the Court grant its Motion to Stay Nonparty Discovery Against AFS, Dkt. No. 112, 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 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of December 2019, I electronically filed the foregoing Reply In Support of 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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