IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

NONPARTY ACCENTURE FEDERAL SERVICES, LLC'S
RESPONSE IN OPPOSITION TO
PLAINTIFFS' "MOTION TO SEAL"

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INTRODUCTION

Plaintiffs improperly seek to unseal Accenture Federal Services, LLC's ("AFS") documents that were properly designated as Highly Confidential and Confidential pursuant to the Protective Order entered on December 23, 2019, Dkt. No. 114 (the "Protective Order"), and seek to circumvent the procedures agreed to by the parties and ordered by the Court in the Protective Order. Although Plaintiffs filed a "Motion to Seal" nonparty AFS' Highly Confidential and Confidential documents, which were attached to Plaintiffs' Motion for Summary Judgment, Dkt. Nos. 175 & 176, the name of this filing is misleading. Dkt. No. 177. In reality, the motion seeks to *unseal* the documents, and this Court should not permit an end-around to the Protective Order. Accordingly, pursuant to Local Rule 7(b), AFS submits this Response in Opposition to Plaintiffs' "Motion to Seal."

Nonparty AFS made five productions of documents and data over the course of four months between June and October 2020. In the process, AFS reviewed tens of thousands of documents, and identified confidentiality designations for each and every document. AFS produced nearly *30,000* documents,[1] many of which contain highly confidential, sensitive, and trade secret information, with the understanding that the Protective Order that was negotiated among counsel for Plaintiffs, the Defendant United States Internal Revenue Service ("IRS"), and

[1] Under Contract No. TIRNO-10C-00022, (the "PTIN Contract") and the relevant regulations, and as the prime contractor, AFS is prohibited from disclosing information without the express prior written approval of the IRS. PTIN Contract, § 2.1; *see also* IRSAP 1052.224- 900(d) Disclosure of "Sensitive But Unclassified Information Safeguards." Therefore, AFS made its productions to the IRS who reviewed the productions to ensure that no information protected by privilege was contained therein. AFS is not aware that any documents were withheld by the IRS from the AFS productions.

(Continued...)

AFS, and entered by this Court, would be honored.[2] AFS spent hundreds of thousands of dollars in legal fees and vendor costs, *all while remaining a nonparty to this litigation*. Under the terms of the Protective Order, Plaintiffs could have challenged the confidentiality designations of any individual AFS documents long ago, but they chose not to do so.

Now, nearly eighteen months after AFS made its final production as a third party, Plaintiffs filed the improper "Motion to Seal" requesting that the Court *unseal* AFS' documents. Plaintiffs did not discuss the relief requested in the "Motion to Seal" with AFS. Plaintiffs did not initiate the challenge procedures specifically agreed to in the Protective Order. Plaintiffs did not follow any of the required steps to file a motion to unseal the documents in question. Simply put, Plaintiffs disregarded the carefully negotiated and agreed upon procedures in the Protective Order entered by this Court. That is enough to deny Plaintiffs' "Motion to Seal."

However, even if Plaintiffs' "Motion to Seal" could be considered a proper challenge to AFS' confidentiality designations (it cannot), under the controlling precedent of this Circuit, the documents must remain under seal. In *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), the D.C. Circuit enumerated a six-factor test to determine whether information should be publicly-disclosed under the common law right of access over the objection of another party (or, in this case a *nonparty*). As discussed below, each of the six factors compel this Court to seal the AFS-produced documents.

[2] AFS has no knowledge as to whether the Protective Order was further negotiated with other third parties, but notes that documents produced by third parties are explicitly included in the Protective Order's purview. Protective Order at ¶ 2 ("The restrictions and limitations contained in this Protective Order shall apply to documents and electronically stored information ('ESI') (including all copies, excerpts and summaries thereof) produced, and deposition testimony provided, in connection with third party subpoenas served during the pendency of this case (collectively, 'material').").

Plaintiffs' "Motion to Seal" must be denied and the AFS Confidential and Highly Confidential documents attached to Plaintiffs' Motion for Summary Judgment and any references to the information therein in related filings must be kept under seal.

BACKGROUND

As set forth within the First Amended Complaint, filed on August 7, 2015, Dkt. No. 41 (the "FAC"), the case involves a putative class of PTIN preparers' claims that the IRS fee collected for PTINs was, at least in part, improper and impermissible. *See* FAC at ¶¶ 39-50. AFS presumes that the Court and Parties have a familiarity with the facts underlying Plaintiffs' allegations, and accordingly, will not repeat them here. Instead, AFS focuses on the relevant factual and procedural background as it relates to Nonparty AFS.

I. AFS IS NOT A PARTY IN THIS LITIGATION

AFS is a nonparty to the dispute between the Plaintiffs and the IRS. AFS has no role in the dispute, no financial interest in its outcome, and no authority to interpret the regulations and statutes at issue. Instead, AFS was brought into this litigation by Plaintiffs via a nonparty subpoena seeking broad swaths of highly confidential, proprietary, and competitively sensitive information.

Shortly after filing the Amended Complaint, on August 26, 2015, Plaintiffs served a nonparty subpoena for the production of documents on AFS pursuant to Federal Rule of Civil Procedure 45. *See generally* Ex. 1, Subpoena. Pursuant to Rule 45, AFS responded to Plaintiffs' Subpoena on September 9, 2015, by serving responses and objections to each request. In December 2015, discovery was stayed until the rendering of a decision on dispositive motions. On July 10, 2017, this Court determined that "all fees defendant has charged to [Plaintiffs'] members to issue or renew a PTIN under 26 C.F.R.§ 300.13, including those paid to the third-party vendor are hereby declared unlawful;" and "that the defendant is permanently enjoined

from charging PTIN fees. . . ." *Steele v. United States*, No. 1:14-CV-01523-RCL, 2017 WL 3621747, at *1 (D.D.C. July 10, 2017), *vacated and remanded sub nom. Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019). Defendant then appealed to the United States Court of Appeals for the District of Columbia 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). Shortly after, counsel for Plaintiffs contacted counsel for AFS to discuss AFS' responses to the Subpoena in light of the remand.

After several discussions among counsel for AFS and Plaintiffs, on June 24, 2019, AFS served First Amended Responses and Objections to Plaintiffs' Subpoena in an effort to comply with the amendments to Federal Rule of Civil Procedure 26 that took effect on December 1, 2015. On July 5, 2019, counsel for Plaintiffs sent a letter to counsel for AFS confirming Plaintiffs' disagreements with AFS' Amended Responses and Objections. On July 13, 2019, counsel for AFS responded to Plaintiffs and again explained AFS' position that it would not produce its non-public, confidential, and highly proprietary cost or pricing data in response to Plaintiffs' Subpoena.

II. PLAINTIFFS' MOTION TO COMPEL AFS PRODUCTIONS

Plaintiffs filed a Motion to Compel Production against AFS on October 1, 2019. Dkt. No. 101. AFS opposed the Motion to Compel because the information Plaintiffs sought to compel was highly confidential, competitively sensitive, and could do significant harm to AFS' competitive position if it were disclosed where there was no mechanism to protect that information from improper disclosure. *See, e.g.*, Dkt. No. 103 at 15-16. Plaintiffs dismissed AFS' concerns in their Reply brief by arguing that the Protective Order, which had been

painstakingly negotiated among counsel for Plaintiffs, the IRS, and AFS, but not entered at that point, would protect AFS' information and interests. Dkt. No. 105 at 4-5. Plaintiffs indignantly argued in the Reply to the Motion to Compel:

> AFS's burden argument focuses on the "non-public, competitively sensitive" nature of the information sought, but AFS has not articulated how nine-year-old pricing- and cost-related information is competitively sensitive, or why such information would not be adequately protected by the proposed protective order that it negotiated and to which it agreed. The proposed protective order, ECF No. 102-1, provides for both a "CONFIDENTIAL" designation and a "HIGHLY CONFIDENTIAL" designation. The latter designation may be used for information that a producing party believes in good faith is (1) "trade secret or confidential research, development, or commercial information," and (2) "relates to highly sensitive technical or financial information (such as cost or pricing data, or profit information)." *Id.* ¶ 3(ii). Any information designated as "HIGHLY CONFIDENTIAL," including pricing, profit, or cost information, may not be provided to individuals who are "involved in competitive decision-making for or on behalf of any party to the litigation or any other firm that might gain a competitive advantage from access to the material designated as "HIGHLY CONFIDENTIAL." *Id.* ¶¶ 9(i)(a), (iv)(a), (vi)(c), 11; *see also id.* at 13 (Ex. B). Not only will such information not be publicly disclosed as in the FOIA context, but access among the parties and involved third parties is also limited. ***No competitive harm will occur if AFS produces the information under the proposed protective order, and AFS's baseless claims of competitive harm provide no basis for withholding the information***.

Id. at 5 (emphasis added). This Court granted the Plaintiffs Motion to Compel on April 27, 2020 "for the reasons set forth in plaintiffs' reply memorandum." Dkt. No. 124.

Pursuant to the Court's Order on the Motion to Compel, and in reliance on the Protective Order, AFS produced nearly 30,000 documents as a nonparty in this litigation. AFS also produced a Rule 30(b)(6) corporate deponent and spent significant time and expense preparing a sworn declaration from a corporate witness in lieu of additional deposition testimony. *See* Oliver Decl. Exs. AE & Y. Like AFS' document productions, the deposition transcript and declaration

were reviewed for confidentiality and properly designated, and on a page-by-page basis for the deposition transcript.

III. THE PROTECTIVE ORDER

In parallel with AFS' discussions regarding production with the Plaintiffs, counsel for Plaintiffs, the IRS, and AFS began negotiating a proposed protective order to submit to the Court. After numerous drafts, revisions, and discussions that spanned the course of three months, the IRS and Plaintiffs filed a Joint Motion for Protective Order with the negotiated proposed order attached on October 1, 2019, the same day that the Joint Motion for Protective Order was filed. Dkt. Nos. 102 & 102-1. The Joint Motion notes that discussions began in May 2019, required "multiple drafts" exchanged with third parties including AFS, and that the negotiations were "extensive and time-consuming." Dkt. No. 102 at 2.[3]

The Protective Order provides for two levels of confidentiality designations: Confidential and Highly Confidential. Paragraph 3 provides:

> Subject to the following provisions of this paragraph, parties may designate material as either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL."
>
> (i) A party or third-party may designate material as "CONFIDENTIAL" only when it believes in good faith that the material falls within the protections of Federal Rule of Civil Procedure 26(c), including, but not limited to, "trade secret or confidential research, development, or commercial information." See Fed. R. Civ. P. 26(c)(l)(G). The party or third-party asserting confidentiality bears the burden of establishing compliance with Rule 26(c).

[3] The Joint Motion also notes: "The parties, however, are aware that some Third-Parties still object to certain provisions of the proposed protective order." Joint Motion at 3. Though not explained in the Joint Motion, AFS continued to object to the burdensome procedure in the proposed protective order that required the producing party to file a brief proving that its designations were proper, if a designation was challenged, rather than the more typical procedure of the party challenging designation filing a brief explaining its challenge and the authority under which it sought to remove it. *See* Protective Order at ¶ 13(iii).

> (ii) A party or third-party may designate material as "HIGHLY CONFIDENTIAL" only: (a) when it believes in good faith that the material falls within the protections of Federal Rule of Civil Procedure 26(c), including, but not limited to, "trade secret or confidential research, development, or commercial information," see Fed. R. Civ. P. 26(c)(l)(G); and (b) the material relates to highly sensitive technical or financial information.(such as cost or pricing data; or profit information), or other such . highly sensitive company information that would risk significant competitive harm if publicly disclosed. The party or third-party asserting high confidentiality bears the burden of establishing both compliance with Rule 26(c) and that the material is "HIGHLY CONFIDENTIAL."

Protective Order at ¶ 3(i)-(ii). All of the AFS documents that Plaintiffs now unilaterally seek to unseal are and have been properly designated under the Protective Order.

However, even if Plaintiffs were to argue that any of AFS' documents are not properly designated, the Protective Order sets forth a disputes process that Plaintiffs have not followed. Paragraph 13 requires that any Confidential or Highly Confidential information be filed under seal. *Id*. at ¶ 13. To the extent that a party seeks to use Confidential or Highly Confidential information designated by another party or third party, the Protective Order provides:

> If any party intends to introduce or publicly file any material designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pursuant to this Protective Order, it shall serve a written notice or objection to the designating party no less than fourteen (14) days prior to such introduction or filing. This notice shall specifically identify the material that the party wishes to have introduced or filed, or if objecting to the confidentiality designation, have the designation removed.
>
> (ii) Within fourteen (14) days of receipt of such notice or objection, the designating party:
>
> > (a) shall review the material to which the notice or objection applies, and
> >
> > (b) notify the party in writing whether the designating party will agree to remove the designation, and

> (c) if it will not agree to remove the designation, the designating party will state with specificity its reasons for not agreeing, including but not limited to a declaration· setting forth the party's good faith basis for designating the material as confidential under Federal Rule of Civil Procedure 26(c).
>
> (iii) If an agreement cannot be reached, the designating party may move for a ruling from the Court, designating the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" or for other similar protection, within fourteen (14) days of the expiration of the fourteen (14) day period referenced above.
>
> The material at issue will be treated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" until the Court decides the motion. If the challenge includes more than one thousand (1,000) distinct documents, the designating party may request a reasonable extension of time, which will be granted by the challenging party.

Protective Order at ¶ 13(i)-(iii). Plaintiffs failed to follow this procedure.

On March 17 and 18, 2022 only six (6) days before Plaintiffs' motion for summary judgment deadline, Plaintiffs' counsel emailed counsel for AFS with a list of documents asking whether AFS would be willing to "withdraw or narrow" confidentiality designations on the documents identified. Ex. 2. Plaintiffs' counsel's email assured AFS, "Of course, should Accenture choose to retain its designations, we will file the documents under seal as required by the Protective Order, and will provide you a courtesy copy of the filing." *Id.* There is no reference to Plaintiffs' challenging the designation and no reference to Paragraph 13 of the Protective Order. Plaintiffs' counsel's email only referenced Local Rule 7(m) conferral, but it did not inform AFS that the Plaintiffs were planning to *unseal* the documents, rather than seek to seal them as required by the Protective Order.[4]

[4] AFS notes that even limiting the request to Local Rule 7(m), Plaintiffs still failed to comply with the requirements. Local Rule 7(m) requires a party to confer with the opposing party "in a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement." As is clear from the email chain, Plaintiffs counsel only (Continued...)

In response to Plaintiffs' counsel's email, counsel for AFS prepared proposed redacted versions of the two sets of deposition excerpts Plaintiffs provided and removed the Confidential designation from one document, AFS_00092320. Ex. 2. AFS retained its proper Confidential and Highly Confidential designations on the remaining documents and the redacted portions of the deposition excerpts. Plaintiffs' counsel responded only with "Thanks." *Id*. There have been no additional communications between AFS' and Plaintiffs' counsel since other than to provide copies of the under-seal filings to show what Confidential and Highly Confidential AFS information Plaintiffs relied upon and to provide copies of the "Motion to Seal" and corresponding proposed order.

IV. PLAINTIFFS' "MOTION TO SEAL"

Plaintiffs and the IRS filed competing motions for summary judgment on March 23, 2022. Dkt Nos. 173, 175. Each of the Parties filed numerous attachments, including Confidential and Highly Confidential AFS-produced documents. *E.g.*, Dkt No. 176, Oliver Decl. Exs. A, Y, AB, AD, AE, AH, AK, AM, AO, AP, Dkt. No. 175, Pls. Mot. Summ. J. at 7-9, 19 (containing redacted AFS information); Dkt. No. 175-2, Pls. Statement of Material Facts at 11-15 (same).

When seeking to use Confidential or Highly Confidential information produced by another party (or third party), the Protective Order requires the filing party to file the information under seal to protect the confidentiality. In this Court, a party seeking to seal information must file a motion to seal pursuant to Local Rule 5.1(h) and participate in a good faith meet and confer to resolve any disputes Local Rule 7(m). Plaintiffs did neither. Instead, Plaintiffs filed a motion

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assured AFS counsel that they would file the AFS documents under seal and did not even imply that they would be filing a motion seeking that the Highly Confidential and Confidential AFS information be *unsealed*. *See* Ex. 2. Even under Rule 7(m), Plaintiffs failed to comply.

requesting that the Court improperly unseal AFS' Confidential and Highly Confidential documents, *i.e.*, Plaintiffs requested that this Court deny the relief that it should have been requesting. "Motion to Seal," Dkt. No. 177 at 1. Plaintiffs further did not meet and confer on the relief requested in the "Motion to Seal" with AFS—in fact, AFS only learned that the Plaintiffs were seeking to improperly unseal AFS' information when it received a copy of the filed "Motion to Seal" from Plaintiffs' counsel.

For the purposes of clarity of this Opposition, Plaintiffs improperly seek to unseal the AFS-produced documents identified in the table below.[5]

Bates No./Document	Oliver Decl. Exhibit	Designation
D. Williams Transcript (excerpts)	A	Highly Confidential
AFS Declaration	Y	Highly Confidential
AFS_00113166	AB	Confidential
AFS_00064509	AD	Highly Confidential
A. Dinn Transcript (excerpts)	AE	Highly Confidential
AFS_00138012	AH	Highly Confidential
AFS_00174133	AK	Highly Confidential
AFS_00072661	AM	Highly Confidential
AFS_00080619	AO	Highly Confidential
AFS_00035154	AP	Highly Confidential

At a high-level, the documents consist of (1) an excerpt of AFS' corporate deposition testimony, Oliver Decl. Ex. AE; (2) an excerpt of an IRS deposition disclosing AFS Highly Confidential information, Ex. A; (3) AFS' Highly Confidential Corporate Declaration produced in lieu of deposition testimony, Oliver Decl. Ex. Y; (4) internal AFS spreadsheets depicting profit and loss forecasts and summaries of the day-to-day activities on the PTIN Contract, Oliver Decl. Exs. AD & AB, (5) powerpoint decks summarizing the inner-workings of the PTIN system

[5] This list was created using the sealed documents that Plaintiffs' counsel provided to AFS. To the extent that Plaintiffs seek to unseal any other AFS documents, AFS objects to that disclosure and requests an opportunity to respond to those individual documents as well.

and rough orders of magnitude for costs of additional functionalities, Oliver Decl. Exs. AH, AM, & AP; (6) a copy of an unredacted non-competitively awarded task order to AFS for funding under the PTIN program, Oliver Ex. AO; and (7) an internal AFS summary of the proprietary PTIN system functionality, Oliver Decl. Ex. AK.[6]

The "Motion to Seal" further seeks to unseal the currently-redacted information contained in Plaintiffs' Motion for Summary Judgment that quote or describe designated information; along with portions of Plaintiffs' Statement of Material Facts as to which Plaintiffs Contend There Is No Genuine Issue, which quote or describe designated information. Dkt. No. 177.

None of Plaintiffs' improper attempts to circumvent both the Protective Order and the Local Rules of this Court should be permitted.

ARGUMENT

I. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 26, where "good cause exists," courts have broad discretion to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]" Fed. R. Civ. P. 26(c)(1)(g). In the case at hand, this Court issued the Protective Order pursuant to Rule 26's standard specifically to protect such confidential and trade secret information of both parties and nonparties. *See, e.g.*, Joint Motion for Protective Order at 2; Protective Order at ¶ 3.

[6] In an effort to minimize redactions and publicly-file this Opposition, AFS has only described the information in the documents at a high-level. To the extent the Court wishes for more granular descriptions, AFS is happy to file an amended Opposition under seal.

While judicial records are subject to a presumption of disclosure, "[t]hat presumption may be outweighed in certain cases by competing interests." *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017). Courts in this Circuit employ a "six-factor test to balance the interests presented by a given case." *Id.*; *United States v. Hubbard*, 650 F.2d 293, 316-17 (D.C. Cir. 1980) (setting forth the six factors). Those factors are:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders, 964 F.3d 1121, 1131 (D.C. Cir. 2020) (quoting *Metlife*, 865 F.3d at 665). The weighing of these factors is committed "to the sound discretion of the trial court." *Hubbard*, 650 F.2d at 316-17.

While an entity's status as a nonparty does not shield it from judicial review under the *Hubbard* factors, this Court has previously reviewed the factors in light of nonparties' "unique interests and rights." *McConnell v. Fed. Election Comm'n*, 251 F.Supp.2d 919, 927 (D.D.C. 2003). This Court has also acknowledged that nonparties "clearly have a greater privacy interest than those here by their own volition," particularly when "these individuals or entities were brought into the proceeding by the parties—acquired, it appears, based on assurances of confidentiality." *Id*.

II. THE PROTECTIVE ORDER PROTECTS THESE DOCUMENTS AND INFORMATION AND PLAINTIFFS SHOULD BE REQUIRED TO FOLLOW THE PROCEDURES THEREIN

As an initial matter, as detailed at length above, Plaintiffs, the IRS, and AFS painstakingly negotiated the Protective Order over several months. Plaintiffs cannot now

unilaterally circumvent its requirements because they no longer serve their interests. This Court need only focus on five points to deny Plaintiffs' requested relief:

1. AFS is a third party to this litigation whose documents and information deserve special protections by this Court due to its "unique interests and rights";[7]

2. AFS produced the documents and information based on assurances that the confidentiality of the information would be protected;[8]

3. AFS properly designated the documents that Plaintiffs wrongfully seek to unseal under the Protective Order as either Highly Confidential or Confidential;

4. Plaintiffs never challenged a single AFS confidentiality designation throughout this litigation; and

5. Plaintiffs did not follow the procedure set forth in the Protective Order before filing the improper "Motion to Seal."[9]

Those five points alone should protect AFS' documents and information from the inappropriate disclosure that Plaintiffs seek. If Plaintiffs want to challenge designations, they should begin the processes in the Protective Order, which are intended to give the producing party an opportunity to substantively respond. Unless Plaintiffs follow the procedures agreed upon and ordered by the Court, there is no legitimate request to unseal AFS' properly designated Confidential and Highly Confidential information. As this Court previously held, just because a party wants certain information to be disclosed does not mean that it is entitled to the disclosure

[7] *See McConnell*, 251 F.Supp.2d at 927.

[8] *See id*.

[9] It is also worth noting that this is not the first time that the Plaintiffs have violated the Protective Order's terms when using AFS-produced documents. Pursuant to the Protective Order, a third party who is not present at a deposition must provide prior written approval for any Highly Confidential information to be used at a deposition at which the third party is not present. Protective Order at ¶ 6(ii). Plaintiffs ignored that provision entirely and used AFS Highly Confidential information at one of the IRS depositions and did not even acknowledge its violation of the Protective Order until counsel for AFS wrote a letter to counsel for Plaintiffs. A copy of that letter is attached as Ex. 3.
(Continued...)

of that data. *See United States v. Kellogg Brown & Root Servs., Inc.*, 284 F.R.D. 22, 36-37 (D.D.C. 2012) (Lamberth, C. J.).[10]

Although these facts alone are sufficient to justify this Court's denial of Plaintiffs' request, out of an abundance of caution, AFS also explains why the *Hubbard* factors weigh strongly in favor of nondisclosure.

III. THE *HUBBARD* FACTORS WEIGH STRONGLY AGAINST DISCLOSURE OF AFS HIGHLY CONFIDENTIAL AND CONFIDENTIAL DOCUMENTS AND INFORMATION

The six-factor analysis applied to AFS' documents and AFS' information in Plaintiffs' filings in this case strongly weighs in favor of nondisclosure. The documents were reviewed, designated, and produced during discovery by a nonparty subject to a Rule 45 subpoena from Plaintiffs, who assured AFS that the confidentiality of the documents would be protected both

[10] Under Rule 45, in matters where compliance with a subpoena is required (as is the case here), the requesting party has a duty to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). Where a party fails to comply with this duty, courts must "impose an appropriate sanction," including "reasonable attorney's fees." *Id.*; *see also U.S. ex rel. Strauser v. Stephen L. LaFrance Holdings, Inc.*, No. MC 20-5 (CKK), 2020 WL 2496986, at *5 (D.D.C. May 14, 2020) (citing *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001)). After determining that sanctions, often in the form of expenses and fees, are owed, courts will allocate expenses by considering "(1) whether the non-party has an interest in the outcome of the litigation; (2) whether the non-party can more readily bear the costs of production than the requesting party; and (3) whether the litigation is of public importance." *Strauser*, 2020 WL 2496986, at *5 (citing *Linder*, 251 F.3d at 177).

As demonstrated throughout this Opposition, there is no doubt that Plaintiffs' utter disregard for the agreed-upon Protective Order has resulted in significant and undue expense to nonparty AFS, particularly with regard to expenses associated with this Opposition and to negotiate and prepare the Protective Order (which Plaintiffs now seek to ignore). *See* Background, *supra*, at 6-9 (discussing the "numerous drafts, revisions, and discussions that spanned the course of three months" to prepare Protective Order). Therefore, this Court need only consider how much AFS is entitled to recover in expenses. To that end, AFS, as a nonparty with no interest in the outcome of this litigation, requests this Court require Plaintiffs to pay the entirety of the expenses, including attorneys' fees, associated with the negotiating, drafting, and defending of the parties' Protective Order, including, but not limited to, the expenses incurred to file this Opposition.

via the Protective Order and via their own arguments before this Court on the Motion to Compel. Plaintiffs' Summary Judgment arguments and Statement of Facts that rely on those documents should remain under seal for the same reasons. The fact that Plaintiffs' *want* to disclose AFS' Confidential and Highly Confidential information designated pursuant to the Protective Order is not sufficient to overcome the *Hubbard* analysis. Plaintiffs' "Motion to Seal" addresses the *Hubbard* factors in the most cursory fashion and primarily to fend off the arguments they obviously expected to receive from AFS. *See* "Motion to Seal" at 3-4. That alone is sufficient to deny the relief that Plaintiffs seek. *See Upshaw v. United States*, 754 F.Supp.2d 24, 29 (D.D.C. 2010) (cursory arguments under the *Hubbard* factors "hardly warrant[] close attention"). To find otherwise and disclose AFS' documents at issue would turn the Protective Order and the D.C. Circuit's precedent on its head.

A. Factor 1: There is No Need for Public Access to the Documents At Issue

The purpose of the common-law right of public access to judicial records is not simply to provide individuals with information they may want for their own private purposes. Rather, the right "is a fundamental element of the rule of law" that serves to "maintain[] the integrity and legitimacy of an independent Judicial Branch," by preventing courts from developing "'secret law,' inaccessible to those who are governed by that law." *In re Leopold*, 964 F.3d at 1127 (quoting *Metlife*, 865 F.3d at 663, 674). In other words, "[a]ccess to [judicial] records is intended to ensure the integrity of judicial proceedings by affording the public a means of monitoring judicial misconduct." *Herron v. Fannie Mae*, No. CV 10-943 (RMC), 2016 WL 10677615, at *2 (D.D.C. June 20, 2016) (citation and quotation marks omitted).

None of those considerations are served by disclosing the AFS documents and information at issue here. AFS is not a party to this litigation. According to Plaintiffs, "[i]n *Montrois*, the D.C. Circuit remanded this case back to this Court 'for further proceedings,

including an assessment of whether the amount of the PTIN fee unreasonably exceeds the costs to the IRS to issue and maintain PTINs.'" Pls. Mot. for Summ. J. at 16 (*citing Montrois v. United States*, 916 F.3d 1056 (D.C. Cir. 2019)). That is not an AFS issue. It never has been. Indeed, Plaintiffs apparently agreed with this position when this case was initially litigated and was decided on dispositive motions, with AFS producing no information whatsoever. Whether and to what extent the IRS' regulations permit it to charge tax preparers for PTINs is not a decision over which AFS has ever had decision-making authority or, in fact, any involvement or influence.

AFS is merely the contractor who won the competitively-awarded PTIN contract, and then was brought into this litigation as a nonparty under a Rule 45 subpoena. Being a government contractor does not require disclosure of a company's highly confidential, proprietary, and trade secret information no matter how much the Plaintiffs wish that were true. It is also significant that these documents were produced during discovery because documents obtained through discovery are afforded a higher level of privacy. *See In re McCormick & Co., Inc., Pepper Prod. Mktg. & Sales Pracs. Litig.*, 316 F.Supp.3d 455, 466 (D.D.C. 2018) (stating that discovery documents are "are afforded a stronger presumption of privacy").

As described above, the documents that Plaintiffs seek to disclose include nonparty AFS profit and loss projections, Oliver Decl. Ex. AD, and proposed cost build-up information, Oliver Exs. AM & AP, obtained during discovery. Plaintiffs can make no legitimate argument that such highly confidential (in both the common usage and defined term usage under the Protective Order) information has any relevance to the determination as to whether the IRS charged an excessive fee in contravention of its own regulations.

The first *Hubbard* factor weighs strongly in favor of nondisclosure.

B. Factor 2: The AFS Documents and Information Have Never Been Publicly-Disclosed or Available

Next, there has been no previous public access to the AFS-produced documents or information beyond the very high-level references contained in this Opposition. That fact weighs strongly against disclosure of the AFS-produced documents. *See In re Leopold*, 964 F.3d at 1131 (second *Hubbard* factor considers "the extent of previous public access to the documents"); c*f. Friedman v. Sebelius*, 672 F.Supp.2d 54, 59 (D.D.C. 2009) ("[T]he rationale behind treating prior access as favoring unsealing [is] that it is less harmful to release a document that was once public than to release one that has never been made publicly accessible."). AFS takes precautions to protect its Confidential and Highly Confidential information—as is clear from the investment it made in this matter to ensure that there was a suitable protective order in place before producing any documents or information to the Plaintiffs or IRS. Those precautions include marking documents with proprietary and confidential legends, limiting disclosure to necessary recipients inside and outside of the company, and ensuring that it is never publicized. The disclosure of these documents and information would be the first time it was disclosed publicly and therefore the most harmful. *See id.*

The second *Hubbard* factor weighs strongly in favor of nondisclosure.

C. Factor 3: AFS is a Nonparty and Strenuously Objects to the Disclosure of the Documents and Information

AFS' third-party status is particularly significant in this third *Hubbard* factor. Whether a third party objects to the unsealing of its information and "the strength with which" they do "is significant" to the *Hubbard* analysis. *Hyatt v. Lee*, 251 F.Supp.3d 181, 185 (D.D.C. 2017) (Lamberth, J.). Indeed, the *Hubbard* court itself noted: "We think that where a third party's property and privacy rights are at issue the need for minimizing intrusion is especially great and

the public interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small." *Hubbard*, 650 F.2d at 319.

As is clear by this filing, AFS strongly objects to the disclosure of its highly confidential and competitively-sensitive trade secret information. Plaintiffs have acknowledged that AFS objects to the disclosure of the documents and information. "Motion to Seal" at 1-2.

Thus, this third factor weighs strongly against disclosure.

D. Factor 4: These Documents and Information Represent Internal AFS Trade Secret Information and Therefore AFS Has the Strongest Privacy Interest In Protecting It

"[T]he tradition of access" to court documents is subject to a "time-honored exception[]" in that "courts have refused to permit their files to serve as . . . sources of business information that might harm a litigant's competitive standing." *Hubbard*, 650 F.2d at 315. In other words, "[p]rotecting an entity's 'competitive standing' through retained confidentiality in business information has been recognized as an appropriate justification for restriction of public or press access." *In re McCormick*, 316 F.Supp.3d at 463-64 (quoting *New York v. Microsoft Corp.*, No. 98-cv-1233, 2002 WL 1315804, at *1 (D.D.C. May 8, 2002)); *see also, e.g.*, *Metlife*, 865 F.3d at 671 ("For documents containing sensitive business information and trade secrets, [the fourth and fifth *Hubbard*] factors often weigh in favor of sealing and, as *Hubbard* itself noted, courts commonly permit redaction of that kind of information."); *United States v. Aetna Inc.*, No. 1:16-CV-01494 (JDB), 2016 WL 8739257, at *2 (D.D.C. Dec. 4, 2016) (finding the fourth *Hubbard* factor "weighs strongly in favor of sealing . . . information" that "includes highly sensitive and confidential business information which [the objecting party] has not disclosed publicly"); *G&E Real Estate, Inc. v. McNair*, No. CV 14-418 (CKK), 2020 WL 956469, at *5 (D.D.C. Feb. 27, 2020) (granting motion to seal because applicant "has strong privacy interests in the business information contained in the documents"); *Fiorentine v. Sarton Puerto Rico*,

LLC, No. CV 19-3424 (CKK), 2020 WL 4530610, at *2 (D.D.C. Aug. 6, 2020) (same). This Court has also recognized that the disclosure of information that would allow a competitor to pinpoint a government contractor's pricing or bidding strategy has a risk of substantial harm, even if the contractor does not identify specifically how the information would be used by its competitor. *See Gen. Elec. Co. v. Dep't of Air Force*, 648 F.Supp.2d 95, 104 (D.D.C. 2009).

Sensitive business information and trade secrets of a government contractor are precisely what are at issue here. Each of the documents that Plaintiffs seek to unseal contain highly confidential, trade secret, and competitively-sensitive information of a government contractor that is in a highly-competitive realm where rivals will jump at any opportunity to glean insider knowledge of AFS. As noted above, the documents include profit and loss forecasting, cost build-up information, and detailed explanations of system functionalities that would provide any competitor with certain AFS secret strategy for a competitive proposal.

Plaintiffs seem to forget that the PTIN Contract was competitively-awarded to AFS. There was a 2015 recompete of the contract that was also awarded to AFS. And, most recently, there was a 2021 recompete that was awarded to AFS mere months ago on November 19, 2021. Plaintiffs unfounded implication that the Highly Confidential and Confidential information AFS seeks to protect is old and outdated is simply incorrect. This information is still trade secret information that has real impacts on current proposal strategy and would cause substantial harm to AFS if it were disclosed.[11] *See Gen. Elec.*, 648 F.Supp.2d at 104. Indeed, this Court has stated that the "passage of time" is irrelevant to the sensitive nature of the information. *See Tavoulareas v. Wash. Post Co.*, 111 F.R.D. 653, 661 (D.D.C. 1986). In short, even if the

[11] Many of the documents Plaintiffs seek to unseal also have competitive sensitivity beyond only the PTIN Contract because they reflect broader AFS' practices relating to competitive proposals and pricing analysis.

information is "old," that passage of time does not overcome AFS' interest in protecting its highly-sensitive competitive information.

This fourth *Hubbard* factor weighs strongly against disclosure.

E. Factor 5: The Prejudice to AFS if the Documents are Disclosed is Immense

The fourth and fifth *Hubbard* factors often are analyzed together. *See Metlife*, 865 F.3d at 671. Therefore, for the same reasons explained above, the fifth *Hubbard* factor—"the possibility of prejudice to those opposing disclosure," *In re Leopold*, 964 F.3d at 1131—similarly favors a continued seal. This information was highly competitively sensitive and trade secret information of AFS when it was produced, and the fact that AFS won a recompete of the very same contract just last year demonstrates that it still is. The disclosure of that information would lead to immense prejudice in AFS' highly competitive government contracting world.

Like the fourth factor above, the fifth *Hubbard* factor weighs strongly against disclosure.

F. Factor 6: The Purpose for the Introduction of the Documents Is Unclear, and Cannot Overcome AFS' Interest In Protecting the Documents and information

The sixth and final *Hubbard* factor looks to "the purposes for which the documents were introduced during the judicial proceedings." *In re Leopold*, 964 F.3d at 1131. Here, the documents were introduced in support of Plaintiffs' Motion for Summary Judgment. As a nonparty, AFS has no interest in the outcome of the Motion for Summary Judgment and did not file its own. AFS has no knowledge to be able to determine whether there is any relevance between the AFS documents and the Plaintiffs' arguments. However, as Plaintiffs' made clear that the issue to be decided is whether the *IRS* charged excessive PTINs beyond their statutory and regulatory authority, it is a stretch that *AFS'* documents will help to make those arguments.

Plaintiffs filed upwards of seventy (70) exhibits to their Motion for Summary Judgment—only twelve of which were AFS-designated documents or contained AFS Highly

Confidential and Confidential information. That suggests that Plaintiffs do not intend for the Court to rely heavily on that AFS information if their Motion for Summary Judgment is granted. That also weighs against disclosure. *Cf. In re McCormick*, 316 F.Supp.3d at 466 (stating that information "that is intended to play a crucial role in a court's analysis should be accessible to the public unless an overriding privacy interest controls.").

Moreover, the D.C. Circuit has not recognized any heighted standard of review for class actions. *Id.* at 464. Accordingly, there is nothing to overcome the other five *Hubbard* factors weighing strongly against disclosure of AFS' Highly Confidential and Confidential information.

This sixth *Hubbard* factor also weighs against disclosure.

CONCLUSION

For all of these reasons, Nonparty AFS respectfully requests that the Court deny Plaintiffs' "Motion to Seal" and permanently seal the AFS-produced documents attached to Plaintiffs' Motion for Summary Judgment and any portion of the Motion for Summary Judgment or Statement of Facts Not in Dispute that cites or relies upon the AFS-produced documents.

Dated: April 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2022, I electronically filed the foregoing Nonparty Accenture Federal Services, LLC's Response in Opposition to Plaintiffs' "Motion to Seal" using the Court's NextGen CM/ECF system, which caused service on all counsel of record.

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