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

REPLY IN FURTHER SUPPORT OF
PLAINTIFFS' MOTION TO SEAL (ECF 207)

The IRS responds to Plaintiffs' Motion to Seal, ECF 207, and asks the Court to maintain the seal on Exhibit CR, filed in support of Plaintiffs' summary-judgment reply. ECF 210. Pursuant to the Protective Order, ECF 114, and the Local Rules, Plaintiffs filed a "Motion to Seal," but asked the Court to deny the motion because Exhibit CR does not contain confidential information justifying the sealing. The IRS has not overcome the presumption of public access, and Exhibit CR should be unsealed.

I. Designating Exhibit CR as "CONFIDENTIAL" under the Protective Order does not justify sealing it.

The IRS argues that Exhibit CR should be sealed because it was designated "CONFIDENTIAL" under the Protective Order. ECF 210 at 2 ("The Court has *already ordered* that these documents are to be filed under seal, and thus, because the United States has followed the procedures outlined in the Protective Order, no further justification is needed to keep these documents sealed."). But whether a document is "subject to a protective order during discovery" is "irrelevant" to deciding a motion to seal. *Johnstown Feed & Seed, Inc. v. Cont'l W. Ins. Co.*, 2009 WL 866828, at *2 (D. Colo. Mar. 26, 2009); *United States v. All Assets Held at Bank Julius*

Baer & Co., 520 F. Supp. 3d 71, 78 (D.D.C. 2020) ("[E]ven where a protective order has been issued, a district court 'cannot abdicate its responsibility to oversee the discovery process and determine whether filings should be made available to the public.'" (citation omitted)). As one court explained:

> Documents subject to discovery are not customarily filed with the Court and thus are not available to the public. Consequently, the Court readily enters agreed-upon protective orders that govern the conduct of parties *vis-a-vis* each other, but such orders are not intended to, and indeed do not, purport to weigh the public's right of access. Unlike documents that are privately exchanged between the parties as part of the discovery process, documents filed with the Court for the purpose of obtaining an adjudication *do* invoke the public rights discussed above, and thus, such documents are presumptively available to the public.

Johnstown, 2009 WL 866828, at *2. "Thus, the mere fact that material may be subject to a protective order limiting disclosure does not mean that it must remain shielded from public disclosure." *All Assets*, 520 F. Supp. 3d at 78. The Court still must independently "determine whether the evidence may be filed under seal." *In re Press & Pub.*, 2021 WL 1946378, at *7 (D.D.C. May 14, 2021). The designation under the Protective Order, therefore, does not relieve the IRS of its burden to establish that sealing is appropriate in light of the strong presumption of public access.

II. The IRS has not satisfied its burden of rebutting the presumption of public access in this class action against the government.

"The burden to rebut the presumption of disclosure rests with the objecting party. And, a party seeking to seal court documents must come forward with specific reasons why the record, or any part thereof, should remain under seal." *In re McCormick & Co.,* 316 F. Supp. 3d 455, 464 (D.D.C. 2018) (internal quotations marks and citation omitted); *United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121, 140-41 (D.D.C. 2012) ("[T]he burden is instead the respondent's to

demonstrate the *absence* of a need for public access because the law presumes that the public is entitled to access the contents of judicial proceedings."). "The D.C. Circuit has explained that the common-law right of public access to judicial records is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch." *United States v. Munchel*, 2021 WL 4709745, at *2 (D.D.C Oct. 8, 2021) (Lamberth, J.) (cleaned up); *United States ex rel. Schewizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 172 (D.D.C. 2008) (Lamberth, J.) ("[O]ur Court of Appeals has characterized public access to judicial records as fundamental to a democratic state." (internal quotation marks and citation omitted)). In this case alleging the illegal exaction by the IRS of hundreds of millions of dollars from a class of over a million individuals, the need for public access is heightened. *In re McCormick*, 316 F. Supp. 3d at 464-65 ("[T]he fact that a case is a class action is not irrelevant under *Hubbard*."); *All Assets*, 520 F. Supp. 3d at 81 (the presumption of public access is "particularly strong" where the government is a party); *Hyatt v. Lee*, 251 F. Supp. 3d 181, 184 (D.D.C. 2017) (Lamberth, J.); *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 58 (D.D.C. 2009).

This need for public access is particularly acute where user fees are at issue, because the class members have a concrete interest in accessing this information. As with any user fee issued pursuant to the Independent Offices Appropriations Act, the public has a right to analyze and assess how the fee was determined and what it includes. Agencies are required, in promulgating user fees through regulations, to provide "a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular items." *Nat'l Ass'n of Broads. v. F.C.C.*, 554 F.2d 1118, 1133 (D.C. Cir. 1976); *Engine Mfrs. Ass'n v. EPA*, 20 F.3d 1177, 1181-83 (D.C. Cir. 1994) (requiring the agency to provide a cost justification that was "in intelligible if not plain English"). "By expressly requiring in the IOAA that fees be

prescribed by regulation, Congress evidenced its concern that such fees be communicated in advance to those who would have to bear them, thus permitting them to take intelligent action to avoid undesired consequences." *New Eng. Power Co. v. U.S. Nuclear Regul. Comm'n*, 683 F.2d 12, 16 (1st Cir. 1982). Here, in violation of the IOAA, the IRS did not include the Accenture portion of the PTIN fee in any regulation, and now seeks (again) to conceal from the public information about the basis of the Accenture portion of the fee.

Exhibit CR is an IRS contract with Accenture for Accenture's work on behalf of the Return Preparer Office. This document is highly relevant to determining whether the PTIN fee "exceeds the costs to the IRS to issue and maintain PTINs." *Montrois v. United States*, 916 F.3d 1056, 1058 (D.C. Cir. 2019). As Plaintiffs explained in their motion to compel briefing, "[t]he complaint challenges the entire PTIN fee return preparers were required to pay including the portion paid to AFS." ECF 105 at 2; *see also* ECF 82 at 1 ("[T]he PTIN fee is comprised of an amount payable to the Internal Revenue Service and an amount payable to a third-party vendor, which processes initial and renewal PTIN applications."). The Accenture contracts are particularly critical to the litigation because, as the vendor tasked with "administer[ing] the application and renewal process," Accenture issued the PTINs and maintained the PTIN database. *User Fees Relating to Enrollment and Preparer Tax Identification Numbers*, 75 Fed. Reg. 60,316, 60,319 (Sept. 30, 2010); ECF 177-30 ¶ 75. The IRS concedes the relevance of the Accenture fee, acknowledging that Plaintiffs can challenge "whether the product or service for which the IRS contracted is a direct or indirect cost of the PTIN Program that can be charged consistent with the IOAA and OMB Circular A-25." IRS Opp. Br., ECF 183 at 28.

The IRS has previously stated that it "has only designated documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL in an attempt to respect third party designations as the IRS and

third parties often produced duplicate or substantially similar documents. The United States has no objection to lifting these designations so long as the third parties have no objection." ECF 181 at 2-3. The IRS has not provided any justification for sealing Exhibit CR, apart from stating that it was properly designated under the Protective Order. This is far from sufficient under *Hubbard* and the public, especially the return preparers who are forced to pay the PTIN user fee, is entitled to this information. *TIG Ins. Co. v. Firemen's Ins. Co.*, 718 F. Supp. 2d. 90, 95 (D.D.C. 2010) (finding that a conclusory claim of confidentiality was "not sufficient to properly evaluate the instant motion under the six-part balancing test articulated by this Circuit.").

Given the presumption of public access, the user fees at issue, the nature of the litigation, the relevance of the document, and the lack of commercial sensitivity, Exhibit CR should be unsealed.

For the reasons set forth in Plaintiffs' Motion and this Reply, the Court should order Exhibit CR unsealed.

Dated: July 18, 2022

Respectfully submitted,

/s/ William H. Narwold
MOTLEY RICE LLC
William H. Narwold
bnarwold@motleyrice.com
DC Bar No. 502352
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103
Telephone: (860) 882-1676
Facsimile: (860) 882-1682

MOTLEY RICE LLC
Meghan S.B. Oliver
moliver@motleyrice.com
Charlotte Loper

cloper@motleyrice.com
Ebony Bobbitt
ebobbitt@motleyrice.com
28 Bridgeside Boulevard
Mount Pleasant, SC 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450

Class Counsel

LAW OFFICE OF ALLEN BUCKLEY LLC
Allen Buckley
ab@allenbuckleylaw.com
2727 Paces Ferry Road, Suite 750
Atlanta, GA 30339
Telephone: (678) 981-4689
Facsimile: (855) 243-0006

GUPTA WESSLER PLLC
Deepak Gupta, Esq.
deepak@guptawessler.com
Jonathan E. Taylor
jon@guptawessler.com
1735 20th Street, NW
Washington, DC 20009
Telephone: (202) 888-1741
Facsimile: (202) 888-7792
Facsimile: (202) 888-7792

CAPLIN & DRYSDALE, CHARTERED
Christopher S. Rizek, Esq.
crizek@capdale.com
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
Telephone: (202) 862-8852
Facsimile: (202) 429-3301

Additional Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2022 I electronically filed this Reply in Further Support of Plaintiffs' Motion to Seal. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

Dated: July 18, 2022

/s/ William H. Narwold
William H. Narwold