IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. **WMN05CV1297**
	)	
JOHN BAPTIST KOTMAIR, JR., et al.,	)	
	)	
	)	
Defendants.	)	

DEFENDANT SAVE-A-PATRIOT FELLOWSHIP'S MOTION TO STRIKE UNITED STATES' REPLY TO SAPF'S OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Defendant Save-A-Patriot Fellowship moves this Court to strike portions of the United States' "reply" to SAPF's opposition to the United States' motion for summary judgment, for the reasons set forth below.

Defendant SAPF specifically objects to the introduction of new evidence and affidavits which are beyond the issues raised in Plaintiff's motion for summary judgment and Defendant's opposition to the same. This new matter is beyond the scope of what is allowable in a reply. It was not introduced for *rebuttal purposes, but rather to expand Plaintiff's original allegations, and to supply* what was previously lacking in its motions. In other words, the government is still attempting to improperly amend its complaint by alleging new "facts" via affidavit, just as it did in its motion for summary judgment.[1]

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[1] *This impropriety was previously addressed at length in Defendant SAPF's opposition to United States* motion for summary judgment, Docket 54, pages 4–5.

Furthermore, the government is doing this at a stage in which it is well aware Defendant is normally barred from rebuttal.

Since any attempt to amend a complaint via affidavit is violative of the Federal Rules of Civil Procedure,[2] Defendant SAPF prays this Court strike from the record all new allegations and evidence introduced, identified *infra*, including the declarations of the persons identified *infra*. Defendant also objects to the legal implications Plaintiff attempts to draw from the new matter, and moves this Court, if it does not strike the new matter, to grant leave to Defendant to file a surreply, or in the alternative, to conduct a hearing to try all facts raised in the affidavits and deemed pertinent by this Court.

BACKGROUND

On June 19, 2006, the United States moved for summary judgment in this case with respect to both Defendants. (Docket 42). Defendant SAPF's response in opposition was filed July 7, 2006 (Docket 54). Plaintiff filed a reply to Defendant SAPF's opposition on July 21, 2006 (Docket 62); this reply improperly offers new documents and new declarations.

ARGUMENT

Declarations and exhibits fail as admissible evidence for numerous reasons

The affidavits introduced via Plaintiff's reply are insufficient for numerous reasons. Although each declaration will be detailed *infra*, the affidavits fail first and foremost because they are not confined to rebuttal, but present new evidence never before seen in this case. Many of the statements are also not briefed in Plaintiff's reply.

As discussed in Defendant's opposition to the government's motion for summary judgment, Defendant objected to all new allegations raised via declaration and in violation of the Federal Rules of

[2] *Miller v. Gain Financial, Inc.*, 995 F. 2d 706 (App. 7th Cir. 1993).

Civil Procedure 15(a).[3] In its reply, Plaintiff is now attempting to bolster the new allegations it raised with even more untimely introduced matter, and such matter should be struck for the very reasons Defendant set forth in its opposition. These include allegations and evidence relative to: (a) Defendant Kotmair's representative status before the Internal Revenue Service; (b) the "Affidavit of Revocation and Rescission" and the "Statement of Citizenship," their purpose(s) and the statements SAPF makes about them; (c) allegations that Defendant "directs" members to file complaints in District Court or in Bankruptcy Court "in order to prevent collection"; and (d) allegations that members "rely" on materials from SAPF to form their beliefs.

Further, Plaintiff has now improperly raised, via declarations attached to its reply, yet two more allegations: (a) that Defendant advises members "not to report income earned"[4] and (b) that the Defendant somehow assists or advises in the filing of "zero returns" by members.[5]

The new matter which should be struck for various specific reasons, outlined in detail below, is included in every declaration Plaintiff introduced with its reply, and in the majority of the exhibits also introduced. Each declaration will be discussed in turn.

1) Declaration of Gary Metcalfe. This declaration, presumably introduced to overcome the defects of Agent Rowe's first declaration (Docket 43), reiterates allegations introduced by Rowe and includes some entirely new allegations. It is most telling that Plaintiff only references Metcalfe's ¶5–7 in its brief; these paragraphs state that SAPF sends letters to the IRS signed by Kotmair, that the Ogden service center collected over 800 letters, and that each protest letter says the same two things, "to the best of [Metcalfe's] recollection." The letters themselves are the best evidence of their content, and

[3] Docket 54, pages 4–5.
[4] See Metcalfe's declaration, ¶4.
[5] See Rowe's second declaration, ¶26, Plaintiff's reply, page 11.

Metcalfe's opinions about them should be disregarded. But even more importantly, no other assertions made by Metcalfe are presented in the reply brief. Thus ¶4 and ¶¶8–14 should be struck by the Court on the ground of irrelevance.

There are only two *factual* statements in the entire declaration which are directly relevant to the original complaint: ¶5, relating to the costs of the protest letters, and ¶6, that the IRS service center in Oregon collected letters signed by Mr. Kotmair.

All other statements are generalized and utterly unsupported conclusory allegations on the part of Agent Metcalfe, and should be disregarded or stricken. These specifically include: (a) at ¶4, that SAPF "advises SAPF customers not to report income earned while working in the United States"; (b) at ¶5, that Kotmair and SAPF "promote a tax-fraud scheme that involves preparing protest letters for submission to the IRS … "; (c) at ¶11, that Kotmair "is not authorized to represent individuals regarding their personal income tax liabilities …"; (d) at ¶12, that SAPF prepares documents "purporting to revoke an individual's application for their Social Security number, *in order to discontinue the withholding of income and employment taxes*." [emphasis added]; and (e) at ¶ 13, that the "Affidavit of Revocation" and "Statement of Citizenship" are "part of the scheme."

Affidavits submitted on summary judgment must contain admissible evidence and be based on personal knowledge. See *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954 (App. 4th Cir. 1996). A court "may therefore strike portions of an affidavit that are not based upon the affiant's personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements." *Cox v. County of Prince William,* 249 F.3d 295 (App. 4th Cir., 2001). This was also recognized by Plaintiff's

counsel, when, during Metcalfe's deposition, he stated that Metcalfe could only testify as to facts, or what was written, but that he could not testify as to conclusions.[6]

Moreover, Metcalfe's declaration contains contradictory testimony, and is therefore not credible. Metcalfe states, at ¶8, "I did not research the arguments stated in the protest letters ... because these arguments are frivolous." In addition to thus admitting that he has no basis on which to determine whether the statements in the protest letters are false (or even frivolous), Metcalfe directly contradicts his position that he did not research the arguments by his statements at ¶9 and ¶14 that he "found numerous Tax Court cases stating these arguments were frivolous," and that he "identified these same arguments in a document published by the IRS titled 'The Truth About Frivolous Arguments.' "[7] Obviously, in order to make such statements, Metcalfe would have had to conduct at least a minimal threshold of research.

In ¶13, Metcalfe states that "as part of the scheme, SAPF sells to customers an 'Affidavit of Revocation'..." As Defendant has already pointed out to this court, the government did not present any such document in its motion for summary judgment,[8] nor at Mr. Kotmair's deposition.[9] Yet suddenly, at this extremely late date, it presents a copy of an "Affidavit" apparently signed by Nicholas Taflan (see *infra*). Notably, Metcalfe retired in 2005.[10] Plaintiff's counsel received Taflan's first declaration June 19, 2006.[11] Even at that date, Taflan's declaration contained no hint of the "Affidavit of Revocation and

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[6] See Exhibit 3, Metcalfe's deposition, page 53:1-24.
[7] Whether or not Metcalfe is referring to arguments in the letters or arguments he is claiming are present within the "Affidavit of Revocation" and "Statement of Citizenship" is difficult to tell from the arrangement of the declaration's paragraphs.
[8] See SAPF oppositon to United States motion for summary judgment, Docket 54, page 25.
[9] See Kotmair deposition, generally, Exhibits 43A-D of Docket 44 (Newman's Declaration, Plaintiff's motion for summary judgment) to confirm.
[10] See Metcalfe declaration, ¶1.
[11] See Newman's second declaration, ¶12.

Rescission" and this document was only supplied with his second declaration on July 18, 2006. Thus, the question arises whether Metcalfe ever saw such an "Affidavit" during the time of his investigation. It appears highly likely that he did not, and it is not credible that he had "personal knowledge" of such document in order to form his conclusion that it is part of a "tax-fraud" scheme.[12] His conclusory statement that the purpose of "documents purporting to revoke an individual's application for their Social Security number" is to "discontinue the withholding of income and employment taxes" is likewise incredible, and is unsupported by any facts or exhibits whatsoever. Metcalfe doesn't even bother to describe or identify said "documents"—it is impossible to understand to what he refers. He also fails to describe how these "documents" are claimed to operate in order to "discontinue the withholding." Such generalized and/or conclusory statements are not admissible as evidence, see *supra.*

Finally, Metcalfe's conclusion that protest letters written by Defendant Kotmair are "frivolous" *per se* is irrelevant to the actual allegations of the complaint.[13] He states no facts which remotely connect the letters to any "tax fraud" or violations of § 6700 or § 6701. Finally, whether they are "frivolous" is not germane, since Plaintiff admits the letters are not in violation of § 6701.[14]

2) The **Declaration of Camille Nagy** exhibits new documents—never before introduced in this case, nor listed or produced by Plaintiff during discovery—including a letter purporting to be from Tax Freedom 101, and what appear to be monthly statements and membership assistance requests with

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[12] The necessary factors for "tax-fraud" were discussed in SAPF's motion for summary judgment, see Docket 38, pages 27-28.

[13] See Complaint, ¶ 36 and 42: "Defendants have reason to believe that ... if the IRS relied on [the "frivolous" letters] it would result in understatements of tax liabilities"; "Defendants substantially interfere with the administration of the internal revenue laws by sending frivolous letters."

[14] See Docket 54, page 18. In fact, Plaintiff has never *shown* that the letters contain frivolous arguments, it has simply *labeled* them repeatedly as "frivolous." Further, Metcalfe testified in his deposition that the letters were "disregarded," so they fail to obstruct or hinder the IRS. As for the allegation that they are

handwritten notations. The letter from Tax Freedom 101 is not addressed to anyone, and the monthly statements and assistance requests have all contact and identifying information utterly redacted, therefore the documents themselves do not support her statements about them.

The fiduciary of Save-A-Patriot, John Kotmair, Jr., has supplied sworn testimony by affidavit that Camille Nagy did not join Save-A-Patriot Fellowship until the year 2003,[15] and that Tax Freedom 101 is not controlled by Save-A-Patriot Fellowship.[16] Nothing in Camille Nagy's declaration rebuts that sworn testimony, yet it appears from the monthly statements' dates that they are intended to *imply* that Camille Nagy was a member of Save-A-Patriot before the year 2003. Since she was not, it is likely that the non-redacted originals would reveal a different name than hers. Likewise, the inclusion of the generic Tax Freedom 101 letter appears intended to *imply* that Tax Freedom 101 was controlled by SAPF,[17] and does nothing to rebut previously sworn statements. Finally, because this declaration and documents are immaterial to the allegations of the complaint, they should be struck.

Moreover, Camille Nagy states in ¶5 that she signed a Patriot Defense Fellowship (PDF) agreement that she "would reimburse Save-A-Patriot Fellowship members who had income tax liabilities or were incarcerated for tax crimes." However, the PDF agreement (Exhibit 37 of Rowe's declaration), states on page one that "[c]overage ... is extended to criminal *defense* in tax cases only ...", "toward trial expenses" and "any appeal." Since this is only for reimbursing actual legal costs of defending against prosecution, Camille Nagy's statement is incredible. It does not even comport with Plaintiff's own exhibits, and should be struck (along with all other statements relative to it).

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part of a "tax-fraud scheme," neither Plaintiff, nor Metcalfe in his declaration, have particularized this allegation nor alleged any manner in which such scheme operates.

[15] See Docket 54, Exhibit 1, (Kotmair's Affidavit), ¶58.

[16] Docket 38, Exhibit 19, (Kotmair's Affidavit), ¶4.

Finally, it is a false statement: Camille Nagy has never been a member of the Patriot Defense Fellowship.[18]

3) The **Declaration of Joseph Nagy** exhibits new documents—never before introduced in this case, nor listed or produced by Plaintiff during discovery—including a copy of a postal money order receipt which has no indication of who purchased it nor to whom it was sent, various requests for payment, and case file reminders. According to the declaration, virtually all of the requests for payment pertain to matters involving the California Franchise Tax Board (i.e., state income taxes). In addition, two of them indicate on their face that they pertain to Camille Nagy, not to Joseph Nagy, as he states in his declaration. Regarding the case file reminders, Nagy alleges in his declaration that the case file reminders say that he "*should* purchase and send" various notices to the IRS. Contrary to his allegation, the exhibits referenced in his declaration merely say things such as: "I received your recent request that case development work be done," "please send payment," and "letters needed to keep your case current" or "letters which can be sent to the IRS."

It is plain that statements and documents pertinent to letters sent to the California Franchise Tax Board (¶¶ 7-11 and Exhibits 1-5) are concurrently *impertinent* to the seeking of an injunction under the federal Internal Revenue Code; therefore, these ought to be stricken from the record. In addition, the implied allegation that SAPF informs members that they "should" send letters to the IRS forms no part of the complaint. Nor is it conceivable that, *arguendo*, telling someone they "should" have letters sent to the IRS—for any amount of payment requested—is in itself pertinent to "tax-fraud" or violations under IRC §§ 6700 or 6701, or any other laws under the internal revenue code. The only matter in which such

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[17] It must be noted that Tax Freedom 101 no longer exists; since the website was taken down in 2005, any allegations or implications regarding it merely beat a dead horse.
[18] See Exhibit 2, Kotmair's affidavit, ¶5.

allegation might be pertinent is a case in which a member considers *themselves* defrauded—by sending in payment for a letter not written, or being misled as to what such letter would say, etc. No such complaint is before this court. Therefore, all of this material should be stricken on the grounds of impertinence.

Moreover, Joseph Nagy states in ¶6 that "according to the agreement for the Patriot Defense Fellowship, if I was incarcerated for a tax crime, my wife was expected to receive payments from other Save-a-Patriot members." However, as noted *supra*, the PDF only covers a person's actual legal costs of *defending* themselves against prosecution. Joseph Nagy's statement is incredible; it does not even comport with Plaintiff's own exhibits, and should be struck, along with all other statements relative to it. It is also a false statement: Joseph Nagy has never been a member of the Patriot Defense Fellowship.[19]

Finally, in ¶ 7, 11, 13, and 14, Nagy prefaces statements made about the contents of letters not in evidence with "to the best of my recollection." All of these statements are highly suspect, since he has not provided copies of the letters, and vague descriptions of what he might remember about them are not the best evidence. Since there is no evidence to support these descriptions, they should be struck. Further, since Nagy misrepresents the case file reminders—which *are* attached as exhibits (see *supra*)—there is no reason to believe that he is faithfully representing something *not* in evidence.

Pursuant to the Federal Rules of Evidence 401, proffered evidence must also be relevant to prove a *proposition* that *is itself* of consequence to the determination of the action, *i.e.*, the proposition must be material to the lawsuit.[20] Since Nagy's vague descriptions of letters not in evidence, whether true or not, have not even been presented in Plaintiff's reply brief as support for any proposition—nor has Plaintiff made any showing that they are connected to violations under §6700 or §6701—it is self-evident that

[19] See Exhibit 2, Kotmair's affidavit, ¶4.

these statements should be excluded from the Court's consideration. In fact, the only paragraphs referenced in the reply brief are Joseph Nagy's ¶¶3-6; it is thus self-evident that ¶¶7–14 are likewise irrelevant, and should be excluded.

4) The **Second Declaration of Joan Rowe** includes newly introduced documents: (a) Exhibits 38–39, which she terms "Privacy Act Requests" signed by John B. Kotmair, Jr. These are not privacy act requests; if the Court examines them, it will see they are actually letters to the Field Director of Compliance Services of the Ogden IRS Center, regarding the authentication of the documents relied upon by the IRS in determining a deficiency; (b) Exhibits 40–42 and 44–47, which contain IRS correspondence regarding SAPF members and responses to the same signed by John B. Kotmair, Jr.; (c) Exhibit 48, a "zero return" for the year 1998 purportedly filed by Wesley Sherwood. Ms. Rowe lays no foundation for how she obtained any of the documents which are attached as exhibits.

The documents Rowe misrepresents as "Privacy Act Requests" are not, in fact, such requests. In its reply, Plaintiff further misrepresents these letters, on page 9, as *seeking* the "source" of the income and "other non-existent documents," when the letters actually state that the disclosure office has not provided any "authenticated documents"[21] regarding the source of income, and conclude that the only documents the IRS relied on to establish the source were transcripts. Since it is self-evident that these letters are not FOIA requests, all references to them as such should be struck.

With regard to all the correspondence of Exhibits 40–42 and 44–47: these documents are all newly introduced, and are not presented or argued in Plaintiff's brief as evidence for anything, from which it may appropriately be inferred that they are either redundant or immaterial (See *supra*,

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[20] *U.S. v. Fountain,* 2 F.3rd 656, 667 (App. 6th Cir. 1993).
[21] That is, signed documents (under penalty of perjury) which establish the amount and source of income.

discussion of Federal Rules of Evidence 401). They should be stricken from the record, and Rowe's statements regarding them as well.

Finally, Rowe's Exhibit 48, which consists of a "zero return" and attachments for 1998, signed by Wesley Sherwood, should be struck because it, and the argument associated with it, is newly introduced beyond the scope of a reply. In addition, Rowe states in ¶26 that the "SAPF member attached to his return a Form W-2 indicating that he received $50,361 of wage income in 1998." The W-2 Form to which she refers to has all identifying information redacted; therefore, it does not support her statement. Because these documents are immaterial to the complaint and contrary to the government's previously established facts, they should be struck.

Plaintiff uses Exhibit 48 in a jumbled attempt to resurrect its allegation that SAPF is in violation of §6701.[22] Plaintiff conflates its contention that "SAPF's claim is that their customers cannot understate anything by reporting nothing"—something that has never been claimed by SAPF at any time[23]—with the newest allegation, that SAPF "suggest[s]" its members "report 'nothing' or a zero []amount ...". Next, Plaintiff attempts to support this by stating that "[SAPF's] customers have filed returns reporting all zeroes," offering Exhibit 48 as evidence. Of course, this Court may take judicial notice that individuals make their own decisions and take independent action (and SAPF members are no exception). Further, §6701 penalizes a person who "aids or assists in, procures, or advises with respect to, the *preparation or presentation of a return* ..." [emphasis added]. Since Rowe has not concomitantly introduced any evidence to support any claim that SAPF so assisted or advised Wesley Sherwood in the filing of the "zero return,"—nor would there be any opportunity to rebut such claim even if she had—the

[22] Page 11 of Plaintiff's reply, Docket 62.
[23] SAPF did, however, demonstrate in its motion for summary judgment what the term "understatement of a liability" necessarily means.

"zero return" and all argument drawn from it should be struck. Finally, Wesley Sherwood was not a member of SAPF at the time the 1998 "zero return" was filed,[24] so it should also be struck on the ground of impertinence.

5) The **Declaration of Nicholas Taflan** exhibits new documents—never before introduced in this case, nor listed or produced by Plaintiff during discovery—and includes statements to the effect that SAPF "directed" him to do certain things, or that he "relied on" materials supplied by Save-A-Patriot, as well as the first introduction of a copy of an "Affidavit of Revocation and Rescission," (signed in 1996, well before the cause of action before this Court), documents he filed with the United States District Court of the Southern District of Ohio, and copies of bills received for paralegal services.

Paragraphs 4–12 of the declaration, and their related exhibits, concern a Collection Due Process Hearing—an administrative remedy prescribed by Congress in IRC §§ 6320 and 6330—which Taflan requested as the law states is his right. Since he was denied the opportunity to have the requisite hearing, he filed a complaint against the IRS employees responsible for denying him a Congressionally-established remedy, and thereby his constitutional right to due process.[25] Since the only allegations in the complaint filed against SAPF regarding court filings charge that their purpose is to "obstruct IRS collection efforts" or to "understate customers' tax liabilities,"[26] these documents and declarations concerning the securing of a legal right have nothing to do with the allegations in the complaint. Such material, being both improperly brought before this court—as it would be an expansion of the pleadings—and impertinent to the charges of the complaint, should be struck. Moreover, Taflan's

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[24] See Exhibit 2, Kotmair's affidavit, ¶6. See also Docket 54, Exhibit 1 (Kotmair's affidavit), IR policy agreement, ¶9.11 (Exhibit A).

[25] The Court may take judicial notice that the complaint Taflan filed does not hinder the IRS from collecting the amount it claims is due in any way, since it is in the nature of a mandamus, requesting the court to order the hearing to be held, but not staying the collection actions.

statement that he was "directed" by Save-a-Patriot would indicate that *his* decision to file a complaint was made by someone else, but he has provided no support for such contention.[27] Moreover, a Court cannot enjoin citizens from bringing suits, or assisting others in bringing suits, in courts of law in this land. It is their right, secured by the Constitution, to pay the filing fee and to have due process, and the courts are certainly competent to handle lawsuits they consider frivolous. There is nothing in IRC § 7408 or § 7402, being related to controversies that arise under the *tax revenue laws*, that would convey any power to a court to enjoin citizens from exercising their constitutional right of access to the courts and their right to due process. Therefore, Taflan's entire "filing" is immaterial to the complaint, and should be struck.

Paragraphs 13–16 contain additional statements and purported bills regarding Taflan's bankruptcy filing in 2003. With regard to the matter of the filing of bankruptcy petitions, Plaintiff states, on page 9 of its "reply":

> "The only remaining disputed fact—that Mr. Taflan's bankruptcy petition was prepared by someone other than SAPF,—would not alter the outcome of this case, and is therefore not material."

A key component of the charges laid against SAPF regarding bankruptcy petitions was, naturally, that SAPF prepares them. Therefore, Plaintiff's statement that this "disputed fact … would not alter the outcome of this case" is a conspicuous admission that bankruptcy petitions fall outside the

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[26] See ¶¶ 20, 37, and 42 of the Complaint.

[27] Plaintiff itself, in fact, has provided ample evidence that Taflan's beliefs are his own. Exhibit 14 of Taflan's declaration (Docket 48), submitted with Plaintiff's motion for summary judgment, contains documents prepared by Taflan. One document, the "Debtor's fact sheet on their requirement to file returns, presented to the Court at the January 13, 2004 hearing (Exhibit K)," is handwritten by Taflan. A transcript of the hearing, and a typed statement by Taflan which he presented himself, are also part of Taflan's Exhibit 14. For the Court's convenience, these statements and a portion of the hearing transcript—which clearly shows that Taflan's position is his own—are reproduced as Exhibit 5 of this motion.

scope of the internal revenue laws (and the injunction powers invoked by Plaintiff) altogether. In other words, all allegations regarding the preparation of bankruptcy petitions, and all evidence offered in support of those allegations, are immaterial to the instant injunction suit. Following Plaintiff's admission to its logical conclusion, it is now revealed that all statements and documents offered by Taflan relating to bankruptcy petitions are impertinent to this case, and should be struck.

Paragraphs 17-20 of Taflan's declaration concern Exhibit 6, which he says is "a true and correct copy of the 'Statement of Citizenship' that was provided to me from the Save-a-Patriot Fellowship." Exhibit 6 actually consists of four documents: a copy of an affidavit to Rite Aid dated 1/06/03 which is signed by Taflan, a copy of a "Statement of Citizenship" dated 01/23/04 which is *not* signed by Taflan, a blank sample "letter of transmittal" with no identifying characteristics, and a blank "Affidavit of Request and Transmittal." Taflan restates portions of the affidavit to Rite Aid—*not* the "Statement of Citizenship"—at ¶18. This paragraph is intentionally worded to conflate the two documents—affidavit and "Statement"—so as to imply that SAPF provided the affidavit to Rite Aid. However, the affidavit is dated an entire year before the "Statement of Citizenship," obviously because it does *not* form part of the "Statement," but is rather a separate document. Further, the affidavit contains statements found in IRC §3402(n) (in Subtitle C of the code), which are not referenced at all in the "Statement of Citizenship."[28] Finally, SAPF does not provide a document like the affidavit to Rite Aid to anyone.[29] Thus, Taflan's declarations concerning the "Statement of Citizenship" are not credible, and should be disregarded.

A final portion of Taflan's declaration concerns itself with the "Affidavit of Revocation and Rescission" he signed in 1996, which is also attached as an exhibit. Taflan also reiterates fragments of the document within his declaration, at ¶22, but gives no additional meaning or interpretation to these

[28] The Statement of Citizenship only references 26 CFR § 1.1441-5, pertaining to subtitle A of the code.

out-of-context statements. While it is incumbent on Plaintiff to produce any documents it wants this Court to render judgment upon, Plaintiff did not bring this document forward until now, when Defendant has no opportunity to rebut. This "Affidavit" is clearly being introduced only because SAPF pointed out in its opposition to Plaintiff's motion for summary judgment that Plaintiff wanted this Court to "decide that fraud has been committed in connection with [the Affidavit] (or even by it), based solely on Rowe's conclusions," in violation of the "best evidence" rule.[30] Plaintiff tacitly acknowledges that its introduction of this document is untimely by hedging its bets: first, it claims that the non-existence of this document (as was the case when it presented its originating motion) is not a material fact, and second, that a copy of the document is now attached, so there are no genuine issues of material fact. In other words, the non-existence of the document didn't matter before (or even now) in determining whether fraud (or a violation of § 6700 or § 6701) has occurred, but now that the document has been produced, it does matter in such determination.[31] Of course, since Defendant is unable now to substantially rebut a document never before in evidence, or raise any dispute regarding it, no due process can be had by allowing this document into evidence.[32] Thus, this document, and all restatements of this document found in Taflan's declaration, should be struck.

At ¶27 of his declaration, Taflan also misrepresents ¶4 of Exhibit 8, "Affidavit of Revocation and Rescission Instructions." He states that the instructions say one "cannot file an IRS Form W-4 … once you execute and forward the affidavit …," but he omits the rest of that instruction, which states

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[29] See Exhibit 2, Kotmair's affidavit, ¶¶7–8.
[30] *Gordon v. U.S.*, 344 U.S. 414, 421 (1953).
[31] Defendant admits that Plaintiff's statements, found on page 8, are confused at best; but this is the only logical construction SAPF can give those statements.
[32] It is interesting that Taflan states, at 17, that he does not recall whether he paid for the "Affidavit of Revocation" (Plaintiff's term) and "Statement of Citizenship." His statement thus provides no evidence

"the filing of any IRS or state income tax form(s) ... will invalidate the affidavit." With this qualifier properly in view, it is apparent that the instruction does not prohibit anyone from filing W-4s or forms, merely informs them that if they do, the entire Affidavit (*i.e.,* their *own* statement of belief) will be rendered invalid. At ¶21 of his declaration, Taflan says that the materials supplied by SAPF with the Affidavit stated "it would allow me to revoke my Social Security number so that I was no longer obligated to pay, and my employer was not required to withhold, employment taxes." The instructions supplied as Exhibit 8 do not say any such thing; his unsupported statement should thus be disregarded.

Moreover, in ¶¶28 and 29, Taflan makes statements to the effect that he "relied on" materials "attached to this declaration related to the "Statement of Citizenship" and to the "Affidavit of Revocation and Rescission" in "believing that my employer should not withhold" income or employment taxes "from my wages." These claims are so impertinent to the cause of action as to be ludicrous; what difference does the basis for Taflan's beliefs about *withholding* make to the instant case? Since Plaintiff does not relate these statements to any proposition within its reply brief, it is clear that they should be excluded. After all, what can one understand from them but that Taflan merely agrees (or agreed) with SAPF's position on certain court cases, various laws and regulations? He himself signed the "Affidavit of Revocation and Rescission,"[33] (and his signed affidavit to Rite Aid, see *supra,* did not come from SAPF). Of course, nothing in his declaration, nor in his exhibits, shows that he filed this "Affidavit of Revocation or Rescission" with the court, or sent it to the Secretary of the Treasury, so it is

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for Plaintiff's claim, on page 8 of its reply, that "defendants sell... an 'Affidavit of Revocation' ... and 'Statement of Citizenship' ... "

[33]See Exhibit 10 of Docket 54, p. 276: the Senate Finance Committee stated that preparing a "false or fraudulent document *under the tax laws*" [emphasis added] was the penalized behavior. It is self-evident that an affidavit not proscribed nor required by any law or regulation, which consists of statements of one's sincerely held beliefs, cannot be a document subject to penalties under § 6701—nor can the statements of one's beliefs be false or fraudulent unless the signer committed perjury.

not certain that he actually did. Even so, he must have signed it of his own free will; if he did not believe the statements he signed, then he perjured himself.

Finally, Taflan's declaration contains the curious statement that he was "not *promised*" anything (by the government) in exchange for the declaration, which sparks the question of what he was *offered*, either implicitly or directly.[34] This alone calls both declarations he has proffered into question.

6) The only paragraphs from the **Second Declaration of Thomas Newman** which are presented and argued in Plaintiff's brief are ¶9–13; everything else is thus irrelevant and should be struck. Nevertheless, in ¶2–8, Newman attempts to rehabilitate Agent Rowe by stating that she had not reviewed the "administrative file" before her deposition on February 14, 2006, but subsequently reviewed it, and that her declarations are based on that subsequent review. If his assertions are taken as true, they confirm SAPF's original charge that the majority of Rowe's statements, being made merely upon review of another's investigation, are hearsay, and thus inadmissible.[35] Even more troublesome, if his statements are true, then Agent Rowe was kept ignorant of the main case until *after* discovery; in fact, even after Defendant SAPF had submitted a motion for summary judgment. Agent Metcalfe, who conducted the investigation on behalf of the Secretary of the Treasury, was deposed by SAPF. But it was not Metcalfe's declaration that set forth the facts Plaintiff considered relevant; it was Agent Rowe—someone Plaintiff now states did not have the file until well after the discovery deadline. Therefore,

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[34] Compare and contrast this statement with the statements found at the end of the Nagys' respective declarations, in which they each declare that the United States did not "offer me anything" in exchange for their declaration. See Docket 46, ¶20, and Docket 47, ¶20.

[35] Federal Rules of Civil Procedure 56(e) states that affidavits in support of summary judgment "shall set forth such facts as would be admissible in evidence, ..."

from Plaintiff's counsel's own admissions, Rowe's testimony is inadmissible. In short, Plaintiff has no witness at all.[36]

On the other hand, Newman never told Defendants that they should limit their questions of Agent Rowe to procedures followed by IRS employees in such cases, nor did he object, even once, that Agent Rowe was unable to answer questions because she had not reviewed the file.[37] Rowe herself stated during the deposition that she had reviewed the file.[38] Newman's objections at the deposition were that she was not *competent* to testify as to what false or fraudulent statements or actions had been made by Defendants.[39] Since this is the case, all of Plaintiff's counsel's explanations as to Rowe's deposition seem to be an attempt to recast the actual event in a light favorable to Plaintiff's case.

If new matter is deemed relevant, Defendant is entitled to rebut argument concerning it

Looking back to the initiation of this suit, it is clear that Plaintiff filed its complaint without the evidence necessary to support it, apparently with the expectation that it could use civil judicial procedures to fish for the proof it should have had at the outset. As a result, Plaintiff is injecting new witnesses and documentary evidence at this late date, which severely prejudices Defendant's ability to conduct discovery or rebut Plaintiff's claims. Therefore, this new matter should not be allowed to support Plaintiff's claims.

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[36] It must be noted that IRC § 7603 places the burden of proof for violations of §§ 6700 and 6701 squarely on the Secretary of the Treasury. Plaintiff ignores this in arguing, on pages 7–8 of its reply, that since Defendant did not "explain" away its allegations, they are established facts. This is a naked bid to shift the burden of proof away from the Secretary and onto SAPF.

[37] See Exhibit 1, Declaration of George Harp, ¶¶3–12; Exhibit 2, Kotmair's Affidavit, ¶¶10–12, also Rowe's deposition, Exhibit 4.

[38] Rowe's deposition, Exhibit 4: 25:3-9.

[39] See Docket 54, SAPF's opposition to Plaintiff's motion for summary judgment, page 3, lines 6–16.

Plaintiff admits that its investigation is ongoing.[40] Yet, although Plaintiff asserts that it could not have provided the identities of witnesses any sooner, it never gives any reasons for waiting until after it filed its complaint to actually investigate the claims it made. Metcalfe declared that during the course of his investigation, over 800 letters signed by John B. Kotmair, Jr.—sent on behalf of SAPF members—had been collected by the IRS.[41] Thus, Plaintiff had the identities of Mr. and Mrs. Nagy (as well as scores of other members) at least a year ago, giving it plenty of opportunity to obtain whatever testimony and documents it deemed necessary to support its case. Yet Plaintiff apparently never bothered to contact anyone until after Defendants filed their summary judgment motions—and shortly before its own motion for summary judgment was due.[42] Since Plaintiff introduced these witnesses after discovery was closed, Defendants were prevented from deposing them on the matters to which they are now testifying. That Plaintiff chose not to find these witnesses until after discovery cannot reasonably excuse the severe prejudice to Defendants in this regard.[43]

Likewise, Plaintiff's attempts to amend its complaint by way of introducing new allegations into each new motion creates a situation akin to the mythical Hydra—every time Defendant SAPF cuts down one of Plaintiff's claims, another one is presented to take its place. This piecemeal approach puts Defendant in the position of constantly having to readjust its defense with each motion in order to

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[40] See Docket #62, pg. 5.
[41] See Declaration of Gary Metcalfe, ¶6.
[42] See Docket #62, page 5. It must also be noted that despite Plaintiff's unsubstantiated claim to the contrary, none of the 8,000 or so pages of correspondence it provided as part of its initial disclosures contained the identity of Taflan. See Exhibit 2, Kotmair's Affidavit, ¶9.
[43] This is why the discovery matter of the referral, the foundational document in this case, is of vital importance. Such document would show what Metcalfe's "investigation" had actually turned up, or even the lack of a genuine investigation. That Plaintiff has continually introduced new allegations and evidence is itself a tacit admission that its original claims were insufficient to support the relief sought.

accommodate some new allegation, until, arriving at the present juncture, Plaintiff makes new allegations in a motion for which Defendant has no normal course of rebuttal.

Indeed, with the continual shifting of its claims, it appears Plaintiff is inviting this court to take any loose collection of offerings and develop its own theory of how these may be construed as a "tax-fraud" scheme or a violation of § 6700 or 6701, or even "obstruction" or "hindrance" of the IRS.

While Defendant is confident that this Court is well aware that the introduction of such new matter is beyond the scope of a reply, Defendant cannot now be certain which, if any, of the untimely "facts" set forth by Plaintiff may be considered relevant by this Court. To that extent, and to the extent that Defendant is also aware of inconsistencies in Plaintiff's reply, Defendant is requesting leave of this Court to set the record straight.

If some of the new matter is deemed material, it is Defendant's position that there *are* genuinely disputed issues. Contrary to Plaintiff's contentions or implications: (1) Defendant *never* assists anyone in preparing or filing returns; (2) Defendant *never* advises anyone not to file an income tax return or any other type of return, nor in fact advises anyone on tax matters; (3) Defendant Kotmair's representative status has never been revoked; (4) Defendant does not "promote a tax-fraud scheme that involves preparing protest letters"; and (5) Defendant does not prepare documents purporting to revoke "an individual's application for their Social Security number, *in order to discontinue the withholding of income and employment taxes*" [emphasis added], nor does Defendant claim that any document which rescinds a signature from such application *ipso facto* discontinues such withholding.[44]

[44] Of course, such documents do not fall under the internal revenue laws at all, and thus cannot be in violation of § 6700 or § 6701, nor any other section of Title 26.

CONCLUSION

For the reasons set forth herein above, Defendant objects to the untimely and expansive new offerings of witnesses and documents by Plaintiff, as well as its new arguments related thereto. Defendant prays this Court strike all such evidence, and any descriptions, inferences, and conclusions drawn therefrom.

In the alternative, and in the event this Court deems any of the new matter relevant and material to the case, Defendant prays this Court grants leave to file a surreply to rebut the new claims and "evidence" offered improperly by Plaintiff, or that this Court conduct a hearing to try all facts raised which are also deemed pertinent by this Court.

Respectfully submitted on this 10th day of August, 2006.

/s/ George Harp
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CERTIFICATE

IT IS HEREBY CERTIFIED that service of the foregoing "DEFENDANT SAVE-A-PATRIOT FELLOWSHIP'S MOTION TO STRIKE UNITED STATES' REPLY TO SAPF'S OPPOSITION TO UNITED STATES' MOTION FOR SUMMARY JUDGMENT" has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 11th day of August, 2006, to the following:

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