IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: WMN 05 CV 1297**
	)	
JOHN BAPTIST KOTMAIR, et al.,	)	
	)	
Defendants.	)	

UNITED STATES' RESPONSE TO SAPF'S MOTION TO STRIKE

On August 10, 2006, defendant SAPF filed a motion to strike, (Docket number 64), the United States' reply to SAPF' opposition to the United of America motion for summary judgment. In its motion to strike, SAPF additionally requests leave to file a sur-reply to the United States' reply, and an evidentiary hearing on the evidence submitted with the reply. The United States opposes SAPF's motion to strike, the request to file a sur-reply, and the request for an evidentiary hearing.

SAPF's Request to Strike the United States' Reply

SAPF's motion fails to meet the minimal requirements for a motion to strike and should be denied. Rule 12(f) authorizes the Court "to order stricken from any pleading any . . . redundant, immaterial, impertinent, or scandalous matter."[1] Rule 12(f) motions are not favored and will be denied unless the matter under challenge has "no possible relation to the controversy and may prejudice the other party."[2]

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[1] *Id.*

[2] *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 174 F. Supp. 2d 388 (D. Md. 2001); *Steuart Inv. Co. v. Bauer Dredging Constr. Co.*, 323 F. Supp. 907, 909 (D. Md. 1971); *see also*

To begin with, the United States' reply is *not a pleading*, and a motion to strike is not the proper means to advance objections to affidavits filed in support of that motion.[3] Only affidavits filed in opposition to motion for summary judgment which do not comply with FRCP 56(e) are subject to Rule 12(f) motion to strike.[4] However, SAPF has made no showing that any of the declarations it seeks to strike fail to meet the requirements of Rule 56(e).[5] For this reason alone the motion to strike should be denied.

Moreover, SAPF's argument that the documents it seeks to strike are immaterial is flawed. SAPF's motion to strike relates to portions of the Metcalf Declaration, Joseph Nagy Declaration, Second Rowe Declaration, and the Declaration of Nicholas Taflan. Those declarations included FOIA requests, letters to the IRS, billing statements, Statements of Citizenship, Affidavits of Revocation, and bankruptcy and district court filings, which are all described in the complaint. The United States did not produce these documents in its summary judgment motion because it did not receive them due to defendants' failure to cooperate in

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Maryland State Conference of NAACP Branches v. Maryland Dep't of State Police, 72 F. Supp. 2d 560, 569 (D. Md. 1999); *Hare v. Family Publications Service, Inc.*, 342 F. Supp. 678, 685 (D. Md. 1972) ("...before a motion to strike will be granted the allegations must be both immaterial and prejudicial"). *See* 5A Wright & Miller, Federal Practice and Procedure § 1382 (1986).

[3] *See* Fed. R. Civ. P. 7; *Domino Sugar Corp. v. Sugar Workers Local Union*, 10 F.3d 1064, 1068 n.1 (4th Cir. 1993) (holding that a motion to dismiss is not a responsive pleading for the purposes of Fed. R. Civ. P. 15(a)); *Smith v. Blackledge*, 451 F.2d 1201, 1203 n.2 (4th Cir. 1971) (motion to dismiss not a responsive pleading); *Sachs v. Snider*, 631 F.2d 350, 350-51 (4th Cir. 1980) (motion for summary judgment not a responsive pleading).

[4] *Hughes v. Amerada Hess Corp.*, 187 F.R.D. 682 (M.D. Fla. 1999).

[5] Rule 56(e) requires that the affiant is competent to testify regarding admissible matters based on their first hand knowledge. SAPF apparently asserts that statement contained in the Metcalf and Nagy declarations—that the information is to the best of their recollection—somehow renders them incompetent. This assertion is without justification and should be rejected.

discovery. The United States obtained these documents from defendants' customers after its motion for summary judgment was filed. With respect to these items, SAPF argued in its opposition to the United States' summary judgment motion that the United States failed to meets its burden of proof because the documents were not produced. The United States countered, in its summary judgment motion, that the existence of the documents is unquestioned, and therefore there was no resulting disputed material fact. The United States produced the documents in its reply.

SAPF now equates the United States argument that no disputed material fact existed —allowing the Court to decide this case based on the motions for summary judgment—with an "admission" that the documents are "immaterial." SAPF's argument is unsound. The filing of motions for summary judgment is not an admission that other material information does not exist.

Matter is immaterial or impertinent if it is irrelevant and does not pertain to the controversy or proceeding before the court.[6] Under this standard, the information SAPF seeks to strike is unquestionably relevant to each element establishing the need for an injunction under IRC §§ 7402 and 7408 for violation of §§ 6700 and 6701. First, the documents all demonstrate that defendants promote a scheme to assist customers in failing to pay income and employment taxes, and stay IRS collections. Specifically, the letters and affidavits instruct customers, and their employers to whom they are instructed to present the documents, that the law —according to SAPF—does not require the withholding of federal taxes.

Moreover, these documents show that defendants' scheme relates to a material matter. In

[6] *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678 (D.S.C. 1940).

proving materiality, the Government must show that defendants' tax-fraud products "would have a substantial impact on the decision-making process of a reasonably prudent investor and includes matters relevant to the availability of a tax benefit."[7] It simply does not make sense that taxpayers would pay defendants more than $600 for a membership, roughly $50 per letter, and hundreds of dollars for court filings unless they expected even greater returns in the form of tax refunds or through the elimination of tax liabilities. Each document SAPF seeks to strike establishes that their products did have an impact on SAPF customers' decision-making process.

Lastly, the evidence submitted with the United States' reply demonstrates the need for an injunction. The factors courts consider with respect to injunctions include, *inter alia*: (1) whether mechanisms are in place for continuing the business or scheme; and (2) whether the defendant had a high degree of knowledge and level of intent; and (3) whether the defendant insists on the legality of his actions.

Each element is established by the evidence presented. The complex billing system, network of participants in defendants' "Patriot Defense Fellowship," and legal filings establish that a mechanism is in place to continue this operation. Secondly, the filing of these court documents and frivolous letters to the IRS demonstrate a high level of intent because defendants peddle this scheme despite being notified by the IRS that Kotmair cannot represent his customers and in view of the overwhelming authority holding schemes to be patently frivolous, sanctionable, and prosecutable. Moreover, defendants' continued refusal to admit their actions are unlawful indicate the need for an injunction.

Lastly, SAPF has established no prejudice from the introduction of these documents. In

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[7] *United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990).

fact, SAPF cannot argue it is prejudiced when it produced and reviewed the documents submitted with the United States' reply, and contrary to its assertion, SAPF was always aware of the identity of its customers and could have deposed any of them. In short, SAPF cannot argue it is prejudiced because its motion to strike can more aptly be described as a sur-reply. It devotes a substantial portion of the motion rebutting claims that it never even requests the Court to strike.[8] For this same reason, SAPF's request to file a sur-reply should similarly be denied.

Respectfully submitted,

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[8] For example, SAPF never requests a single statement or document be struck with respect to the declarations of Camille Nagy and counsel for the United States, but rebuts each of the claims in those declarations in its motion.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing RESPONSE has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 28th day of August, 2006.

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