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 REPLY TO UNITED STATES' OPPOSITION TO SAPF'S MOTION TO STRIKE

On July 21, 2006, the United States filed a reply (Docket 62) to Defendant SAPF's opposition to United States' motion for summary judgment. The United States' reply improperly offered new documents and new declarations which were both immaterial and impertinent. For these reasons, SAPF filed a motion to strike a major portion of those documents and declarations on August 10, 2006 (Docket 64), and the United States opposed SAPF's motion to strike on August 28, 2006 (Docket 66). Save-a-Patriot Fellowship hereby replies to the United States' opposition, and renews its request for leave to file a sur-reply as an alternative remedy to the motion to strike.

ARGUMENT

Plaintiff raises several arguments and makes several misrepresentations in its opposition to SAPF's motion to strike. Each will be addressed in turn.

Rule 12(f) motions are "disfavored"

First, Plaintiff argues that Rule 12(f) motions are disfavored, and tries to tie Defendant's motion to strike only to the issue of materiality. Plaintiff cites several cases in support of its contention that SAPF's motion to strike "fails to meet the minimal requirements" and should be denied unless the "*matter under challenge* 'has no possible relation to the controversy and may prejudice the other party,'[emphasis added]." The cases Plaintiff cites, however, are cases in which the "matter under challenge" was specifically allegations in a complaint or amended complaint, or, in one case, a defense raised. Naturally, courts are not inclined, at the *outset* of an action, to strike allegations or defenses which appear at first blush to bear some relation to the complaint. In due course, the evidence for or against the allegations will be brought by both parties, its admissibility weighed, and a decision on those allegations reached. For example, in *Maryland State Conference of NAACP Branches v. Maryland Department of State Police*, 72 F. Supp. 2d 560 (D. Md. 1999), at p. 569, the court stated that new allegations added in an amended complaint "represent only one side's version of events and presumably will be disputed vigorously by defendants," and noted that the inclusion of an event in the complaint does not determine whether *evidence* of such event will be "admissible or legally significant."

The "matter under challenge" here is entirely different from that of striking portions of an original or amended complaint, or even a specific defense raised; and the standard suggested by Plaintiff does not apply. Rather, although Defendant does indeed raise issues concerning the materiality of some of the *evidence* sought to be introduced by Plaintiff in its reply to SAPF's opposition of US' summary judgment motion, the main ground for striking Plaintiff's reply to SAPF's opposition to its summary

judgment motion is Plaintiff's attempt to introduce new evidence and allegations for the first time in a reply brief.[1] This issue of untimeliness, and its relationship to impertinence, was addressed by the Supreme Court in *Harrison v. Perea*, 168 U.S. 311, 318 (1897),[2] where the court stated, quoting from *Wood v. Mann*, 30 F.Cas. 447 (1834), that "impertinence is the introduction of any matters in a bill, answer, or other pleading in the suit which are not properly before the court for decision at any particular stage of the suit."

As a backdrop as to why motions to strike may be disfavored, the court in *Wood, supra*, p. 451, stated: "[I]f the court should be satisfied, that the matter was not proper for an answer, and involved inquiries, not in that stage of the cause open to litigation, I have no doubt, that it would be the duty of the court, as a matter of self-protection, to suppress it. It is a great mistake to suppose, that, if the parties do not object to a matter, the court are bound to entertain cognizance of it, and to decide it." Thus, motions to strike are not disfavored because impertinent or immaterial matter is acceptable, but because the courts, by fulfilling their duties to disregard such matter, make them unnecessary.

That being said, Defendant SAPF is literally fighting for its existence in this suit. If the injunction sought by Plaintiff is granted, its voice—that is, the collective voice of its members—will be permanently censored. As a result of this precarious position, and the continuing efforts of Plaintiff to prejudice Defendant's defense by injecting evidence at a time when no normal course of reply is available to respond to it, Defendant filed its motion to strike to preserve in the record its objections to the improper introduction of such matter. Defendant seeks to insure that a failure to make known its

[1] This appears to be an attempt to rectify its failure to introduce it at the proper time—that is, in its original summary judgment motion.

[2] *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678 (D.S.C. 1940) cites *Harrison v. Perea* in discussing "impertinence," at p. 684.

objections will not be construed as a waiver of such objections. Thus, even if a motion to strike should not otherwise be necessary, Plaintiff's actions in this case have made it necessary.

United States' reply is "*not a pleading*"

The second argument presented by Plaintiff is that its reply to SAPF's opposition to its summary judgment motion is not a pleading (Docket 66, page 2).[3] To support this contention, Plaintiff cites three cases, all of which refer specifically to *motions to dismiss* as not being "responsive pleadings" within the context of FRCP 15(a).[4] The courts have held that for purposes of amending complaints as FRCP 15(a) allows, a plaintiff could "still amend without leave of the court after the motion to dismiss had been made."[5] This is obviously inapplicable here.

Moreover, in the very next sentence on page 2 (Docket 66), Plaintiff acknowledges that Rule 12(f) *does* apply to affidavits filed in opposition to a summary judgment motion.[6] It would appear, then, that Plaintiff is arguing that a brief in opposition to a summary judgment motion *is* a pleading for

[3] SAPF also filed a motion to strike (Docket 58) the United States' reply to SAPF's opposition to the motion for sanctions for discovery violations (Docket 55). Plaintiff did not in that instance raise the argument that a reply was *not a pleading*.

[4] Plaintiff misstates the ruling in *Sachs v. Snider*, 631 F.2d 350 (App. 4th 1980) as "motion for summary judgment not a responsive pleading" in a transparent attempt to claim support where none exists. The actual ruling of *Sachs v. Snider*, at p. 350, states that "Appellant correctly points out that the filing of a motion to dismiss, as was done in this case, does not constitute filing a responsive pleading within the meaning of FRCP 15(a)." Furthermore, the court said, at p. 351, that "in *Clardy v. Duke University*, 299 F.2d 368 (4th Cir. 1962), we held that an amendment after summary judgment was not permitted as a matter of right under FRCP 15(a). We see no difference of substance between Clardy and this case, and hold that the same applied to amendment after a judgment of dismissal."

[5] *Smith v. Blackledge*, 451 F.2d 1201 (App. 4th Cir. 1971), at 1203, FN2.

[6] Here again, Plaintiff misstates *Hughes v. Amerada Hess Corp.*, 187 F.R.D. 682 (M.D. Fla. 1999), when it claims that "*Only* affidavits … which do not comply with FRCP 56(e) are subject to Rule 12(f) motion to strike.[sic]" [emphasis added] The word "only," self-servingly added by Plaintiff, renders a meaning remote to that of the court's actual statement at p. 684: "Affidavits filed in opposition to a motion for summary Judgment which do not comply with Federal Rule of Civil Procedure 56(e) are subject to a motion to strike." It must be noted, as well, that this statement by the court says affidavits not in

purposes of Rule 12(f), but a brief in *reply* to an opposition to a summary judgment *is not* a pleading. Defendant is unable to discern the distinction Plaintiff draws between the two.[7]

Defendants' "failure to cooperate" in discovery

Plaintiff once again drags out its tired refrain—"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 discovery" (page 2)—as a mantra to cover up its own failure to fully investigate its claims before filing its injunction suit against Defendants (hoping to use the civil discovery process in lieu of its own initiative). Plaintiff further claims that it didn't obtain the untimely introduced documents until after its summary judgment motion was filed. (Docket 66, p. 3). However, Plaintiff admits in its opposition to SAPF's summary judgment motion (Docket No. 62-1, p. 5) that it knew the identities of the witnesses it ultimately used at least as early as November 4, 2005, when it filed its initial disclosures. Yet it waited until after discovery was closed (and another three or four months more) before trying to contact them. Thus, while Plaintiff admits that the documents and declarations subject to the motion to strike *were* untimely, it attempts to excuse this by blaming Defendant.

Plaintiff's delay has been prejudicial to the defense, since it prevented Defendant SAPF from deposing such witnesses, from knowing and examining the specific evidence it would be expected to counter, and having an opportunity to rebut it. Plaintiff's assertion that Defendant was not prejudiced because it knew the identities of Fellowship members "and could have deposed any of them" is nothing short of ridiculous. Certainly, it would be worthless to depose random members in the vain expectation

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compliance with FRCP 56(e) are subject to strike, but not that this is the only reason they could be stricken.

[7] Further, applying the principle of *reductio ad absurdum* to Plaintiff's contention, it would appear Plaintiff itself ought not to have filed a motion to strike Docket 51—the remaining exhibits of SAPF's

that one of them might ultimately be chosen by Plaintiff as a witness, and in the absence of any expectation as to what Plaintiff might proffer as relevant testimony. Rather, Plaintiff was obligated by the discovery rules, and Defendant's requests pursuant thereto, to disclose the specific identities of its expected *witnesses*, and their expected *testimony*, but failed to do so. It is no remedy to identify them after they have already testified by affidavit. Plaintiff should not be permitted to profit from its own willful decision not to pursue its investigation in time to present its case to the court.

Plaintiff's assertion that SAPF cannot argue it is prejudiced "when it produced"[8] the documents the United States untimely submitted is likewise ridiculous. Certainly, it would be worthless for SAPF or SAPF's counsel to review all documents SAPF has ever produced—newsletters, statements, booklets, web pages, letters, court pleadings—in the vain expectation that Defendant *might* be able to guess the exact statements or documents Plaintiff claims were made in violation of IRC § 6700 or § 6701, or which might be used by Plaintiff as evidence. Again, Plaintiff was obligated by the discovery rules, and Defendants' requests pursuant thereto, to *list* and *identify* all documents intended to be introduced, but it failed to do so. Plaintiff never identified any documents it planned to rely on other than its initial disclosure, which listed correspondence (in general), websites, and the Reasonable Action newsletter(s). As an example, Plaintiff never identified, during the entire discovery period, nor indeed until its motion for summary judgment, that documents such as a "Statement of Citizenship," an "Affidavit of Revocation and Rescission," a "zero return"[9] and a billing statement (the last two not even identified

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response in opposition to the United States motion for sanctions for discovery violations—since, by Plaintiff's logic, that response was also *not a pleading*.

[8] Docket 66, p. 5.

[9] This is particularly egregious, since it was introduced at the very last minute through Agent Rowe, who could not possibly have any personal knowledge—nor does she claim she has—of when or whether the person alleged to have "filed" this document was a member of SAPF, nor whether SAPF "assisted" in

until Plaintiff's reply brief) would be used as evidence for anything. Nor did it produce such documents until it attempted to remedy its motion for summary judgment in the guise of a reply to Defendant's opposition. Plaintiff should not be permitted to profit from its own willful decision not to identify these documents to Defendant in discovery, nor to produce these documents in time to present its case to the court.

Moreover, when Defendant SAPF pointed out, in its opposition to Plaintiff's motion for summary judgment, that Plaintiff had no documentary evidence for its claims, and that declarations introduced with Plaintiff's motion for summary judgment were fatally flawed, this did *not* open the door for Plaintiff to remedy its errors and produce the missing documentation in its reply—nor did it open the door so that new declarations and allegations could be introduced. To avoid prejudice to the defense, such "evidence" must be produced in a timely manner, which allows Defendant to investigate the allegations and evidence and frame a sufficient and germane defense. With this in mind, it is apparent that Plaintiff's contention that Defendant SAPF is not prejudiced because "its motion to strike can more aptly be described as sur-reply," page 5, is actually an admission that SAPF *is* prejudiced, since Plaintiff concurrently argues that SAPF should not be allowed a sur-reply, and its motion should be denied. In other words, if SAPF had not filed a motion to strike, it would be prejudiced with respect to its defense; but because it did file such motion, and Plaintiff deems it a sur-reply, SAPF is not *now* prejudiced. Is it Plaintiff's contention that the 20-day time period in which to submit a motion to strike is enough time in which to develop a defense to statements and documents never before introduced? If so, how was it that Plaintiff apparently was unable to develop and present its case in the year it had before it submitted a motion for summary judgment?

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preparing the document, nor anything else which is actually material to a claim of violations under §

SAPF "never requests" certain statements or documents struck

Curiously, Plaintiff states in a footnote on page 5 that SAPF "never requests a single statement or document be struck" with respect to the declarations of Camille Nagy and United States' counsel. Defendant is at a loss to understand Plaintiff's mistake: on page 7 of its motion to strike, Defendant specifically states, with regard to Camille Nagy's declaration and the documents introduced thereby: "Finally, because this declaration and documents are immaterial to the allegations of the complaint, they should be struck." With regard to counsel's declaration, Defendant specifically states, on page 17 of its motion to strike: "The only paragraphs … which are presented and argued in Plaintiff's brief are ¶9-13; everything else is thus irrelevant and should be struck." Moreover, the entire motion to strike, as stated on page 1, is predicated on the introduction of new evidence and affidavits beyond the scope of that allowable in a reply, and upon the fact that Plaintiff is still attempting to improperly amend its complaint thereby. It is not necessary for Defendant to restate its position at every mention of a new statement or document in the motion.

"Proving" materiality

Plaintiff argues first that the documents introduced with its reply "show that defendants' scheme relates to a material matter," on page 3, but offers no examples or specifics. Indeed, the entirety of Plaintiff's opposition has not only failed to show any specific relationship between the documents and statements submitted to a "material matter" (see *infra*), but Plaintiff is satisfied merely to repeat, on page 3, that the "information SAPF seeks to strike is *unquestionably relevant* to each element establishing … violation of §§ 6700 and 6701." [emphasis added] Plaintiff fails to show that its untimely introduced statements are "unquestionably relevant," and does not even attempt to rebut SAPF's detailed analysis

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6700 or § 6701.

of the many contradictions within the declarations themselves. Further, Plaintiff pointedly ignored the fact that most of the statements and documents it attached to its reply brief were *not actually pre*sented in the brief, and *for that reason alone, they are utterly irrelevant* and should be struck.

Yet, in a strange segue, Plaintiff states on page 4 of its response that "materiality" must be proven through showing "defendants' tax-fraud products 'would have a substantial impact on the decision-making process of a reasonably prudent investor and include matters relevant to the availability of a tax benefit." This quote from *United States v. Campbell*, 897 F.2d 1317 (5th Cir.1990), at p. 1320, actually reads:

> "1. False and fraudulent statements.
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> "[1] To establish a violation of section 6700(a)(2)(A), the government must prove that a person (1) made or furnished a statement with respect to tax benefits (2) which he or she knew or had reason to know (3) was false or fraudulent (4) as to a material matter. Material matters are those which would have a substantial impact on the decision-making process of a reasonably prudent investor and include matters relevant to the availability of a tax benefit. 1982 U.S.Code Cong. & Ad.News at 1015; *United States v. Buttorff*, 761 F.2d 1056 (5th Cir.1985).
>
> "[2] At least two types of statements fall within the statutory bar: statements directly addressing the availability of tax benefits and those concerning factual matters that are relevant to the availability of tax benefits." [emphasis added]

Thus, on balance, the court in *United States v. Campbell* affirms what Defendant SAPF has faithfully pointed out all along: the false or fraudulent statements which constitute a violation of § 6700 and are made regarding a "material matter" must either *directly address* or be *relevant to* the *availability of tax benefits*, and must be made to a *potential* investor. Plaintiff has self-servingly substituted its own words, "tax-fraud products," for "material matters," deliberately obscuring the court's elucidation of IRC § 6700. Then, to cover the fact that it has not shown any false or fraudulent statements made by Defendant pertinent to the availability of tax benefits by reason of *joining* SAPF (since none exist), Plaintiff speculates on SAPF members' motives in joining SAPF. "It simply does not make sense that

taxpayers would pay defendants more than $600 for a membership … ," Plaintiff postulates, "unless they expected even greater returns in the form of tax refunds or through the elimination of tax liabilities." Plaintiff's worldview encompasses nothing greater than a presumed profit motive, specifically financial profit. Does it make sense that National Rifle Association members pay for membership when they gain no financial awards, just assurance that the NRA "speaks" for them? It is common for people in this country to donate to churches, charitable associations, political groups, and membership organizations because they perceive a benefit in assembling with others to achieve an outcome unattainable by them alone. If a person joins or donates to the ACLU, is it for personal gain, or is it for the advocacy they believe the ACLU can bring to bear? It is not surprising, perhaps, for the government to downplay or disparage the genuine motivation of some in joining with others to preserve their First Amendment rights to freedom of speech and association—and in paying others to help them exercise those rights, regardless of outcome. After all, the exercise of that lawful freedom may result in (alleged) inconvenience and or annoyance to certain government officials. Of course, insistence on the freedom to state one's beliefs *is* an insistence on the "legality of [one's] actions," since freedom of speech is guaranteed by the highest law of the land. If one can now be enjoined for such "insistence," as Plaintiff claims, then the Constitution has been overturned.

CONCLUSION

For the reasons set forth herein above, and in Defendant's motion to strike, Defendant prays this Court strike the untimely and immaterial matter introduced by Plaintiff in its reply to SAPF's opposition to US' motion for summary judgment, and any descriptions, inferences, and conclusions drawn therefrom.

Again, in the event this Court deems any of the new matter relevant and material to the case, Defendant prays for a leave of Court to file a surreply to rebut Plaintiff's untimely offerings, or to conduct a hearing to try any facts deemed pertinent by this Court.

Respectfully submitted on this 11th day of September, 2006.

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CERTIFICATE

IT IS HEREBY CERTIFIED that service of the foregoing "DEFENDANT SAVE-A-PATRIOT FELLOWSHIP'S REPLY TO UNITED STATES' OPPOSITION TO SAPF'S MOTION TO STRIKE" has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 12th day of September, 2006, to the following:

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