IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

NORCAL TEA PARTY PATRIOTS, et al., ON BEHALF OF THEMSELVES, THEIR MEMBERS, and THE CLASS THEY SEEK TO REPRESENT,	)	Case No. 1:13-cv-00341
	)	Judge Michael R. Barrett
Plaintiffs,	)	
v.	)	
THE INTERNAL REVENUE SERVICE, et al.,	)	
Defendants.	)	

UNITED STATES' RESPONSE TO PLAINTIFF TPTP'S MOTION TO CLARIFY PRELIMINARY INJUNCTION

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SUMMARY

In its Motion, Plaintiff Texas Patriots Tea Party states that the relief it seeks is for the IRS to "finish developing TPTP as it was prepared to do in 2013 with any additional inquiry limited to (1) what the IRS had then identified as new issues raised in, or still to be clarified from, TPTP's response to the second development letter; and (2) facts regarding TPTP's activities on or before March 2013." (Dkt. 306-1, PageID 10065.) Prior to the filing of this Motion, TPTP did not inform the United States of the relief sought.[1] Had TPTP done so, the United States would have been amenable to that relief and the parties likely would have been able to resolve the issue extra-judicially. In fact, on November 14, 2016, during a meet-and-confer telephone call regarding the TPTP development questions, counsel for the United States inquired whether TPTP's concerns may be addressed by limiting the time frame of the questions to lessen the burden on TPTP. TPTP's counsel dismissed the suggestion and, prior to the filing of the Motion, did not indicate any renewed interest in pursuing that avenue of resolution. However, the United States is still amenable to resolving this issue by limiting the requested information to the time period prior to March 2013. The United States is also amenable to resolving this matter by agreeing to allow TPTP to submit the additional information it believes would be relevant to

[1] Prior to the filing of this Motion, TPTP shifted the focus of its relief several times but did not communicate to United States' counsel the relief requested, as is required by Local Rule 7.3(b). First, in its November 11, 2016 letter to counsel, TPTP indicated an unwillingness to answer any of the questions in the September 26, 2016 development letter: "If the IRS shares TPTP's view that the preliminary injunction forecloses the IRS from demanding that TPTP respond to the Development Letter, or is willing to entertain that notion, then it may be possible to reach an agreement on a protocol for resolving the parties' continuing dispute and obtaining a determination." (Exhibit 1, November 11, 2016 Letter from TPTP's Counsel.) Then, in an email dated November 18, 2016, TPTP indicated that it intended to submit some materials but needed Court intervention to determine what materials to submit: "We believe TPTP is entitled to recognition of tax-exempt status, and we will submit the materials needed to make that determination. We think that the necessity of the development issues is a disputed issue for the Court to decide." (Exhibit 2, November 18, 2016 Email from TPTP's Counsel.) Finally, the November 21, 2016 Emergency Motion stated that it sought a determination regarding whether the September 26th development letter was in the "ordinary course." (Dkt. 301, PageID 9961.)

establish whether it is entitled to tax exempt status. While the IRS issued the development letter in the ordinary course, TPTP can decide whether to respond fully, incompletely, or with different information. However, the United States requests that any Court order along those lines clarify that it is not in the ordinary course but is an accommodation for TPTP and require that any additional information be submitted within 30 days.

In the event TPTP is not amenable to the accommodations the United States is willing to make to resolve this Motion, the IRS is justified in pursuing answers to the questions it has posed to TPTP. TPTP argues that, by seeking additional information, the IRS is not processing its application in the "ordinary course," but this argument rests on two faulty assumptions: (1) that TPTP's application was complete and "on the path to approval" in August 2013 (Dkt. 306-1, PageID 10064) and (2) that the IRS does not ordinarily ask applicants to provide information about their activities covering a timeframe of more than six to nine months. (Dkt. 301-1, PageID 10058). Neither of these assumptions is correct. Prior to the stay requested by TPTP, the IRS was processing its application in the ordinary course, and contrary to TPTP's assertions, TPTP now seeks extraordinary treatment.[2]

TPTP also seeks to poison the well by misrepresenting the facts of its case and falsely implying, without any basis, that Department of Justice (DOJ) counsel and IRS Chief Counsel (IRS Counsel) attorneys improperly influenced the processing of TPTP's application. Plaintiff's allegations break down under the weight of false assumptions and misleading recitations. Specifically, whether by design or mistake, TPTP makes two fundamentally incorrect factual

[2] In fact, it appears that TPTP is seeking "clarification" as a covert way to have the Court order the IRS to approve TPTP's application regardless of whether it qualifies for tax exempt status.

assertions in telling its story. First, TPTP erroneously claims that it was "on the path to approval" in August 2013. This claim is based on a mischaracterization of the roles of Tax Law Specialist Emily Mangrum and IRS Counsel Preston Quesenberry in processing TPTP's application and ignores the then-current process used to review applications. Second, and more disturbingly, TPTP makes false assumptions regarding material withheld under the attorney-client and work product privileges, incorrectly filling in the gaps to infer that the IRS Office of Chief Counsel and the Department of Justice inappropriately attempted to influence the processing of TPTP's application. These inferences are demonstrably false. As a result of the severity of these accusations, the United States is compelled to release the unredacted documents, as the actual redacted text is both banal and consistent with the government's position throughout this litigation. Reviewing these materials in their entirety establishes that TPTP's interpretation of the timeline is without any basis in fact. Furthermore, TPTP's argument that it was "on the path to approval" does not withstand scrutiny in light of the merits of TPTP's application under 26 U.S.C. § 501(c)(4). Simply put, TPTP has not met its burden of showing that its campaign intervention activity falls within permissible limits, and that it qualifies for tax exempt status under § 501(c)(4). As a result, the IRS is within its rights to seek additional information to determine whether TPTP qualifies for tax exempt status. Finally, both the scope of the development questions and the nature of the timeframe are adapted from the template questions that the IRS uses for all organizations that raise issues similar to those raised by TPTP's application. The IRS is processing TPTP's application in the ordinary course and in compliance with this Court's Order on TPTP's Motion for Preliminary Injunction. No further "clarification" is needed.

DISCUSSION

I. TPTP ignores the IRS's process, erroneously claiming it was "on the path to approval."

TPTP incorrectly claims that its application was complete and "on the path to approval" in August 2013 and that "before learning TPTP had sued, *the IRS's responsible specialist would have approved TPTP's application without further development . . .*" (Dkt. 306-1, PageID 10064, 10047) (emphasis in original). From this faulty starting point, TPTP views any further processing of its application as unwarranted and evidence of wrong doing by the IRS. (Dkt. 306-1, PageID 10064.) However, this assertion ignores the processes in place at the IRS: the "responsible specialist" was part of a collaborative review and did not have sole authority to grant TPTP's application. An accurate timeline shows the IRS consistently following then-current procedure regarding TPTP's application.

A. Application of the Expedited Process to TPTP.

In June 2013, as part of the changes the IRS implemented in response to the criticisms and recommendations described in the TIGTA Report released in May 2013, the IRS implemented a new procedure, the Optional Expedited Review Process ("Expedited Process"), to address the backlog of § 501(c)(4) applications while still ensuring that only entities legally entitled to tax exemptions receive them.

As part of the Expedited Process, TPTP's case was transferred from Exempt Organizations (EO) Determinations to EO Technical, where it was assigned to Tax Law Specialist Emily Mangrum. (Gov't Ex. 5, Memorandum TEGE-07-0713-12) (providing for

transfer of the case from EOD to EOT).[3] Ms. Mangrum's case history notes specify that TPTP's application was being handled in accordance with the Expedited Process: "This case is being processed under procedures pursuant to the memoranda from A/Director Corbin" (Control Nos. TEGE-07-0613-08 and TEGE-07-0713-12)." (Bates[4] 429) [5] As part of the process, the IRS sent Letter 5228 to eligible applicants, including TPTP. Letter 5228 explained that the applicant could choose to make representations concerning its activities, which would result in expedited recognition of its tax exempt status.[6] While the applicants were considering whether to elect the expedited option, the entity's application would be reviewed by a specialist in EO Technical with assistance from IRS Chief Counsel attorneys "for the purposes of making a proposed recommendation should the applicant not provide the expedited option representations." (Gov't Ex. 4, p. 2.)[7] From there, the review of applications continued as a collaborative process between the assigned specialist in EO Technical and an assigned IRS Chief Counsel attorney. (Gov't Ex.

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[3] In June 2013, Ms. Mangrum reviewed TPTP's application to determine whether it was eligible to participate in the Expedited Process, but it was not formally transferred to EOT until August 2013.

[4] References to "Bates" are to Exhibit A of TPTP's Motion, which was filed under seal.

[5] The Expedited Process was set forth in TEGE-07-0613-08 and TEGE-07-0713-12. (Attached as Gov't Exs. 4, 5.) The IRS developed this process to further "effective and efficient tax administration and to assist in the transparent and consistent review of applications for tax-exempt status under section 501(c)(4)." (Gov't Ex. 4, TEGE-07-0613-08, p. 1.) The Expedited Process applied to applicants for § 501(c)(4) status whose applications had been pending 120 or more days as of May 28, 2013, indicated the organization may be involved in political campaign intervention, and did not raise concern regarding private inurement. TEGE-07-0713-12 changed the policy to require that the pending applications be formally transferred to EO Technical. This process was amended on July 28, 2014 when the Director issued TEGE-07-0714-0022. The IRS has prepared a webpage that summarizes these procedures at https://www.irs.gov/charities-non-profits/new-review-process-and-expedited-self-certification-option. All of this information is, and has been, publicly available.

[6] The representations were that the applicant intends to limit its political activities to 40% or less of both its time and expenditures and, therefore, intends to designate 60% or more of its total time and expenditures to its social welfare activities.

[7] If this review determined that the entity's application could be approved, then the entity would be notified that it did not need to make the representations requested by Letter 5228.

3, Declaration of Emily Mangrum, ¶ 8.)

In TPTP's case, Ms. Mangrum completed a review of the application, and then IRS Counsel Preston Quesenberry reviewed the application to see whether he agreed with her recommendation. (Id., p. 3) (describing review process by EOT and IRS Counsel attorney). In August 2013, Ms. Mangrum narrowly recommended approval, noting that TPTP's "case is close as each of taxpayer's activities involves some non-exempt activity." (Bates 465.) TPTP characterizes this as Ms. Mangrum's "official conclusion," but such a statement ignores the procedure then in place: Ms. Mangrum's recommendation was part of a collaborative process, not an "official conclusion." (Dkt. 306-1, PageID 10051.) Under the Expedited Procedure, Mr. Quesenberry contacted Ms. Mangrum to discuss her recommendation. (Bates 456.) Ms. Mangrum recalls this discussion as "generally similar to those in any other close case. He did not agree with my recommendation that they be approved, so we discussed our analysis of the case and the facts in the application as part of a collaboration to try to reach the best answer." (Gov't Ex. 3, ¶ 10.) Following their discussion, Ms. Mangrum and Mr. Quesenberry agreed that TPTP needed additional development. Ms. Mangrum then stopped working on TPTP's case, because further development required contact with the taxpayer. Since TPTP was a represented party in litigation, she was instructed not to contact them.

TPTP asserts that, because Ms. Mangrum recommended approval of TPTP's application in August 2013, the fact that it did not receive an approval is evidence of misconduct. However, this claim ignores the collaborative, consensus-driven process applicable to all similarly situated entities. What TPTP casts as IRS Counsel and DOJ pushing her to change her "official position," is no such thing. Rather, Ms. Mangrum and Mr. Quesenberry collaboratively reviewed TPTP's application in accordance with the Expedited Process.

B. Application of the litigation hold procedure to TPTP.

TPTP also leaps from references in the application file to TPTP's involvement in litigation to an erroneous conclusion that IRS Counsel and/or DOJ intervened to force Ms. Mangrum to change her recommendation after TPTP joined this lawsuit. TPTP also complains that "the IRS continually and secretly revisited TPTP's file at DOJ's request in 2013, 2014, and 2015." (Dkt. 306-1, PageID 10047.) There is no support for TPTP's claims. The fact that TPTP's involvement in litigation is mentioned in its application file does not evidence an attempt to punish it for joining this case. Rather, once TPTP joined this lawsuit, it was determined that, in accordance with Revenue Procedure 2013-9 § 4.04 and in consultation with DOJ, the IRS would only finalize applications that did not require contact with taxpayers beyond the issuance of a favorable determination letter. This explains both the mention of TPTP's involvement as a litigant and the subsequent status-checks of its application.

As Ms. Mangrum explains in her declaration, on August 13, 2013, she "made a note in [her] Technical Case History that TPTP was a litigant" to remind herself not to contact TPTP directly. (Gov't Ex. 3, ¶ 5.) She further explains: "The fact that TPTP was a litigant made no substantive difference in how I processed TPTP's application or in my opinion or recommendation about the case." (*Id.*)

As previously explained in prior filings, Rev. Proc. 2013-9 § 4.04 is a long standing, viewpoint neutral procedure first established in 1969, which provides that "[a] determination letter or ruling on exempt status will not ordinarily be issued if an issue involving the organization's exempt status under § 501 or § 521 is pending in litigation. . . ." (*See* Dkt. 212, PageID 7847; Dkt. 248, PageID 9120-21 and n.5 for discussion of policy and policy rationale;

see also Dkt. 290, PageID 9818; Dkt. 293 at pp. 6-8.)[8] However, in order to address the backlog of applicants, the IRS determined that it would continue to work on application files that were sufficiently complete that a determination could be made without contacting the entity (who was a plaintiff in litigation). For example, both TPTP and Americans Against Oppressive Laws (AAOL) had pending applications for tax exempt status when they joined this lawsuit as plaintiffs on August 5, 2013. AAOL's application for tax exempt status was granted in July 2014. (*See also Linchpins of Liberty, et al. v. I.R.S.*, Case No. 1:13-cv-777 (D.D.C. Dec. 9, 2016) Dkt. 119, ¶¶ 15, 18, 20-25, 28) (nine plaintiff entities with pending applications received approvals of tax exempt status after litigation commenced); *True the Vote, Inc. v. I.R.S.*, 71 F. Supp. 3d 219, 224, n.4 (D.D.C. 2014) (plaintiff received approval of tax exempt status after litigation commenced). However, the IRS concluded that it could not make a favorable determination on TPTP's application without further interaction with TPTP and halted work on the application.

As the process used to review tax exempt applications evolved[9] and as events in the litigation made the status of pending applicants pertinent, DOJ contacted IRS Counsel to inquire as to the status of pending applications and whether some could be resolved without taxpayer contact. For example, TPTP cites an August 8, 2014 email under the heading: "Mangrum

[8] We recognize that this Court concluded, in a November 2016 Order, that it is "not convinced that the IRS's general litigation hold policy justifies the delay in processing TPTP's application" and that "the litigation hold policy should arise only when an applicant's tax exemption status is at issue in the litigation." (Dkt. 302, PageID 10013.) The IRS has altered its approach in light of prior, similar criticism of the litigation hold procedure from the D.C. Circuit in a related case. However, it remains the case that, in 2013, the IRS placed TPTP's application into a litigation hold in accordance with Rev. Proc. 2013-9 § 4.04.

[9] After the issuance of the 2013 TIGTA Report, the IRS overhauled both the structure of the Exempt Organizations Unit and the procedures for processing tax exempt applications. These changes are detailed in the Declaration of EO Director, Tamera L. Ripperda, which was filed on November 11, 2016 in regard to *Linchpins of Liberty, et al. v. I.R.S.*, Case No. 1:13-cv-777, (D.D.C. Nov. 11, 2016) (Dkt. 113-4) (attached as Gov't Ex. 6).

Changes Her Recommendation after DOJ's August 2014 Contact." (Dkt. 306-1, PageID 10050.) As discussed in depth in section II.B., below, TPTP implies that the contact by DOJ caused a change in Ms. Magrum's recommendation. The implication is baseless. About this email, TPTP states: "This Court had just held a July 29, 2014 status conference after denying the IRS's Motion to Dismiss portions of Count II that sought injunctive relief for TPTP." (Dkt. 306-1, PageID 10050.) While not incorrect, more pertinent is that the Court's Order on the Motion to Dismiss held that only plaintiffs whose applications remained pending had standing to assert a claim under Count II. (Dkt. 102, PageID 1669, n.11.)[10] Accordingly, this ruling occasioned DOJ's inquiry as to the status of the pending application.

As documented in TPTP's application file, in August 2014, IRS Counsel asked Ms. Mangrum for an update regarding the status of TPTP's application. She re-reviewed TPTP's file to refresh her recollection about the case. (Gov't Ex. 3, ¶ 13.) Ms. Mangrum again discussed her recommendation with Mr. Quesenberry, and because they disagreed on the course of action, Meghan Biss, who was Ms. Mangrum's acting manager at the time, also reviewed the file. Both Mr. Quesenberry and Ms. Biss drafted separate memoranda regarding TPTP's application based on their respective reviews of the file. Mr. Quesenbery and Ms. Biss both concluded that, based on the information in the application file, the IRS could not determine what amount of TPTP's activities constituted political campaign intervention, and § 501(c)(4) entities have to show that less than 50% of their activities involve political campaign intervention. After Ms. Mangrum

[10] At the time of the oral argument on the Motion to Dismiss, two plaintiffs had pending applications, TPTP and AAOL. AAOL's application for tax exempt status was granted shortly before the issuance of the Order on the Motion to Dismiss. Accordingly, DOJ's inquiry was limited to inquiring about the status of TPTP's application, the only one that remained pending.

independently reviewed each memorandum, she understood why Mr. Quesenberry and Ms. Biss believed TPTP's application required more development: "I had viewed the case as a close call all along, and after reviewing their analyses I did not disagree with their recommendations of additional review. So, I updated the triage worksheet to reflect the recommendation for additional development." (Gov't Ex. 3, ¶ 16.)[11]

In alleging that DOJ counsel improperly influenced the application process, TPTP ignores the litigation hold procedure. Instead, TPTP casts aspersions on the involvement of IRS Counsel and DOJ, to imply that Ms. Mangrum was bullied into changing her favorable recommendation in order to delay TPTP's application once TPTP joined this litigation. As detailed in the next section, this view is baseless and contradicted by the actual content of these communications. All inquiries between DOJ counsel and the IRS were made to determine the status of applications and whether they could be resolved without contact between IRS and the applicant.

II. TPTP makes false assumptions and draws erroneous inferences from materials redacted for privilege.

Throughout its statement of facts, TPTP cites to portions of documents redacted based on the attorney-client and/or work product privilege in an effort to wrongly imply that DOJ counsel attorneys and IRS counsel interfered with the normal processing of TPTP's application for tax exempt status. Such implications are legally improper and demonstrably false.[12]

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[11] Similarly, following a September 2015 Court conference in which the status of TPTP's application was discussed, DOJ counsel again inquired regarding the status of TPTP's application and whether, consistent with the Revenue Procedure.

[12] Plaintiff's inference of misconduct is serious. As a result, we are compelled to take the unusual step of producing unredacted versions of the pertinent documents, which reveal material that is properly the subject of attorney-client privilege.

A. No adverse inference may be drawn from a proper claim of privilege, and it is inappropriate for TPTP to attempt to use materials redacted under a claim of privilege to impugn the conduct of IRS Chief Counsel or DOJ counsel.

There is "an abundance of authority holding that an adverse inference cannot be drawn from an invocation of the attorney-client privilege." *Whitney v. City of Milan. Tennessee*, No. 109 CV 01127, 2014 WL 11411675, at *1 (W.D. Tenn. Feb. 27, 2014); *see Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed. Cir. 2004) ("[N]o adverse inference shall arise from invocation of the attorney-client and/or work produce privilege."); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir.1999) ("[W]e know of no precedent supporting such an [entitlement to an adverse] inference based on the invocation of the attorney-client privilege."), *abrogated on other grounds*, *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003). This is because "a client asserting the [attorney-client] privilege should not face a negative inference about the substance of the information sought." *Parker v. Prudential Ins. Co. of Am.*, 900 F.2d 772, 775–76 (4th Cir. 1990). In fact, this District Court has stated that "such a penalty for invocation of the [attorney-client] privilege would have seriously harmful consequences." *U.S. v. United Tech. Corp.*, Case No. 3:99-cv-093, 2005 WL 6199561, at *3 (Feb. 2, 2005, S.D. Ohio) (*quoting Nabisco*, 191 F.3d at 226). These consequences include intruding upon "the protected realm" of the privilege, *Parker*, 900 F.2d at 775 (4th Cir. 1990) or even "oblig[ing] the client to produce the privileged materials," *THK Am., Inc. v. NSK, Ltd.*, 917 F. Supp. 563, 566-67 (N.D. Ill. 1996).

B. TPTP's negative insinuations drawn from privilege redactions are fallacious.

While TPTP does not overtly ask the Court to draw an adverse inference from the privilege redactions, it insinuates that the redactions of references to DOJ's involvement support its argument that DOJ and IRS Counsel inappropriately intervened in the handling of TPTP's application. This is false. To the contrary, the unredacted documents show that DOJ's only

involvement with the IRS's processing of TPTP's application was (1) to urge the IRS to work as expeditiously as possible and (2) to ask the IRS to determine whether contact with the taxpayer was necessary and make determinations on any application where such contact was not necessary.

TPTP continually cites the redacted material in an effort to imply inappropriate involvement by DOJ and IRS Counsel. For example, under the heading: "Mangrum Changes Her Recommendation after DOJ's August 2014 Contact." (*Id*. at 10050), TPTP cites redacted emails to imply, although lacking any basis in fact, that DOJ and IRS Counsel Casey Lothamer acted inappropriately:

> Then, on August 8, 2014, Casey Lothamer (another IRS attorney who has provided support and testimony for the DOJ in this case) emailed Quesenberry. . . . Lothamer began: 'DOJ has inquired . . .' Quesenberry, in turn, asked Mangrum whether she had 'reviewed the case file again recently' . . .
>
> After Mangrum told Quesenberry that she still recommended approval, others entered the picture. This included Lothamer, an IRS attorney, and Jon Waddel, both witnesses and affiants in this case. [citations omitted] It also included various other IRS, IRS Chief Counsel, and DOJ litigation attorneys. [citation omitted] After conferring with Quesenberry and her own Acting Manager, Susan Cundiff, Mangrum changed her official conclusion . . .

(Dkt. 306-1, PageID 10050-51.) Here, TPTP attempts to imply that the involvement of Mr. Lothamer and DOJ counsel had a causal effect on Ms. Mangrum's decision to change her recommendation from "approval" to "needs development." Such negative inferences are inappropriate and demonstrably false, as the unredacted text demonstrates:

From: Lothamer Casey
Sent: Friday, August 08, 2014 9:44 AM
To: Quesenberry Preston
Subject: (c)(4) case

Preston,

DOJ has inquired about the status of Texas Tea Party Patriots. This is the only organization in the Norcal case that has a claim for equitable relief still outstanding. Since we have requested EOT to start another review of the litigation cases, would you mind prioritizing the review of this case given its litigation status? If this ends up being a favorable, DOJ

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Unredacted_IRS_WeThePeopleTexas_000473

would like to issue it as soon as possible so that the taxpayer does not incur discovery expenses on the equitable relief portion of its claim. Also, DOJ would like to know when they can expect the review of this case to be completed. I'm available to discuss at your convenience.

Thanks,

Casey

Casey A. Iothamer
Senior Technican Reviewer
CC:TEGE:EOEG:EO
Phone: (202) 317-4821

(Gov't Ex. 7, Unredacted_IRS_WeThePeopleTexas_000473-74) (material previously redacted for attorney-client privilege is highlighted in yellow).

The implication that IRS Counsel and DOJ inappropriately intervened in Ms. Mangrum's decision ("Mangrum changed her official conclusion" after "IRS Chief Counsel and DOJ litigation attorneys" "entered the picture") could not be further from the truth. As the email pictured above confirms, DOJ's only concern was being kept up-to-date on the status of the case and urging the IRS to move quickly, if possible, so that TPTP would not incur unnecessary discovery expenses.[13] (*See also* Gov't Ex. 3, ¶ 18) ("I did not have any involvement with counsel

[13] TPTP again references this exchange in its argument section: "Mangrum maintained this position [regarding approval of TPTP's application] for a full year, until IRS attorneys intervened in 2014 when the DOJ asked the IRS to re-review the file for litigation purposes." (Dkt. 306-1, PageID 10062.) While TPTP makes this assertion absent any supporting citation, it appears to be referencing the August 8, 2014 email reproduced above. As can be seen from the email, there is no basis to imply that DOJ's involvement had any impact on Ms. Mangrum's decision-(continued...)

for the Department of Justice regarding the processing of TPTP's application. I never spoke with anyone from DOJ while I worked in the Exempt Organizations unit. At no time di danyone from the DOJ try to influence my views, or any recommendation I would make, regarding TPTP's application.") In addition, as detailed above, Ms. Mangrum's recommendation was not an "official conclusion." Rather, she was part of a collaborative process whereby she discussed her recommendations with Mr. Quesenberry to come to a consensus. (*See supra*, I.A.)[14]

TPTP then implies that its status as a litigant impacted the substantive review of its application. Discussing a meeting between Ms. Mangrum and Mr. Quesenberry, TPTP states: "The record of this meeting is largely redacted except for the words 'in case DOJ wants it,' but within days, Mangrum had begun a draft denial letter, even though she still recommended approval." (Dkt. 306-1, PageID 10050, n.3.) At this meeting, TPTP states, Mr. Quesenberry informed Ms. Mangrum that TPTP was "after all a 'litigant now.'" (Dkt. 306-1, PageID 10050.) By including the phrase "in case DOJ wants it" in this discussion, TPTP implies a causal relationship between a reference to DOJ and the drafting of a proposed adverse determination letter. Any such implication is specious. A description of the meeting that TPTP refers to, found in Ms. Mangrum's case history notes at Bates 429, shows that there is no basis for an insinuation that the DOJ inappropriately intervened in TPTP's case:

(… continued)

making process. To the contrary, Ms. Mangrum participated in the normal review process, whereby she collaborated with Mr. Quesenberry to review TPTP's application.

[14] In addition, the EO Determinations Agent who reviewed the case before Ms. Mangrum also recommended that additional information was necessary. That Ms. Mangrum and Mr. Quesenberry eventually reached that conclusion is far from surprising. (*See* Bates 428) (EO Agent Janine Estes writes: "Case potentially adverse. Additional development needs to be coordinated with EOT.").

8/9/13	Discus with TEGE Counsel. Only 3 activities we know that may promote social welfare	E.Mangrum
	(2 rallies, 1 candidate forum). Website - "Events" page includes events with significant	
	campaign activity. Applicant states those are events of other orgs, but cannot	
	distinguish who is hosting event; also it devotes time to reporting /recapping such	
	events. Decision - start drafting denial / FTE (in case DOJ wants it soon)	
	(in case DOJ wants it soon) to see if we have enough and go from there.	

(Gov't Ex. 7, Unredacted_IRS_WeThePeopleTexas_000429) (material previously redacted for attorney-client privilege is highlighted in yellow). This conversation is consistent with the procedure in the Expedited Process memoranda: each reviewed TPTP's file, then they discussed the entity's activities and whether the entity has established that it promotes social welfare as required by the statute. Finally, the only reference to DOJ has to do with proceeding without delay.

TPTP next gets it exactly wrong when it cites to a proposed development letter written by Ms. Mangrum and speculates that the reason the letter was not sent was because of DOJ's "litigation strategy.":

> But Mangrum's letter was never sent. The 2014 analysis had been at DOJ's request "as part of the ongoing litigation" and so that DOJ could decide "whether or not to file appeals" and consider "discovery schedules in several cases." Bates 480. The strategic litigation concern having passed, the IRS did nothing with its latest re-analysis of TPTP's file.

(Dkt. 306-1, PageID 10052.) While TPTP insinuates that DOJ instructed the IRS to draft development questions and then prevented IRS from sending them because of a "litigation strategy," in fact, DOJ's inquiry was limited to requesting a status update and urging the IRS to make any determinations that could be made without taxpayer contact as expeditiously as possible. The phrases TPTP quotes are from the following email:

From: Butler Paul T [mailto:Paul.T.Butler@IRSCOUNSEL.TREAS.GOV]
Sent: Thursday, August 14, 2014 3:27 PM
To: Biss Meghan R; Waddell Jon M; Quesenberry Preston
Cc: Lucey Matthew D; Lothamer Casey; Weiner Mark A
Subject: Request for Status

I am continuing to attempt to assist DOJ as they work to resolve and/or limit the IRS' exposure to various potential remedies and sanctions requested in a wide range of litigation. As part of that assistance and cooperation, DOJ has asked for the status of 12 entities who had pending applications with TEGE Exempt Orgs. DOJ is not seeking to influence the determination process, simply looking to gain as much information as is currently available about each of the entities on the attached list (I think that Preston has already shared this necessary information with Matt about the entity involved in the NorCal case, so there are only 11 others on the list).

I am sorry, but I am not sure who is the proper person to request look into these cases, but I think each of you on the To line of this e-mail has been assisting Casey with getting information for pending litigation. I would be grateful if someone could please check into the status of each of these entities including: if anyone is currently working on the application, and if so, the identity of the assigned agent, any approximation of an estimated completion date that may be possible.

Please contact me before you dive too deeply into this so that we can discuss. If you need any additional information, please let me know so that we can get this information to DOJ as soon as possible as they have indicated that decisions on whether or not to file appeals and discovery schedules in several cases may be influenced by this information.

Thank you in advance,

Paul

(Gov't Ex. 7, Unredacted_IRS_WeThePeopleTexas_000480) (material previously redacted for attorney-client privilege is highlighted in yellow). First, the unredacted text confirms that DOJ's involvement was limited to inquiries regarding status. Second, it also confirms that the IRS understood that: "DOJ is not seeking to influence the determination process."

The unredacted text shows the fallacy of TPTP's insinuation that DOJ inappropriately intervened in the processing of its application, and it was inappropriate for TPTP to make such unfounded insinuations in the first place.

III. TPTP was not "on the path to approval" in August 2013, because TPTP had not met its burden to establish that it qualifies as a social welfare organization, as required for tax exempt status.

TPTP applied to be exempt from taxation under Internal Revenue Code § 501(c)(4). Organizations that qualify for tax exempt status under § 501(c), in effect, receive a public subsidy from Congress. *See Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544

(1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."). IRS EO Determinations reviews the applications of would-be tax exempt entities to ensure that organizations meet their burden of showing eligibility for tax exempt status. *See Universal Life Church v. United States*, 372 F. Supp. 770, 775 (E.D. Cal. 1974) ("one seeking a tax exemption has the burden of establishing his right to a tax-exempt status"). The importance of this task is underscored by the low audit rates of tax exempt entities, which TPTP highlights in its Motion: "the number of tax-exempt organizations that are audited each year is typically less than 1%." (Dkt. 306-1, PageID 10058). Given the minimal likelihood of a future audit, it is crucial for the IRS to make an informed and accurate decision at the application determination stage, based on a complete record, so that only entities that meet the requirements set by Congress receive the public subsidy.[15]

TPTP bears the burden to establish its qualification for tax exemption under § 501(c)(4), and based on the information in its application file, it has not met that burden. (Gov't Ex. 8, Declaration of Jeffrey I. Cooper, Director, EO Rulings & Agreements, ¶ 5.) Under section§ 501(c)(4), tax exempt status is given to groups that are "operated exclusively for the promotion of social welfare." 26 U.S.C. § 501(c)(4). Groups claiming tax exempt status under § 501(c)(4) may engage in limited campaign intervention, but that cannot constitute the group's primary

[15] TPTP also suggests that the IRS's development questions are unnecessary because the IRS may use TPTP's informational Notices 990-N to monitor whether TPTP remains qualified for tax exempt status. Although TPTP correctly states that it "has only been required to file a Form 990-N," it ignores the fact that it has not complied with this requirement. The records of the IRS show that TPTP has never filed a Form 990-N or any information return related to its tax exempt status. Under the law, TPTP was obligated to file this notice from the date it was legally formed and for every year that its application was pending. *See* 26 U.S.C. 6033(a); Publication 557 Tax-Exempt Status for Your Organization ("An organization that claims to be exempt under section 501(a) but has not established its exempt status by the due date for filing an information return must complete and file [the required form]. If an organization's application is pending with the IRS, it must so indicate on [the requisite forms] by checking the application pending block at the top of page 1 of the return."); *see also* Instructions to Form 990.

activity, because direct or indirect participation in political campaigns on behalf of or in opposition to any candidate for public office is not considered social welfare. *See* 26 C.F.R. § 1.501(c)(4)-1(a)(2); Rev. Rul. 81-95.

The information in TPTP's application file shows that many of its activities constitute or may constitute political campaign intervention, which is inconsistent with the promotion of social welfare.[16] For example, TPTP's 2011 and 2012 events included: distributing voter guides that favor certain candidates (Bates 338-43), participating in candidate fundraisers (Bates 326, 27), and promoting a candidate for Texas House Speaker (Bates 327). (*See* Gov't Ex. 8, ¶¶ 11-13.) While § 501(c)(4) organizations may engage in political campaign intervention, such activities must constitute less than 50% of the organization's total activities. TPTP has not provided information regarding the amount of time and resources it devotes to political campaign intervention activities relative to those devoted to social welfare activities. Without information to establish that less than 50% of TPTP's activities involve political campaign intervention, TPTP has not met its burden to show that it is a social welfare organization under § 501(c)(4). Because this information is lacking, TPTP's application for tax exempt status cannot be approved without additional information. As a result, the IRS was acting in the ordinary course when it recently sought additional information from TPTP.

IV. The IRS is processing TPTP's application in the ordinary course.

In its Motion, TPTP argues that "ordinary course" processing requires limiting the "scope of the questions" asked by the IRS as well as limiting the time frame to "September 1, 2010—when TPTP was incorporated—through March 2013, when TPTP submitted its response to the

[16] TPTP's current tax exempt application file contains its application for tax exempt status and its responses to two development letters. TPTP has not submitted any additional information since March 8, 2013.

second development letter." (Docket No. 306-1, PageID 10057.) However, both the scope of the questions and the nature of the timeframe are adapted from the template questions that the IRS currently uses for all organizations that raise issues similar to those raised by TPTP's application. (Gov't Ex. 6, pp. 17, 19.) The information requests in the September 26, 2016 development letter are based on the template questions that IRS agents use in cases such as TPTP's where political campaign intervention is a relevant issue. (Gov't Ex. 8, ¶ 18.) In addition, contrary to TPTP's assertion that the IRS typically only seeks information regarding six to nine months of an entity's activities (Dkt. 306-1, PageID 10058), the template questions show that the IRS regularly seeks information about the entity's future plans and intended activities. (Id.)

While the IRS is amenable to accommodating TPTP, it would not be accurate to conclude that limiting the scope of the questions and the timeframe constitutes processing TPTP in the "ordinary course." What TPTP seeks, and what the IRS would be willing to provide, is a special process to accommodate its concerns. That is not the "ordinary course" processing requested by TPTP's Motion for Preliminary Injunction and currently required by this Court's Order granting that motion.

CONCLUSION

TPTP bases its arguments on false assumptions bolstered by improper and demonstrably false insinuations of inappropriate involvement by DOJ and IRS counsel attorneys. However, the facts show that the IRS's development questions are in the ordinary course. Accordingly, the IRS is in the process of complying with this Court's Order to process TPTP's application in the ordinary course. The United States is amenable to resolving this issue by limiting the time period of the information requested. The United States is also amenable to resolving this matter by agreeing to allow TPTP to submit the additional information it believes would be relevant to establish whether it is entitled to tax exempt status. While the IRS issued the development letter

in the ordinary course, TPTP can decide whether to respond fully, incompletely, or with different information. However, the United States requests that any Court order along those lines clarify that this is an accommodation for TPTP, not the ordinary course, and require that TPTP submit any additional information within 30 days.

DATED: December 14, 2016

Respectfully submitted,

CAROLINE D. CIRAOLO
Principal Deputy Assistant Attorney General
Tax Division

/s/ Joseph A. Sergi
JOSEPH A. SERGI (DC 480837)
Senior Litigation Counsel

LAURA C. BECKERMAN (CA 278490)
JEREMY N. HENDON (OR 97890)
LAURA M. CONNER (VA 40388)
Trial Attorneys
U.S. Department of Justice, Tax Division
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-2000
Joseph.A.Sergi@usdoj.gov

Of Counsel:

BENJAMIN C. GLASSMAN
Acting United States Attorney
MATTHEW J. HORWITZ (OH 0082381)
Assistant United States Attorney
221 East Fourth Street, Suite 400
Cincinnati, Ohio 45202
(513) 684-3711
Matthew.Horwitz@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2016, I caused the UNITED STATES' RESPONSE TO PLAINTIFF TPTP'S MOTION TO CLARIFY PRELIMINARY INJUNCTION and attachments to be served by filing the same with the United States District Court for the Southern District of Ohio via the Court's CM/ECF system.

s/ Joseph A. Sergi
JOSEPH A. SERGI

INDEX OF EXHIBITS

1. Letter dated November 11, 2016 from TPTP's Counsel to DOJ

2. Email dated November 18, 2016 from TPTP's Counsel to DOJ

3. Declaration of Emily Mangrum, IRS

4. TEGE Memorandum 07-0613-08: *Interim Guidance on Optional Expedited Process for Certain Exemption Applications Under Section 501(c)(4)*, dated June 25, 2013

5. TEGE Memorandum 07-0713-12: *Amendment to Interim Guidance on Optional Expedited Process for Certain Exemption Applications Under Section 501(c)(4)*, dated July 18, 2014

6. Declaration of Tamera L. Ripperda, Director, IRS Exempt Organizations Unit

7. Unredacted Excerpts, TPTP Application File, IRS_WeThePeopleTexas_000429-430, 455-458, 473-474, 476-481, 494-496

8. Declaration of Jeffrey I. Cooper, Director, IRS EO Rulings & Agreements