IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS,	)	
Plaintiff,	)	
v.	)	No. 1:14-cv-1190-JEB
INTERNAL REVENUE SERVICE, and JOHN KOSKINEN, in his official capacity as Commissioner of Internal Revenue,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants, the Internal Revenue Service and John Koskinen, as Commissioner of Internal Revenue, respectfully move the Court to dismiss the complaint for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1).

Plaintiff, the American Institute of Certified Public Accountants, challenges the Internal Revenue Service's new voluntary program that allows tax return preparers to complete continuing education courses, pass a course-related comprehension test, and receive a Record of Completion. Plaintiff claims that the new tax return preparer program will cause injury to its membership.

But plaintiff does not have standing to bring this suit. The program is not directed at plaintiff's members, who are certified public accountants ("CPAs"), but

rather at uncredentialed tax return preparers. Plaintiff and its membership are not the proper parties to bring this suit. Moreover, plaintiff does not specifically identify any of its members who do claim injury from the new program.

Equally important, because the program is voluntary, plaintiff's members do not suffer any compensable injury. Specifically, plaintiff cannot establish a causal link between the program and the injuries it alleges. Plaintiff asserts that the program is "*de facto* mandatory" because uncredentialed preparers who do not complete the program will lose business to those who do. But for purposes of subject matter jurisdiction, business decisions that are motivated by competitive pressures remain voluntary, thereby breaking the causal chain, and defeating plaintiff's alleged standing.[1]

Finally, plaintiff's standing allegations consist of conclusory speculation regarding claimed future injury. They fail for this reason as well.

THE ANNUAL FILING SEASON PROGRAM

"Basic competency for paid tax return preparers is essential to accurate return preparation, improved tax compliance, effective tax administration, and protecting taxpayers from preparer errors." Revenue Procedure 2014-42, § 2. But while "40% of paid tax return preparers are credentialed as attorneys, CPAs, or EAs [enrolled agents], most of the other 60% of paid tax return preparers lack any kind of professional

[1] E.g., *Petro-Chem Processing v. E.P.A.*, 866 F.2d 433, 438 (D.C. Cir. 1989).

credential or license." Id.[2] Therefore, the Department of the Treasury and the Internal Revenue Service promulgated mandatory regulations in 2011 that required uncredentialed tax return preparers to complete continuing education classes and to pass a competency examination, among other requirements. This Court and the Court of Appeals held that those regulations were invalid because they were not authorized by statute. *Loving v. Internal Revenue Service,* 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd,* 742 F.3d 1013 (D.C. Cir. 2014).

As a result of this determination, the registered tax return preparer regulations are no longer in effect. To remedy the absence of regulatory authority, the Administration has proposed to Congress that it provide the Treasury Department with explicit legislative authority to regulate all tax return preparers. *Department of the Treasury, General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals,* p. 244 (March 2014). Until that legislation is enacted, the Treasury Department and the Internal Revenue Service have established the Annual Filing Season Program (the

[2] The Internal Revenue Service has for many years regulated five separate categories of credentialed tax practitioners: (1) attorneys; (2) CPAs; (3) enrolled agents; (d) enrolled actuaries; and (5) enrolled retirement plan agents. See Former 31 C.F.R. Part 10 (2009). Attorneys, CPAs, and actuaries have been required to pass examinations in order to obtain a state license and/or professional society membership. Enrolled agents and enrolled retirement plan agents have been required to pass special examinations administered under the oversight of Internal Revenue Service proving their competence on tax related matters. See Former 10 C.F.R. § 10.4(1)-(b) (2009). But the majority of tax return preparers are uncredentialed.

"Program") which is designed to improve the competency of uncredentialed tax preparers. Revenue Procedure 2014-42, § 2.

The Program is "voluntary and no tax return preparer is required to participate. . . . This revenue procedure does not restrict any individual from preparing and signing returns and claims for refund . . . " Id., § 3. For an individual who chooses to participate, that individual must (1) have a valid Paid Preparer Tax Identification Number ("PTIN"); (2) complete certain continuing education requirements; (3) pass a course-related comprehension test; and (4) consent to be subject to the duties and restrictions of Circular 230. Id., § 4.05.

Upon completion of the Program's requirements, the Internal Revenue Service will provide the return preparer with a Record of Completion. Id., § 4.02. It will also list the individual in a directory of preparers with credentials or other qualifications ("Directory") that will be available on the Internal Revenue Service's website.[3] However, a preparer who receives a Record of Completion "may not use the term 'certified,' 'enrolled,' or 'licensed' to describe this designation or in any way . . . make representations that the IRS has endorsed the tax return preparer." Id., § 4.07.

The Program is not directed at attorneys, CPAs, or other enrolled preparers. Rather, it is directed at the many uncredentialed return preparers. The Program is

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[3] *IRS Unveils Filing Season Program for Tax Return Preparers, Answers Frequently Asked Questions*, http://www.irs.gov/Tax-Professionals/Frequently-Asked-Questions-Annual-Filing-Season-Program.

"designed to encourage tax return preparers who are not attorneys, certified public accountants (CPAs), or enrolled agents (EAs) to complete continuing education courses for the purpose of increasing their knowledge of the law relevant to federal tax returns." Id., § 1. Accordingly, in publicizing the initiative the Internal Revenue Service has explained that CPAs and other credentialed preparers need not participate because "[t]hey are already in possession of higher level qualifications."[4] The Internal Revenue Service has emphasized that the Program "does not in any way affect or limit the ability of attorneys, CPAs, or EAs to represent taxpayers before the IRS." Id., § 3. And CPAs and other credentialed preparers will be included in the Internal Revenue Service's Directory – with their credentials identified – even without participating in the Program.[5] Even so, CPAs and other credentialed preparers are free to participate in the Program if they so choose. Id.

The complaint alleges that the Program is final agency action subject to the Administrative Procedure Act, 5 U.S.C. §§ 701 – 706. Complaint, ¶¶ 69, 73. The complaint alleges the substantive APA violations that the Program exceeds statutory authority and is arbitrary and capricious. Complaint, ¶¶ 68 – 71, 75 – 77; see 5 U.S.C. §

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[4] *IRS Unveils Filing Season Program for Tax Return Preparers, Answers Frequently Asked Questions,* http://www.irs.gov/Tax-Professionals/Frequently-Asked-Questions-Annual-Filing-Season-Program.

[5] *IRS Unveils Filing Season Program for Tax Return Preparers, Answers Frequently Asked Questions,* http://www.irs.gov/Tax-Professionals/Frequently-Asked-Questions-Annual-Filing-Season-Program.

702(2)(A) & (2)(C). It also alleges the procedural APA violation that the Program was issued without required notice and comment. Complaint, ¶¶ 72 – 74; see 5 U.S.C. § 702(2)(A) & (2)(D).

PLAINTIFF'S STANDING ALLEGATIONS

Plaintiff alleges that it is "the world's largest member association representing the accounting profession . . . . Its members include individual CPAs and accounting firms." Complaint, ¶ 12.

For tax return preparers who do **not** hold a credential such as a CPA, the complaint alleges that the Program is mandatory. Id., ¶ 7 ("In reality, however, the new rule is *de facto* mandatory because it creates a strong competitive incentive for unenrolled tax return preparers to comply.") Plaintiff nowhere alleges that that the Program is "mandatory" for its CPA members who already enjoy the competitive advantage provided by their credential.

Plaintiff does not claim it has or will suffer any injury.[6] Rather, plaintiff alleges associational standing based upon three alleged injuries to others:

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[6] The only time that plaintiff claims injury to itself is found in its procedural APA cause-of-action that alleges that the "AICPA, its members, and other members of the public were not afforded an adequate opportunity to comment on critical features" of the Program. Complaint, ¶ 73. However, because plaintiff does not adequately plead any substantive injury to itself or to its members, the alleged APA procedural injury is insufficient to establish standing on its own. *National Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 15 (D.C. Cir. 2011); *Sierra Club v. E.P.A.*, 754 F.3d 995, 78 ERC 1665 (D.C. Cir. 2014) ("because Petitioners have failed to establish that they will likely suffer a substantive injury, their claimed procedural injury – being denied the right to comment on the Memorandum – necessarily fails."); *Summers v. Earth Island,* 555 U.S. 488, 496 (continued...)

> Certain accounting firms that are members of the AICPA employ individuals who will be injured by the additional regulatory burdens created by the AFS rule.
>
> AICPA members will be directly injured by the AFS rule because it requires firms to "take reasonable steps" to ensure that their newly regulated employees comply with Circular 230. See Rev. Proc. 2014-42, § 6.03; 31 C.F.R. § 10.36(b).
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> AICPA members also will suffer injuries because the rule will cause confusion among consumers.

Complaint, ¶ 12. Plaintiff does not allege that these injuries have occurred; rather, plaintiff alleges that these injuries "will" occur sometime in the future. Id.

ARGUMENT

To establish standing, the plaintiff must establish that (1) it has suffered "injury-in-fact"; that is, a concrete and particularized harm that is actual and imminent and not conjectural or hypothetical; (2) that the plaintiff's injury was caused or "traceable" to defendant's alleged improper conduct; and (3) that plaintiff's injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Chamber of Commerce v. E.P.A.,* 642 F.3d 192, 200 (D.C. Cir. 2011); *Western Wood Preservers Institute v. McHugh,* 925 F. Supp. 2d 63, 69 (D.D.C. 2013).

Here plaintiff does not claim injury to itself, but to its members. Plaintiff therefore must satisfy the requirements of associational (or "representational") standing

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(… continued)
(2009) ("But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.").

which are that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Western Wood,* 925 F. Supp. 2d at 69 quoting *Hunt v. Washington State Apple Comm'n,* 432 U.S. 333, 343 (1977).

Plaintiff does not adequately plead the foregoing standing requirements, and the Court should dismiss the complaint for lack of jurisdiction. See Fed.R.Civ.P. 12(b)(1). In determining a Rule 12(b)(1) motion, the Court may "'consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Jack's Canoes & Kayaks v. National Park Service,* 933 F. Supp. 2d 58, 68 (D.D.C. 2013) quoting *Coalition for Underground Exp. v. Mineta,* 333 F.3d 193, 198 (D.C. Cir. 2003). The Court need not credit conclusory allegations in the complaint. *Ashcroft v. Iqbal,* 556 U.S. 662, 686 (2009). "Where 'injury' and 'cause' are not obvious, the plaintiff must plead their existence in his complaint with a fair degree of specificity." *Munoz-Mendoza v. Pierce,* 711 F.2d 421, 425 (1st Cir. 1983); *Richardson v. Mayor and City Counsel of Baltimore,* 2014 WL 60211 at *4 (D.Md. 2014).

Although the Court must accept well pleaded factual allegations as true, the complaint's "factual allegations . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Mylan Pharm. v. F.D.A.,* 789 F. Supp. 2d 1, 6 (D.D.C. 2011); *American Orthotic & Pros. Ass'n v. Sebelius,* --- F. Supp. 2d ---, 2014 WL 3817124 at *2 (D.D.C. 2014); *Jack's Canoes,* 933 F. Supp. 2d at 68;

Wright v. Foreign Service Grievance Bd., 503 F. Supp. 2d 163, 170 (D.D.C. 2007). And in this case, the Court should set a high bar for standing because the challenged agency action is not directed at plaintiff or its members who are CPAs, but at uncredentialed tax preparers, such as the plaintiffs in *Loving*. The Supreme Court has "emphasized the heightened showing required of a plaintiff alleging injury from the government's regulation of a third party . . . [W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily *substantially more difficult to establish*." *Renal Physicians Ass'n v. U.S. Dep't of Health,* 489 F.3d 1267, 1273 (D.C. Cir. 2007) quoting *Lujan,* 504 U.S. at 562 (emphasis in original). "Courts have adopted a 'general prohibition on a litigant's raising another person's legal rights.'" *Mylan Pharm.,* 789 F. Supp. 2d at 9 quoting *Elk Grove Sch. Dist. v. Newdow,* 542 U.S. 1, 12 (2004). Here plaintiff has failed to allege a nonconclusory, concrete, and imminent injury to its members.

I. The Program is voluntary which breaks the chain of causation required for plaintiff's standing

Unlike the mandatory registered tax return preparer regulations invalidated in *Loving*, the new Program is voluntary. Revenue Procedure 2014-42, § 3. But a voluntary act by a third party between the defendant's act and the plaintiff's injury breaks the chain of causation required for standing. *Huron v. Berry,* --- F. Supp. 2d ---, 2013 WL 6791978 at *5 (D.D.C. 2013); *Petro-Chem Processing v. E.P.A.,* 866 F.2d 433, 438 (D.C. Cir. 1989); *Grocery Manuf. Ass'n v. E.P.A.,* 693 F.3d 169, 176 (D.C. Cir. 2012); *Center for Biological Diversity v. U.S. Dep't of Interior,* 563 F.3d 466, 478 (D.C. Cir. 2009). Plaintiff's

alleged injuries depend upon a substantial number of uncredentialed preparers participating in the Program. But to the extent that the vast majority of uncredentialed preparers do decide to participate in the Program, as plaintiff alleges, those voluntary decisions will break the required chain of causation.

Plaintiff alleges that the Program is *de facto* mandatory for uncredentialed preparers "because it creates a strong competitive incentive for unenrolled tax return preparers to comply . . . . Faced with the prospect of not participating and losing business, tax return preparers will 'choose' to comply." Complaint, ¶¶ 7-8, 55. At this point, plaintiff's allegation is entirely speculative because it is currently unknown how many uncredentialed preparers will choose to participate in the Program.[7]

But even if plaintiff's allegation is credited, such economically driven decisions -- for purposes of standing -- remain voluntary choices that break the chain of causation. Under the law of standing, "economic considerations that cause an individual to reject a certain option because it is less favorable in some ways and more favorable in others does not transform an otherwise voluntary decision into a coerced one." *Huron v. Berry,* 2013 WL 6791978 at *6; *Petro-Chem,* 866 F.2d at 438 ("It is of no moment for the inquiry at hand that [plaintiffs] may be 'forced' by competitive pressures to choose unsafe

[7] By contrast, it is currently known that the credentials of attorney, CPA, and enrolled agent are not "*de facto* mandatory" for uncredentialed preparers because few uncredentialed preparers undertake the effort to obtain any of them. Plaintiff does not allege any specific distinguishing feature(s) of the Record of Completion that will render it "*de facto* mandatory" for uncredentialed preparers.

methods; we cannot deem them injured, in the sense relevant under controlling precedent, by their own choice to compete in kind."). An uncredentialed preparer's decision to take continuing education courses and to obtain a Record of Completion in order to enhance her competitive position is no different than any other voluntary decision by her to invest (thereby incurring costs) in her business in order to maintain her competitive position. For example, if some of the preparer's competitors begin to advertise and the preparer recognizes that she, too, must advertise or lose business, her decision to advertise is still voluntary and not mandatory. Every businesswoman faces a myriad of decisions as to what costs she will incur in order to respond to competitive pressures.

Plaintiff alleges that the Program is an "impermissible end-run" on *Loving* because of the economic incentives it will generate for uncredentialed preparers. Complaint, ¶¶ 49 – 55. Plaintiff is incorrect. This Court in *Loving* indicated that a voluntary program for return preparers was entirely appropriate even though participants could enjoy a competitive advantage. *Loving v. Internal Revenue Service,* 920 F. Supp. 2d 108, 111 (D.D.C. 2013) (under the Court's ruling and injunction it would still be permissible for the Internal Revenue Service "to retain the testing centers and some staff, as it is possible that some preparers may wish to take the exam or continuing education even if not required to. Such voluntarily obtained credentials might distinguish them from other preparers."). This Court implicitly recognized that a business decision remains voluntary even though it may result from economic considerations.

Consequently, even assuming that a large proportion of uncredentialed preparers do decide to participate in the Program, their decisions remain "voluntary" for purposes of subject matter jurisdiction and deprive plaintiff of standing.

II. Plaintiff's complaint fails specifically to identify its members who will suffer injury because of the Program

The first element of associational standing requires that the plaintiff show that its members would have standing to sue in their own right. *Western Wood,* 925 F. Supp. 2d at 70. Conclusory allegations will not satisfy that element. To the contrary, the association plaintiff must "make specific allegations establishing that at least one **identified** member had suffered or would suffer harm." *Id.* quoting *Summers v. Earth Island Inst.,* 555 U.S. 488, 498 (2009) (bold supplied); *Chamber of Commerce,* 642 F.3d at 199-200 (It is "not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm.") If the association plaintiff does not specifically identify its members who have or will suffer injury, the complaint should be dismissed under Rule 12(b)(1). *Western Wood,* 925 F. Supp. 2d at 70; *Chamber of Commerce,* 642 F.3d at 200 ("Because the Chamber has not identified a single member who was or would be injured . . . it lacks standing."). Here plaintiff does not identify any specific member who will suffer any of

the three alleged injuries. Accordingly, all three of plaintiff's claimed injuries to its members fail.[8]

III. Each of plaintiff's three theories of injury has additional flaws

In addition to the above fatal flaws that inhere in all three of plaintiff's alleged injuries, each theory has additional infirmities.

A. Plaintiff does not have standing to sue for injuries suffered by its members' employees

Plaintiff's first theory of injury claims that certain of its members "employ individuals who will be injured by the additional regulatory burdens created by the AFS rule." Complaint, ¶ 12. This theory, therefore, does not allege injury to plaintiff or to its members, but rather alleges injury to its members' employees.

But employers do not have standing based upon the injuries of their employees, except in limited circumstances not alleged here.[9] *Region 8 Forest Service Timber Purchasers v. Alcock,* 993 F.2d 800, 809-10 (11th Cir. 1993).; *Int'l Union v. Dana Corp.,* 278 F.3d 548, 559-60 (6th Cir. 2002); *CNA Financial Corp. v. Local 743,* 515 F.Supp. 942, 947

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[8] In *Florida Bankers Ass'n v. U.S. Dep't of Treasury,* 2014 WL 114519 at **5-6 (D.D.C. 2014), the plaintiff association was not required to identify specific members who had suffered injury. However, *Florida Bankers* is not apposite because it addressed a government action that was directed at the association's members. By contrast, here the Program is directed at uncredentialed tax return preparers, and not plaintiff's members who have a CPA credential.

[9] For example, plaintiff does not allege that the employees suffering injury face a "genuine obstacle" to bringing suit themselves. *Viceroy Gold Corp. v. Aubry,* 75 F.3d 482, 489 (9th Cir. 1996). That such employees may lack a sufficient economic motivation to bring suit does not constitute a "genuine obstacle." *Id.*

(N.D. Ill. 1981); see *Warth v. Seldin,* 422 U.S. 490, 508-10 (1975). Since plaintiff's members do not have standing to sue on behalf of their employees, plaintiff – which is one more step removed -- cannot allege standing either.

Plaintiff has also failed to allege an injury to its members that is sufficiently concrete to provide Article III standing. And even if the Court accepted plaintiff's allegation that the Program will be mandatory for uncredentialed tax return preparers in business on their own, plaintiff does not allege specific facts that plausibly support that the Program will be "mandatory" for an uncredentialed employee of a CPA firm; a firm that competes on its partners' CPA credentials, and not on those of its employees. Consequently, once again the chain of pleaded causation is broken by a voluntary action, this time by the employee in choosing to participate in the Program. *Huron,* 2013 WL 6791978 at *5; *Petro-Chem,* 866 F.2d at 438; *Grocery Manuf. Ass'n,* 693 F.3d at 176; *Center for Biological Diversity,* 563 F.3d at 478.

B. Existing Circular 230 requirements do not provide standing here

Plaintiff's second theory of standing asserts that plaintiff's "members will be directly injured by the AFS rule because it requires firms to 'take reasonable steps' to ensure that their newly regulated employees comply with Circular 230. See Rev. Proc. 2014-42, § 6.03; 31 C.F.R. § 10.36(b)." Complaint, ¶ 12.

This second theory of standing fails for the same reason as plaintiff's first. The second theory again implicitly asserts that employees of some of plaintiff's members will decide to complete the Program, thereby becoming subject to Circular 230, and thereby causing plaintiff's members to undertake additional procedures in order to

ensure their employees' compliance with Circular 230. But again plaintiff's chain of causation is broken by the voluntary actions by third-party employees in deciding to participate in the Program. As pointed out above, plaintiff does not allege specific facts that plausibly support that the Program would be "mandatory" for uncredentialed employees of CPA firms that compete in the marketplace based upon their CPA credentials. "It is well established that causation, or 'traceability,' examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff." *Grocery Manuf. Ass'n,* 693 F.3d at 176 quoting *Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 663 (D.C. Cir. 1996); *Clapper v. Amnesty Int'l,* 133 S.Ct. 1138, 1150 (2013) ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Moreover, the additional "reasonable steps" CPA firms will be required to take are traceable to Circular 230, and not to the Program. Under the existing regulations,

> Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable.

31 C.F.R. § 10.36(a). In 2011, section 10.36 was expanded to ensure that a firm has adequate procedures in place to ensure the proper preparation of tax returns. *Compare* 31 C.F.R. § 10.36 (2011) with 31 C.F.R. § 10.36 (2012). Section 10.36 requires that CPAs

with "principal authority" over their firms to take "reasonable steps" to ensure compliance by **all** employees regardless of whether they are CPAs, uncredentialed preparers, or staff personnel. Consequently, the Program will not increase the regulatory burden. Put another way, Circular 230 causes the alleged regulatory burden and not the Program.

C. Conclusory allegations of injury from undefined consumer confusion do not supply standing

Plaintiff's third theory of standing asserts that its "members also will suffer injuries because the rule will cause confusion among consumers." Complaint, ¶ 12.[10] Plaintiff's speculative prediction fails.

First, plaintiff's allegation that the Program will cause consumers to suffer confusion is conclusory and therefore insufficient. *E.g., Parker Waichman v. Gilman Law,* 2013 WL 3863928 at *4 (E.D.N.Y. 2013); *Patrick Collins v. John Does 1-7,* 2012 WL 1889766 at *2 (S.D.N.Y. 2012); *Flava Works, Inc. v. Roje on Holiday,* 2012 WL 1569568 at *3 (S.D. Fla. 2012). Plaintiff does not allege the substance of the alleged consumer confusion, nor the specifics of how the Program allegedly causes such confusion. For example, the

[10] Plaintiff by this theory appears to recognize that the Program is voluntary, and not mandatory, for its members. If the Program were mandatory such that all CPAs completed the Program, all CPAs would receive the Record of Completion and be listed on the Internal Revenue Service's website as having the Record of Completion along with their CPA credential. No consumer confusion could be plead for CPAs with a Record of Completion as against otherwise uncredentialed preparers who also have a Record of Completion.

complaint lacks any allegation that some particular element of the Program is misleading or ambiguous. Moreover, a preparer who receives a Record of Completion "may not use the term 'certified,' 'enrolled,' or 'licensed' to describe this designation or in any way . . . make representations that the IRS has endorsed the tax return preparer." Revenue Procedure 2014-42, § 4.07. The facts before the Court weigh against a plausible inference of consumer confusion.

Second, plaintiff's further allegation that the claimed consumer confusion will cause injury to its members is equally conclusory. Plaintiff "'cannot rely solely on conclusory allegations of injury; . . . [S]tanding cannot be 'inferred argumentatively from averments in the pleadings,' . . . but rather 'must affirmatively appear in the record.'" *Volunteers of America v. Rochester Gas & Elec.,* 2014 WL 3573338 at *5 (W.D.N.Y. 2014) quoting *Baur v. Veneman,* 352 F.3d 626, 637 (2d Cir. 2003) and *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990). Generic allegations of causation do not suffice. *A.G. ex rel Maddox v. Elsevier, Inc.,* 732 F.3d 77, 83 (1st Cir. 2013); *Silverman v. Town of Blackstone, Va.,* 843 F. Supp. 2d 628, 635-36 (E.D.Va. 2012); *Sorenson v. Minnesota Dep't of Human Services,* 2014 WL 4185817 at *21 (D.Minn. 2014). CPAs already compete with other credentialed preparers; i.e., with attorneys and enrolled agents. Plaintiff does not allege that consumers are currently confused by the various credentials held by competing preparers, and plaintiff alleges no specific facts that preparers holding another type of credential, a Record of Completion, would cause confusion to a degree that would result in injury to its members.

Third, this allegation of injury is brought on behalf of CPAs who are competitors of uncredentialed tax return preparers who may participate in the Program. Particularly given this context, plaintiff must allege the specific consumer confusion and members' injury, and not simply that its members' competitive position may be adversely affected because other preparers earn a tax preparation credential. In the absence of such alleged specific facts, this suit constitutes an anticompetitive contrivance.

Finally, *fourth,* the claimed injury is speculative. Tax filing season does not begin until early 2015. Plaintiff's allegation of consumer confusion is, at this time, merely a speculative prediction regarding consumers' future perceptions without any specific supporting facts. This predicted injury is "conjectural" and "hypothetical" which is not sufficient to support constitutional standing. *Chamber of Commerce,* 642 F.3d at 200.

In short, plaintiff fails to allege specific consumer confusion that is "traceable" or "caused" by the Program itself. Plaintiff's conclusory theory of injury is insufficient.

CONCLUSION

For the foregoing reasons, the Internal Revenue Service requests that the Court dismiss the complaint for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1).

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Dated: September 3, 2014

Respectfully submitted,

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/s/ Joseph E. Hunsader

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