IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. JOHN B. KOTMAIR, JR., dba Save-A-Patriot Fellowship dba National Workers Rights Committee Defendant-Appellant SAVE-A-PATRIOT FELLOWSHIP, an unincorporated association Defendant-Appellant	)	No. 07-1156

APPELLEE'S RESPONSE IN OPPOSITION TO MOTION OF APPELLANT SAPF TO STRIKE PORTIONS OF APPELLEE'S BRIEF AND JOINT APPENDIX

The United States of America, appellee herein, hereby responds to the motion of appellant Save-A-Patriot Fellowship ("SAPF") to strike portions of the Government's brief and of the joint appendix. SAPF's motion to strike is effectively an improper second reply brief and should be denied for that reason. In any event, its arguments are without merit.

1. Appellants John B. Kotmair, Jr. ("Kotmair") and SAPF filed separate opening briefs on April 9, 2007, and April 30, 2007, respectively. The Government filed its answering brief on June 4, 2007. Kotmair filed his reply brief on June 18, 2007. SAPF's separate reply brief is due July 2, 2007 (on extension).

2. In its motion to strike, SAPF seeks to strike certain portions of the Government's brief and of the joint appendix. SAPF does not assert that the appendix includes, or that the Government's brief relies on, any materials that are not properly part of the record of this appeal. Instead, SAPF asserts that the Government's Statement of the Facts "is replete with inaccuracies and counterfactual material" and relies on "immaterial" evidence. (Mot. 1–2.)

3. Neither the federal appellate rules nor the rules of this Court provide for submission of a "motion to strike" portions of briefs like the one SAPF has submitted to this Court. Instead, as the Seventh Circuit recently observed, "[t]he Federal Rules of Appellate Procedure provide a means to contest the accuracy of the other side's statement of facts: that means is a brief (or reply brief, if the contested statement

appears in the appellee's brief), not a motion to strike." *Redwood v. Dobson*, 476 F.3d 462, 471 (7th Cir. 2007). *See also Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 726 (7th Cir. 2007) ("[t]he way to point out errors in an appellee's brief is to file a reply brief, not to ask a judge to serve as editor" by "redact[ing] his adversary's brief"). That Court has concluded that such "[m]otions to strike sentences or sections out of briefs waste everyone's time" and are "frivolous." *Redwood*, 476 F.3d at 471. *See also Custom Vehicles*, 464 F.3d at 728 (observing that the Seventh Circuit does not grant such "unnecessary" and "pointless" motions).

3. SAPF's motion, which is 18 pages long, is in effect an unauthorized supplemental brief filed on SAPF's behalf, one that addresses the statement of facts section of the Government's brief. Earlier in this appeal, SAPF moved to enlarge the type-volume limitation for its opening brief, a request that the Court denied. Now, SAPF evidently seeks to enlarge the type-volume limitation for its reply brief without the Court's leave by submitting substantive argument on the merits of the Government's brief in the guise of a motion to strike.

This is improper. *See Custom Vehicles*, 464 F.3d at 728 (observing that motions to strike portions of an opponent's brief are "a form of 'advance' on the allowance of pages or words used for the party's appellate brief"; to discourage this, appeals court will "deduct from the [permitted length of the movant's] brief double the number of words in a motion to edit an opponent's brief or any other equivalently absurd, time-wasting motion"); *Redwood*, 476 F.3d at 471 (in the future, such motions will subject the movants to monetary sanctions).

4. Moreover, SAPF's assertions in its motion are completely without merit.

a. SAPF argues that pages 104 through 121 and 256 through 301 of the joint appendix should be ordered stricken because they are "irrelevant," "prejudicial," and "immaterial." (Mot. 2–3, 13–14.) SAPF does not dispute, however, that the documents appearing at these pages were part of the record before the District Court and thus are part of the record on appeal to this Court. *See* Fed. R. App. P. 10(a)(1). Because a party may rely in its brief on any material found in the record on appeal, whether or not included in the

joint appendix, 4th Cir. Local Rule 28(f), SAPF's claim that inclusion of this record material in the joint appendix unfairly prejudices its case is patently meritless. Further, SAPF was required to object in writing within 10 days to the Government's designation for the joint appendix of any allegedly unnecessary material, which SAPF did not do. *See* 4th Cir. Local Rule 30(a).

b. Contrary to SAPF's argument (Mot. 2–3, 13–14), the Government's reliance on this record material is not improper. SAPF argues (Mot. 2–3) that pages 104–21 of the joint appendix reproduce material from a website that SAPF does not control. The District Court stated that, for this reason, "any injunction issued by this Court cannot require any action by [SAPF and Kotmair] relative to those websites." (A. 2.) The District Court did not find, however, that this material, which sets forth the conditions and proposed benefits of "membership" in SAPF, was irrelevant or otherwise not properly before it. *See* Doc. 62, Ex. 15 (declaration that former customer had "purchased my membership from a Save-a-Patriot Fellowship Independent Representative who advertise SAPF on the taxfreedom101.com

website"). This material was attached to, and relied on in, the Government's motion for summary judgment, *see* Doc. 42 at 2, 3, 7, citing Doc. 43, Ex. 3, which the District Court granted.

c. Nor is the Government's reliance on the materials at pages 256 through 301 of the joint appendix improper, as SAPF argues (Mot. 13–14). These materials consist of a petition and other documents in a bankruptcy case brought by Nicholas Taflan, an SAPF customer from 1995 through 2006. (A. 251–54; Doc. 42 at 4–6; Doc. 48; *see also* A. 428–71.) Taflan stated that SAPF, among other "services" designed to "reduc[e] the amount of taxes I was required to pay," assisted him in preparing these documents for filing, for which Taflan paid SAPF. (A. 252–53, A. 428–71.) These documents assert, *inter alia*, that the Internal Revenue Service's proof of claim was invalid because the IRS office preparing it maintained no delegation of authority; that the tax assessments set forth in the proof of claim were "fraudulent" because Taflan (who admittedly had substantial income) had filed no returns for the years at issue, and therefore the IRS could not assess a tax; that the IRS's claim was a "claim based on a writing"

requiring additional verification; that the IRS's notice of levy and proof of claim had not been "substantiated" with "authenticated documentation"; and that Taflan was not required to file returns because he had "NO taxable income pursuant to 26 C.F.R. § 1.861-8(f)(1)," a regulation promulgated under Section 861 of the Internal Revenue Code ("I.R.C") (26 U.S.C.), respecting income from sources within the United States.[1] (A. 271–73, 280–82, 290, 293–94.)

In its brief to this Court, the Government cited these record materials to support its statements that Kotmair and SAPF "assist customers in filing pleadings in bankruptcy and federal district courts advocating the U.S.-sources argument" and that they "inform customers that the bankruptcy pleadings they sell require the IRS to prove that the taxes were properly assessed, thus delaying collection."

1/ Section 1.861-8(f) (26 C.F.R.) deals with "miscellaneous matters" respecting the computation of taxable income from sources within the United States and from other sources. This regulation was promulgated under I.R.C. § 861, which states that certain "items of gross income shall be treated as income from sources within the United States." I.R.C. § 861(a). For a description of the "U.S.-sources" argument, *see United States v. Bell*, 414 F.3d 474, 475 n.1 (3d Cir. 2005).

(Gov't Br. 7–8.) In seeking to strike these statements, SAPF notes that the District Court "made no finding with respect to assisting in bankruptcy courts, and *declined to enjoin* SAPF from such activity ("it would be questionable whether any injunction issued under §§ 7402 or 7408 would reach that conduct [*i.e.*, filing bankruptcy petitions on behalf of customers])." (Mot. 13 (emphasis in original), citing A. 484.) In granting the Government's motion for summary judgment that relied, *inter alia*, on this record material, the District Court stated that "SAPF offers to prepare and file customized pleadings for its members advancing the U.S.-Sources argument, . . . in exchange for the payment of additional fees." (A. 480.) The Government's statements are fully consistent with this finding.

d. SAPF argues (Mot. 3–6) that the Government's statements (Gov't Br. 4) that "Kotmair and SAPF market a scheme based on the 'Section 861' argument," "assert that, under the domestic-source income rules of I.R.C. § 861, U.S. citizens need not pay any income taxes on income earned within the 50 states," and "advise members not to report or pay tax on such 'U.S.-source income,'" are not

properly supported. To the contrary, the Government's record references amply support these statements. *See*, *e.g.*, A. 122–23 (SAPF's website states that "[t]axable income . . . is limited to certain income that has been 'earned' while living and working in certain 'foreign' countries or territories" and that "the Form 1040 individual income tax return is appropriate for any person acting as a fiduciary for a nonresident alien and receiving interest and/or dividends from the stock of domestic (US) corporations on behalf of that alien"); A. 124–25 (Kotmair letter advises that SAPF customer need not report or pay income tax on IRA distributions unless the "source of funds that are deposited in your IRS are foreign. . . . If the funds are domestic, then the income is not taxable"); A. 126 (newsletter states that SAPF will provide affidavit of revocation "for every U.S. citizen and resident alien who has discovered the fact that there is NO legal requirement to file an income tax return and wants to revoke that and all other Internal Revenue Service documents ever filed (W-4, etc.), and rescind his/her signature(s) therefrom"; SAPF provides "a statement of citizenship . . . which is to be used in place of a Form W-4 Employees Withholding

Allowance Certificate to claim to be a person not subject to withholding"); A. 131 (newsletter states that "[t]he Internal Revenue Code does NOT apply to U.S. citizens who are living and working within the 50 states who are not involved in certain occupations (like alcohol, tobacco, or firearms) or acting as fiduciaries of nonresident aliens"); A. 132 (newsletter states that "[n]onresident aliens are the only people required to obtain the social security number in order to work in the United States, and thus, they are the only ones required to participate" and "[i]f you are a United States citizen, you do not have a legal requirement to participate in the social security program"); A. 147, 150, 157, 160, 162, 169 (Kotmair letters advise IRS that SAPF customers have no income tax liability because: customer "did not earn any foreign earned income"; customer "did not receive any foreign earned income during the period in question, and therefore has no requirement to file an income tax return"; "[a]ccording to [IRS] regulations, . . . particularly 26 CFR § 1.861-8(f), income must be derived from one of the 'specific sources' listed therein (for citizens, such sources are primarily limited to foreign-earned income) before it is

considered 'gross income' for purposes of the tax laws"; customer "has no requirement to file any tax return for the year at issue because he received no income from the sources listed in 26 CFR § 1.861-8(f)"; customer "denies any requirement to file a tax return . . ., i.e., does not have any 'Foreign Earned Income'"; Doc. 8, ¶¶ 8, 10, & Doc. 10, ¶¶ 8, 10 (admitting that www.save-a-patriot.org is SAPF's website and *Reasonable Action* its newsletter and that members receive the newsletter and have access to SAPF's staff); Doc. 43, Ex. 6E at 5 (newsletter states that "there is no law requiring [Employer identification Numbers] from domestic employers or withholding of income taxes from citizens"). SAPF's complaint (Mot. 3) that certain cited pages do not actually use the words "861" or "sources" is frivolous.

SAPF's further assertion (Mot. 3) that it does not "sell" anything on the cited pages of its website and newsletter or "market" anything in the cited letters to the IRS, is disingenuous. *See* A. 126 (newsletter urges customers to "[c]all for price/personalization" of Affidavit of Revocation and letters to the IRS); A. 127 (newsletter states that "[o]ur exclusive VEHICLES . . . [*i.e.*, Affidavits of Revocation, Statements of

Citizenship, letters to the IRS] are now only available to *Fellowship* members. . . . Please call *SAP Headquarters* for details" (emphases in original)); A. 129 (newsletter states that "[t]he numbers and prices have again changed from those of previous issues of R.A., and are effective as of 6/1/90. When ordering by phone or letter, please refer to the date of the issue you are referring to, the VEHICLE . . . number and name, and cost" and identifies "#2. TAXPAYER DELINQUENCY INVESTIGATION (TDI) LETTER RESPONSE . . . Cost: 8 FRNs [dollars] personalized" (emphases in originals)); Doc. 43, Ex. 6E at 10 (newsletter reprints interview in which Kotmair discusses, *inter alia*, how much SAPF charges for its services).

e. SAPF asserts (Mot. 6) that, "[o]n page 5, the phrase 'and which they represent will enable customers legally to stop paying income tax on their U.S.-source income' should be struck" because "no such statements have been identified by the government or the lower court." (*Ibid.*) SAPF claims that these statements are based on the "conclusory allegations" of Revenue Agent Rowe (A. 70–71). Rowe's statements, however, are descriptions of the documents attached to her

declaration, which are also in the record of this case. (Doc. 53, Exs. 9–14, 16.) Moreover, based on Kotmair's own affidavit in which he objected to these statements, the District Court concluded that "SAPF represents that [its] products and services, if used as SAPF instructs, will enable members to legally stop paying income tax on their 'U.S.-source income.'" (A. 479–80, citing Doc. 54, Ex. 1, ¶¶ 7, 24–28, 30, 32.) In that affidavit, Kotmair states that "SAPF . . . offers publications . . . stating *that U.S.-source income* [of citizens] *is not taxable*," that it "offer[s] to its Fellowship members the Affidavit of Revocation and Rescission, which gives the facts and the authority within it for the revocation of Form SS-5, the application for a social security number." (Doc. 54, Ex. 1, ¶ 7 (emphasis in original).) With respect to letters SAPF sends to the IRS responding to requests for SAPF customers' income tax returns or to other IRS correspondence, stating that the customers were not required to file returns because they are not "citizens of the United States living or working abroad," did not "receive any foreign earned income," "received no income from sources listed in 26 C[F]R § 1.861-8(f)," or is not liable for any tax as a U.S.

citizen, Kotmair's affidavit states that "[t]he documents in question contain true statements of the law." (*Id.* at ¶¶ 24, 25, 27, 28, 30.)

f. SAPF argues (Mot. 7–12) that the Court should strike: (i) the statement (Gov't Br. 5) that "SAPF's newsletter advises that the Affidavit of Revocation, which purportedly revokes the customer's Social Security number and obligation to file income tax returns, is the 'first step in removing yourself from the presumed jurisdiction of the IRS and state taxing authorities'"; (ii) the statement (Gov't Br. 6) that Kotmair and SAPF "advise customers that a lack of response from the Government [to letters SAPF send to the IRS on behalf of customers] is 'conclusive proof' that their Social security numbers have been revoked and that they are no longer required to file returns"; and (iii) the statement (Gov't Br. 6) that "SAPF and Kotmair advise that a customer executing an Affidavit of Revocation 'cannot file an IRS Form W-4 with an employer, or any other IRS or state income tax forms' but instead should file 'a Statement of Citizenship . . . as a replacement for IRS Forms W-4 in order to 'claim to be a person not subject to withholding.'"

Contrary to SAPF's assertions, the quotations that SAPF provides

from several of these citations show that the Government's record references fully support these statements. *See* Mot. 7–8, quoting A. 127; Mot. 8, quoting A. 126; Mot. 9, quoting A. 126; Mot. 10 and 11, quoting A. 468. SAPF's effort to parse the documents otherwise is unavailing. The Government's other record references also support these statements. *See*, *e.g.*, 89–90, from SAPF member handbook ("if you are a citizen or resident alien living or working within one of the 50 union states, . . . you have never been made liable . . . for . . . income tax. . . . If you voluntarily filed a Form 1040 in the past, you created a legal presumption of a requirement where none actually exists under the law, and will be expected by the IRS to continue filing unless and until you rebut that presumption via sworn affidavit"); A. 130, from 1998 newsletter (SAPF provides affidavit "for every U.S. citizen and resident alien who has discovered the fact that there was NO legal requirement to file an income tax return and wants to revoke that and all other Internal Revenue Service documents ever filed (W-4, etc.). . . . The affidavit is an allegation of 'constructive fraud' that confronts the presumption of liability, head-on. . . . [W]hen jurisdiction is challenged

the burden of proof reverts to . . . the IRS. . . . The AFFIDAVIT includes a paragraph with the proper wording to revoke the original Form SS-5 application for the Taxpayer Identification Number/Social Security Number. . . . The retention of the TIN/SSN causes jurisdictional complications with both State and Federal taxing Codes, i.e. Form W-4 entanglement" (emphasis in original)); A. 132, from 1998 newsletter (observing that, even after receiving an Affidavit of Revocation, the Government "does not want to give up its presumption of jurisdiction without a fight"); A. 236–38, from Kotmair deposition ("there's no requirement for any citizen to make an application for a social security number . . [A]s we cite in the affidavit, that act can be revoked, so you're actually revoking the application"); A. 470, from Affidavit of Revocation instructions ("You *cannot* file an IRS Form W-4 with an employer, or any other IRS or state income tax forms, once you execute and forward the *affidavit*. . . . [T]he filing of any IRS or state income tax form(s) with anybody will invalidate the affidavit. In lieu of the Form W-4 you would use a Statement of Citizenship" (emphases in original)); Doc. 43, Ex. 22 (letter to SAPF customer stating that SAPF

will use information obtained from his application for Social Security number "to lay the groundwork for challenging your agreement with Social Security and once and for all sever you from the Social Security Number, subsequently the Social Security Administration and, the Internal Revenue Service"); Doc. 43,Ex. 25 (from www.save-a-patriot.org, reprinting a testimonial from SAPF member stating that he had used Statement of Citizenship to avoid income tax withholding).

Nor does SAPF's citation (Mot. 10) to its member handbook contradict the statements in the Government's brief. That handbook states that "[o]ne who quits the Social Security entitlement program (via affidavit) will not receive back any monies already paid in, and by the submission of the affidavit will be ineligible to receive any future federal benefits." (A. 90.) If the taxpayer submitting the affidavit nonetheless subsequently seeks benefits, "the affidavit is th[e]n revoked and that individual is th[e]n subject to be taxed on the benefits received and will have a requirement to file a Form 1040 tax return." (A. 90.)

g. SAPF argues (Mot. 12–13) that the Government's statements (Br. 6) that "Kotmair and SAPF send letters to, and file complaints against, employers who continue to withhold taxes after having received the customer's Statement of Citizenship" is supported by references to OCAHO cases that SAPF no longer files. SAPF's past behavior is clearly related to its current scheme. Moreover, the Government supports this statement with additional references, with which the record is replete. *See, e.g.*, A. 85, from SAPF member handbook (SAPF "provides such member services as the proper procedure and paperwork to discontinue tax withholding, or the proper response to . . . and employer's request for a social security number. [SAPF] has recently achieved out-of-court settlements with employers who either refused to hire or fired a . . . member who does not possess a social security number"); A. 236–38, from Kotmair deposition (employer not required to withhold social security and income tax of employee who revoked application for social security number: "we have shown the employer the law"; identifying statement from member handbook that, "[i]f your employer will not accept your statement of citizenship or

comply with the laws pertaining to citizens who claim their lawful (exception) from income tax, contact [SAPF] for assistance. They will provide you with a response to the employer"); A. 252, from declaration of former SAPF customer ("I presented my employer with the 'Affidavit of Revocation' and 'Statement of Citizenship' and requested that [the employer] discontinue withholding employment and income taxes from my wages"); Doc. 43, ¶ 59–61 (listing cases); Doc. 43, Ex. 22 (Statement of Citizenship sent to employer of SAPF member); Ex. 23 (SAPF letter to employer of SAPF customer, requesting that it "discontinue unauthorized withholding"); Ex. 25 (testimonial on SAPF website that, with SAPF's help in dealing with employer, customer was able to stop future tax withholding and get refund of past withholding).

As the District Court observed, the evidence against SAPF and Kotmair was "overwhelming, with much of its coming from [their] own documents and testimony." (A. 502.)

ACCORDINGLY, for the reasons stated above, SAPF's motion to strike is improper and entirely without merit and should be denied.

Respectfully submitted,

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JULY 2007

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing response was sent to the Clerk on this 3rd day of July, 2007, by FedEx and that service of the response has been made on appellant John B. Kotmair, Jr., appearing *pro se*, and on counsel for appellant Save-A-Patriot Fellowship on this 3rd day of July, 2007, by sending each of them a copy by FedEx properly addressed as follows:

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