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U.S. COURT OF APPEALS
FOURTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Appellee	)	
	)	No. **07-1156**
v.	)	
JOHN BAPTIST KOTMAIR, JR., and SAVE-A-PATRIOT FELLOWSHIP, Appellants	)	

SAPF's Reply to Appellee's *Opposition* to SAPF's *Motion to Strike* "Statement of the Facts" in Response Brief, and Several Appendix Pages

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SAPF moved to strike material misrepresentations in the government's statement of facts (Appellee's response brief, pp. 4–8). The government has attributed statements and positions to SAPF which are demonstrably *not* statements and positions of SAPF, but rather invented by the government itself as "evidence," either that SAPF activities and speech are subject to penalty under §§ 6700 and 6701,[1] or that SAPF advises violations of Internal Revenue laws.

In opposition, the government argues that federal appellate rules do not provide for motions to strike portions of briefs. (Opp. 2).[2] F.R.A.P. 27 provides for applications for relief by motion, and F.R.A.P. 27(a)(2)(A) provides a "motion must state with particularity the grounds[,] … the relief sought, and the legal

[1] All references to statute sections refer to Title 26, unless otherwise indicated.
[2] "Opp." refers to the government's opposition to the motion to strike, "A." refers to the appendix, "Doc." refers to the lower court docket.

argument necessary to support it." The rules are silent with respect to many types of motions; yet nothing therein forbids a motion to strike; appellate courts have and do consider motions to strike portions of briefs. [3] See *Tallahassee Memorial Regional Medical Center v. Bowen*, 815 F.2d 1435 (11th Cir. 1987) (Footnote in opening brief did not preserve issue; insofar as reply brief addressed same issue, motion to strike was granted.), *U.S. v. One 1964 MG, Serial No. 64GHN3L34408 Washington License No. DFY 260*, 584 F.2d 889 (9th Cir. 1978) (Motion to strike portions of appellees' brief granted where appellees argued matters not raised by appellant; no cross appeal had been filed).

The government cited a 2006 7th Circuit case in which the court decided errors must be contested in a responsive brief rather than motion to strike. However, the decision also acknowledged that "motions may be proper despite the lack of a specific rule." (*Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 727 (7th Cir. 2006)). In *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007), the *motions* panel deferred multiple motions to strike statements of facts by both parties until a hearing on the merits, because it could not efficiently determine from the record which statements were accurate or material. The deferment increased the *merits* panel's reading, and so wasted time. (*Ibid*, at 470–471). In the

[3] Including this Court, *e.g.*, *Mary Helen Coal Corporation v. Hudson*, 1998 WL 708687 (4th Cir. 1998, unpublished opinion).

instant case, the full, in-context quotes from SAPF materials in evidence simply and directly contradict the statements attributed by the government to SAPF.

The government argues that SAPF's motion contains substantive argument on the merits of the government's brief. SAPF's reply brief contains its substantive argument on the merits, and SAPF stands by its reply, which sets forth the government's errors and distortions *relevant to the issues* raised on appeal. SAPF's reply also addresses various "facts" claimed throughout the government's brief, insofar as they pertain to the government's arguments on the merits.

The government also argues that SAPF's assertions are "completely without merit." SAPF replies below, following the structure of its motion.[4]

A. With respect to www.taxfreedom101.com (A. 104–121), the government argues that because it referenced those pages in its summary judgment motion, it can rely on them now. Said motion was *not* granted with respect to this website, and the lower court found the site did not belong to SAPF (A. 483). The government did not cross-appeal this issue and it is now *res judicata.* The contents of such pages are immaterial and properly struck.[5] See *U.S. v. One 1964 MG, supra.*

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[4] *i.e.,* each lettered section follows the original motion's lettered section.

[5] The government also argues that SAPF was required to object to appendix pages it wants struck within 10 days of the government's designation, per Local Rule 30(a). That rule concerns sanctions for unreasonable and vexatious increases of material in the appendix.

B. With respect to the proposition that SAPF "market[s] a scheme based on the 'Section 861' argument," SAPF showed its *own publications* directly contradict this. The government now "argues" by repeating its proposition and claiming the material SAPF quoted still supports said proposition. The logic eludes SAPF.

The government has described the "Section 861 argument" as "a tortured statutory-construction argument [] that the foreign-source income rules from § 861 somehow sharply limit the scope of § 61 ... to conclude that domestic-source income of U.S. citizens is not taxable." (Doc. 42, p. 2). It previously claimed this argument is marketed through SAPF newsletters, website, and independent representatives. (*Ibid.*). *The government now argues that it is not important* (Opp. 11) that the SAPF website, newsletters, and IR material do *not* contain or even reference the "861" or "sources" argument. By this logic, mere insistence that black is white would also make it true.

The government also recites portions of letters written by SAPF to the IRS; such letters are *not* marketing tools, regardless of content.[6] If the government acknowledged this distinction, however, its entire "market[ing] ... the 'Section 861' argument" proposition would collapse. Thus, the government labels such distinction "disingenuous," and shows instead that SAPF sells letters (Opp. 11–12)

[6] The government also cites a personal letter (date unknown) which references domestic vs. foreign sources, but said letter does not offer anything for sale.

through a newsletter (A. 127). Again, the "861 argument" does not appear in this context with reference to the sale of letters; in fact, it does not appear at all.

C. SAPF requested the phrase "and which they represent will enable customers legally to stop paying income tax on their U.S.-source income" be struck, as no such statement has ever been cited from SAPF materials or any testimony in the record. Likewise, Agent Rowe never testified that SAPF says anyone is "enabled" to "stop paying" income taxes by reason of any document of SAPF. (A. 68 *et seq.*)

The government erroneously contends that SAPF has argued this phrase should be struck because it is based on Rowe's "conclusory allegations." (Opp. 12). Having set up this strawman, it defends *all* of Rowe's "statements,"[7] without citing one, as "descriptions of the documents attached to her declaration ...[citing] (Doc. 53, Ex. 9–14, 16)." Those documents are letters to the IRS; none of the phrases cited from them (Opp. 9) contain the phrase in question.

It is self-evident that statements made *within* response letters are not representations *about* the letters in a marketing context.[8] To acknowledge that the representation of a thing is fundamentally distinct from the thing itself, however, would collapse the government's house of cards. It is only because it can find no

[7] Most of which are conclusory allegations.

[8] Further, §6700 penalizes statements made *in connection with the sale of an interest in an entity, plan or arrangement*, not statements made in connection with the sales of letters.

such statements made by SAPF — not even within the cited letters — that it must set up this strawman at all.

The only comparable statement cited is the lower court's own erroneous conclusion, 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." This conclusion is unsupported (see A. 479), and contrary to the government's assertion that the court cited Kotmair's affidavit here, the memo shows the court cited the affidavit only to support *another* finding, about the Affidavit of Revocation and Rescission (ARR) (Doc. 54, Ex. 1, ¶ 7). The government's quote (Resp. 9) of the relevant affidavit portion is unavailing: Kotmair does *not* say that SAPF "publications" or the ARR can "enable" anyone to "stop paying income tax."

The record also provides a direct contradiction to the government's assertions in this regard. The independent representative (IR) agreement (A. 339) states:

> "Under no circumstances are IR's or staff members permitted to refer to Fellowship assistance as *'un-taxing'* or *'de-taxing'* or any other similar phrase. The phrase itself carries with it the connotation that something is being done to cancel or *nullify* an *existing legal requirement*. ... it is the law that imposes a tax. If the law imposes a tax, then it is incumbent upon those who are subject to the law to comply with its provisions *(i.e., file the return and pay the tax)*. If the law does not impose a tax on a specific object, subject or activity, then there is nothing to 'un-tax.' If an IR represents Fellowship services as

> a process of *un-taxing*, then this could be construed to imply that the Fellowship is somehow able to cancel a statutory taxing provision. That is not the case, therefore IR's must refrain from using the term. NOTE: previous signatures on tax returns do create a 'presumption' that a statutory requirement exists, however presumptions are not statutes and may be rebutted – actual legal requirements cannot. ... Semantics are the fine line between being correct and incorrect. Any IR found in violation of this policy will be immediately terminated." [italics in original, other emphasis added] (A. 339–340).

Likewise, see the IR agreement at ¶3 ("The Fellowship Does Not Remove Liens or Levies – Nor Does it Abate Assessments), ¶4 ("The Fellowship Cannot Stop IRS Collection Activity"), ¶5 ("The Fellowship Does Not Determine Whether any Given Person Has a Requirement to File a Return Or A Liability to Pay A Tax.") (A. 340), and the Member Handbook (A. 90). SAPF has never said or represented its documents or letters "enable" someone legally to "stop paying the income tax," and the record so attests.

D & E. SAPF has requested that misrepresentations concerning what SAPF says about the Affidavit of Revocation and Rescission (ARR) and Statement of Citizenship (SOC) be struck. To demonstrate the government's selective quoting and distortion of SAPF's actual statements, SAPF reproduced those words and phrases in fuller context, and cited statements from the record which provide the opposite of the government's assertions. As before, the government asserts only that those quotes "fully support" its proposition and that "SAPF's effort to parse the documents otherwise is unavailing." (Opp. 15) This logic eludes SAPF. The

government's quotes from the Member Handbook and a newsletter (Opp. 15–16) repeatedly support SAPF's true representation about the ARR — *not* as a method of revoking an SSN and obligation to file returns — but as a method of "revoking the application"[9] for an SSN (Opp 16, citing A. 236–38) to quit the "entitlement program" (A. 90), and of rebutting the *presumption* of a requirement to file,[10] created (according to SAPF) when a person voluntarily filed a Form 1040. (Opp. 15, A. 89–90, see also IR agreement, *supra:* "previous signatures on tax returns do create a 'presumption' that a statutory requirement exists, however presumptions are not statutes and may be rebutted – actual legal requirements cannot."). Since SAPF does not claim that the ARR or anything else can revoke a legal obligation to file returns, all such "facts" should be struck.

Social security entitlements and the SSA commissioner's authority to issue SSNs are found in U.S.C. Title 42, *not* in U.S.C. Title 26, the jurisdiction invoked in this case. Thus, SAPF representations with respect to SSN applications or quitting the entitlement program (Opp. 16–18) are not relevant to this appeal.[11]

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[9] The government seems unable or unwilling to recognize the distinction between rescinding a *signature from an application* and claiming to revoke a *number* created by the commissioner of Social Security.

[10] The government also seems unable or unwilling to discern the distinction between rebutting a presumption and revoking an actual legal obligation to file.

The government cites a 13-yr-old letter[12] where an SAPF caseworker proposes that a *copy of an original SS-5 application* (for an SSN) can "lay the groundwork" to challenge an agreement with Social Security and "sever you from ... the [IRS]." (Doc. 43, Ex. 22). This is a reference to obtaining a copy of the SS-5, not to the ARR. The government also cites SAPF's comment that an individual receiving social security benefits should file a return with respect to those benefits (A. 90, Opp. 17). This has no relevance to its claim that SAPF says the ARR revokes an obligation to file.

F. The government argues that SAPF requested the phrase "send letters to, and file complaints against, employers who continue to withhold taxes after having received the customer's Statement of Citizenship" be struck. (Opp. 18–19, emphasis added). SAPF did *not* request "send letters to" be struck, nor does it contest that it writes letters. The government cites one letter and various statements made by SAPF or others with respect to withholding (*e.g.,* A. 85, 236–38, Doc. 43, Ex. 22, 23, 25, but nothing to support the "fact" that SAPF files complaints against employers.[13] Appellee's main response brief contains no argument with regard to

[12] This document was introduced by Agent Rowe without foundation. Judging from the other documents in Ex. 22, it appears to be *circa* 1994.

[13] Doc. 43, ¶ 61, also cited, contains a list of cases filed over nine years ago.

either filing complaints[14] against *or* writing letters to employers; accordingly, the entire phrase, including "send letters to," should be struck.

G. The government argues its claims regarding bankruptcy petitions (and A. 256–301) are "fully consistent" with the lower court's finding that "SAPF offers to … file customized pleadings … advancing the U.S. Sources argument." (Opp. 8, A. 480). The court did *not* enjoin SAPF with respect to bankruptcy petitions; the issue is now *res judicata*. In the absence of a cross-appeal, the petition's contents are immaterial and properly struck. See *U.S. v. One 1964 MG, supra.*

H. In spite of its statement, *supra*, that SAPF's assertions are "without merit," the government is silent with respect to SAPF's request that the material misrepresentation of the membership assistance program (at Opp. 8) be struck. Appellee's main response brief likewise contains no argument therefor, other than restating this "fact" on page 66. Accordingly, its misrepresentations of the membership assistance program are immaterial to this appeal.

WHEREFORE, for the reasons set forth herein above, SAPF's motion to strike should be granted.

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[14] Cases are mentioned on p. 26 of Appellee's response brief, but only to show that courts have rejected various persons' usage of the ARR.

Respectfully submitted this 16th day of July, 2007,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a printed copy of "SAPF's Reply to Appellee's Opposition to SAPF's Motion to Strike 'Statement of the Facts' in Response Brief, and Several Appendix Pages" was sent to counsel for the Appellee, Carol A. Barthell, Attorney, Appellate Section, U.S. Department of Justice, Post Office Box 502, Washington, DC, 20044, and to Defendant/Appellant John B. Kotmair, Jr., Post Office Box 91, Westminster, MD 21158, by facsimile and U.S. mail, with sufficient postage affixed, this 16th day of July, 2007.

GEORGE E. HARP