

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) Civil No. **WMN05CV1297**
)
JOHN BAPTIST KOTMAIR, JR.,)
et al.,)
)
Defendants.)

**DEFENDANTS' MOTION TO STRIKE
UNITED STATES' REPLY TO DEFENDANT'S RESPONSE TO THE UNITED
STATES' MOTION FOR SANCTIONS**

Defendants Save-A-Patriot Fellowship and John Baptist Kotmair, Jr., move to strike portions of Plaintiff's reply pursuant to Rule 901 of the Federal Rules of Evidence. Specifically, Defendants move to strike Exhibits 2, 3, 4, 5, and 7, and the corresponding inferences drawn therefrom, for the reasons set forth below.

Defendants also object to the introduction of argument applying a case decided the exact day Defendants filed their opposition to the United States motion for sanctions, and move this court to strike references to that case, or, in the alternative, to grant leave to Defendants to file a surreply.

FACTS

On June 8, 2006, the United States moved for sanctions for discovery violations with respect to both Defendants. (Docket 39). Defendants' response in opposition to the motion for sanctions for

discovery violations was filed June 26, 2006 (Docket 50). Plaintiff filed a reply to Defendants' response on July 10, 2006 (Docket 55).

Exhibits 2, 3, 4, 5, and 7 appended to the United States' reply purport to be documents generated by Save-A-Patriot Fellowship, such as requests for payment, monthly statements, or case file reminders. These documents are not introduced by any affidavit, nor are they sworn to or certified. They are also new evidence beyond the scope of a reply brief.

In the section of Plaintiff's reply brief entitled "Defendant's Records," in paragraphs 3, 5, and 6 of that section, Plaintiff draws inferences from these unauthenticated documents and uses them to buttress its contention that Defendant Save-A-Patriot keeps records with respect to products and services it offers. Plaintiff reiterates its unfounded conclusions at the top of page nine.

The case *Schulz v. United States and the Internal Revenue Service*,¹ 2006 WL 1788194 (D. Neb., June 26, 2006) is introduced by Plaintiff on page six of its reply memorandum. This case was decided June 26, 2006, the exact day that Defendants' response to Plaintiff's motion for sanctions was due.

ARGUMENT

Before any writing (document) may be received in evidence, it must be authenticated or identified; that is, a foundation sufficient to support a finding that the document is genuine and what it purports to be must first be laid (Fed. R. Evid. 901). Although Fed. R. Evid. 901(b)(1) provides that such authentication can be made through the testimony of a witness with knowledge, Plaintiff has failed to authenticate these exhibits through any testimony. Since the documents introduced as Exhibits 2, 3, 4, 5, and 7 fail the authentication requirement of Fed. R. Evid. 901(a) and 901(b)(1), and are furthermore introduced beyond the scope of a reply, they are inadmissible.

¹ Plaintiff calls this case *United States v. Schulz*.

Likewise, all of Plaintiff's conclusory statements describing these documents, found in the section entitled "Defendant's Records," and at the top of page nine,² are inadmissible. And finally, Plaintiff's conclusion that Defendant SAPF was "less than candid because it does keep records of both the letters, amounts paid, and receipt of payment" should be struck. In addition to this conclusion being improperly drawn upon unauthenticated documents, this Court may take judicial notice that requests for payment, monthly statements, or case file reminders could, at best, be evidence that someone kept these documents as their *own* records. They are not even relevant to the matter of whether or not *SAPF* keeps records concerning "amounts paid and receipt of payment."

Schulz v. United States, supra, is used by Plaintiff to support its argument that since *some* SAPF members are already known to the IRS,³ it would not harm the First Amendment rights of the rest of the members to order the disclosure of the *entire* membership of the Fellowship to the United States.

Of course, this Court may note that *some* members who may be identified to the IRS by reason of correspondence to the IRS, or *some* members who may be identified publicly through the filing of court papers, is nowhere near the equivalent of *all* the members of SAPF. Nevertheless, it is fundamentally unjust, violative of due process, and prejudicial toward Defendants for Plaintiff to introduce a case decided only on the day Defendants filed their response. Since this case is beyond the scope of argument Defendants could have been aware of, or discussed themselves, and they have no opportunity to rebut it, it should be stricken from this Court's consideration.

² Plaintiff states, "The invoices and billing statements demonstrate that defendants can determine the source of Kotmair income and amounts paid to SAPF staff, they simply refuse to do so despite the Court's Order."

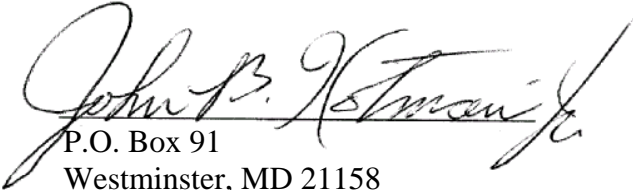
³ They are known by reason of letters written on their behalf by Defendant Kotmair.

CONCLUSION

Since Plaintiff has untimely introduced into evidence unauthenticated documents which are not admissible pursuant to Fed. R. Evid. 901, Defendants pray this Court strike all such evidence, and any descriptions, inferences, and conclusions drawn therefrom. Further, since Plaintiff has introduced a court case published after Defendants' response was due, Defendants pray this Court strike all reference to and argument drawn from, said case (*Schulz v. United States, supra*).

In the alternative, Defendants pray this Court grant them leave to file a surreply to rebut the new claims and "evidence" introduced improperly by Plaintiff.

Respectfully submitted on this 17th day of July, 2006.


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CERTIFICATE

The undersigned hereby certifies that a printed copy of “Motion to Strike United States’ Reply to Defendants Opposition to United States’ Motion for Sanctions for Discovery Violations” was sent to counsel for the plaintiff, Thomas Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 7238, Washington, D.C., 20044, by first class U.S. Mail with sufficient postage affixed this 17th day of July, 2006.

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