

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Courthouse
1100 East Main Street, 5th Floor
Richmond, Virginia 23219-3517
(804) 916-2700

DOCKETING STATEMENT

Caption of Case 4CCA Docket No.(IF KNOWN) 07-1156

United States of America
Appellee

v.

John Baptist Kotmair and Save-A-Patriot Fellowship
Appellants

Type of Action

- Civil
 Criminal/Prisoner
 Cross Appeal

District Maryland Judge Nickerson District Court Docket Number WMN 05-CV-1297

Statute or other authority establishing jurisdiction in the:

District Court 28 U.S.C. §§ 1340, 1345; 26 U.S.C. §§ 7402(a), 7408

Court of Appeals 28 U.S.C. §§ 1291, 1294

A. Timeliness of Appeal

1. Date of entry of judgment or order appealed from 11/29/06 and 2/7/07
2. Date this notice of appeal filed 2/16/07
If cross appeal, date first notice of appeal filed _____
3. Filing date of any post-judgment motion filed by any party which tolls time under FRAP 4(a)(4) or 4(b) 12/14/06
4. Date of entry of order deciding above post-judgment motion 2/7/07
5. Filing date of any motion to extend time under FRAP 4(a)(5), 4(a)(6) or 4(b) Not applicable
Time extended to _____

B. Finality of Order or Judgment

1. Is the order or judgment appealed from a final decision on the merits?
[] Yes [] No

2. If no,
- a.) Did the district court order entry of judgment as to fewer than all claims or all parties pursuant to FRCP 54(b)? Yes No
- b.) Is the order appealed from a collateral or interlocutory order reviewable under any exception to the finality rule? Yes No
 If yes, explain _____
 (Criminal only)
3. Has the defendant been convicted? Yes No
4. Has a sentence been imposed? Yes No Term _____
5. Is the defendant incarcerated? Yes No

- C. Has this case previously been appealed? Yes No
 If yes, give the case name, docket number and disposition of each prior appeal on a separate page.

Case #06-2314, filed on 12/15/06, was a petition for an emergency supervisory writ, which the court treated as a petition for mandamus. The court denied the petition on 1/9/07.

- D. Based on your present knowledge:
 Will this appeal involve a question of first impression? Yes No

If yes, please explain briefly on a separate page.

- E. Are any related cases or cases raising related issues pending in this Court, any district court of this circuit, or the Supreme Court? Yes No
 If yes, cite the case and the manner in which it is related on a separate page. If abeyance, consolidation, or in seriatim argument is warranted, counsel must file a separate motion seeking such relief.

If a related case is pending in this Court, has it been accepted for mediation by the Office of the Circuit Mediator? Yes No

- F. State the nature of the suit, the relief sought, and the outcome below. Attach additional page if necessary. See attached page.

- G. Issues to be raised on appeal. Attach additional page if necessary.
 See attached page.

- H. Does this appeal challenge the constitutionality of a federal or state statute in a case to which the United States or the affected state is not a party? Yes No

If yes, you must give written notice to the circuit clerk for certification of that fact to the United States Attorney General or the state attorney general.

I. Is settlement being discussed? Yes No

J. Is expedited disposition of this case necessary? Yes No
If yes, you must file an appropriate motion.

Is oral argument necessary? Yes No

K. Were there any in-court proceedings below? Yes No
Is a transcript necessary for this appeal? Yes No

If yes, is transcript already on file with district court?
 Yes No

If transcript is not already on file, attach copy of transcript order.

L. List each adverse party to the appeal. If no attorney, give address and telephone number of the adverse party. Attach additional page if necessary.

1. Adverse party United States of America
Attorney Thomas M. Newman, Trial Attorney, Tax Division
Address U.S. Department of Justice
Shreveport, LA 71101
Telephone (202) 616-9926

2. Adverse party _____
Attorney _____
Address _____

Telephone _____

M. If this case arises out of a bankruptcy proceeding, attach a copy of the caption of the case in the bankruptcy court showing the parties' status as debtor, creditor, trustee, plaintiff, defendant, etc.

N. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.

Appellant(s) name SAVE-A-PATRIOT FELLOWSHIP and John Baptist Kotmair, Jr., pro se

Address P.O. Box 91

Westminster, MD 21158

Telephone (410) 857-4441

Attorney's name George E. Harp

Firm _____

Address 610 Marshall St., Ste 619

Shreveport, LA 71101

Telephone (318) 424-2003

Will you be handling the appeal? (In criminal cases counsel below will handle the appeal unless relieved by this court.)

Yes No

FRAP 12(b) provides that each attorney who files a notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney. Any counsel, other than the attorney filing this form, who filed a notice of appeal must provide the requisite statement to be attached to this form.

Signature _____

Date 3/1/07

ATTACH:

1. ADDITIONAL PAGES CONTAINING EXTENDED ANSWERS TO QUESTIONS ON THIS FORM.
2. THE NOTICE OF APPEAL.
3. THE DISTRICT COURT DOCKET SHEET.
4. A COPY OF THE ORDER OR JUDGMENT FROM WHICH THE APPEAL IS TAKEN (DO NOT attach Statement of Reasons or other confidential sections of Criminal Judgment).
5. ANY OPINION OR FINDINGS.
6. ANY OPINION, FINDINGS, OR RECOMMENDATION OF A UNITED STATES MAGISTRATE JUDGE, AN ADMINISTRATIVE LAW JUDGE, A SOCIAL SECURITY APPEALS COUNCIL, OR A BANKRUPTCY COURT.
7. A COPY OF THE TRANSCRIPT ORDER (WITH ATTACHMENTS, IF ANY).
8. A CERTIFICATE OF SERVICE FOR THIS DOCKETING STATEMENT.

N. List name(s) and address(es) of appellant(s) who filed this notice of appeal and appellant's counsel. Attach additional page if necessary.

Appellant(s) name SAVE-A-PATRIOT FELLOWSHIP and John Baptist Kotmair, Jr.

Address P.O. Box 91

Westminster, MD 21158

Telephone (410) 857-4441

Attorney's name John Baptist Kotmair, Jr., pro se

Firm _____

Address P.O. Box 91

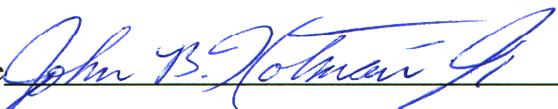
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D. Based on your present knowledge: Will this appeal involve a question of first impression?

To Defendants' present knowledge, the following, at minimum, may present questions of law which have not been directly addressed by previous courts:

- ◆ Whether an injunction can issue under § 6700 if the statements claimed to be false are *not* statements “with respect to the ... securing of any [] tax benefit *by reason of ... participating* in the plan or arrangement.”
- ◆ Whether an injunction can issue under § 6701 if the documents in question are *not* returns, and are *not* prepared to affect the return of any individual or to result in any “understatement of a liability” shown on a return.
- ◆ Whether an injunction can issue under § 7402(a) which infringes the constitutionally protected rights and lawful actions of individuals, such as the right to petition government for redress, (including filing pleadings in courts), and to enlist the help of others in doing so (association), right to contribute to others, and to their legal defense, financially and otherwise.
- ◆ Whether the scope of IRC § 7402(a) includes an order to turn over a membership list of a *bona fide* political organization engaging in free speech on the conjecture of possible harm to plaintiff.

F. State the nature of the suit, the relief sought, and the outcome below.

The United States of America brought a suit for permanent injunction against John Baptist Kotmair, Jr. and Save-A-Patriot Fellowship in the U.S.

District Court for the District of Maryland, claiming violations of IRC §§ 6700 and 6701, as well as general accusations of “tax fraud schemes” and “obstructing” IRS enforcement of the tax laws, and seeking a broad range of injunctive relief under IRC §§ 7408 and 7402(a), including, *inter alia*: selling and distributing books, videotapes, and other media “containing false commercial speech regarding the income tax laws”; representing or assisting any other person before the IRS in connection with any matter; promoting, marketing, organizing, selling, or receiving payment for any plan “regarding the securing of any tax benefit”; and providing “financial incentives” to violate the internal revenue laws.

Defendant John Baptist Kotmair, Jr. (Kotmair) was sued in his individual capacity. Defendant SAVE-A-PATRIOT FELLOWSHIP is an unincorporated association domiciled in the State of Maryland, engaged in protected 1st Amendment activities.¹

Both sides filed motions for Summary Judgment, and Judge Nickerson granted nearly all of the government’s motion for summary judgment, and entered a Permanent Injunction granting nearly all of the relief sought by the government on November 29, 2006. Defendants entered post-judgment motions for a trial and for modification of the permanent injunction order. These were denied by Judge Nickerson on February 7, 2007. Defendants now appeal both orders of November

29, 2006 (Docket #69 and #70) and the January 7, 2007 order (Docket #77) denying the motions for trial and modification of the order.

G. Issues to be raised on appeal.

According to Defendants present knowledge, the following issues are to be raised on appeal:

1. Whether the court issued an injunction outside the scope of its jurisdiction under IRC §§ 7408 and 7402(a), regarding the enjoining of such activities as, *inter alia*:

- a) representing or assisting any other person before the IRS in connection with any matter;
- b) preparing or assisting in the preparation of court filings;
- c) advising anyone that they are not required to file federal tax returns or pay federal taxes;
- d) instructing, advising, or assisting anyone to stop the withholding of federal employment taxes from wages;
- e) providing aid or assistance, financial or otherwise, through the Member Assistance Program or the Patriot Defense Fellowship;
- f) selling or distributing newsletters, books, manuals, and other material “containing false commercial speech regarding the internal revenue laws” or “speech likely to aid or abet others in violating the internal revenue code;”
- g) organizing or selling any document purporting to enable the customer to discontinue payment of federal tax.

2. Whether the court issued commands outside the scope of its jurisdiction under IRC §§ 7408 and 7402(a), including orders to:

- a) produce a list of Save-A-Patriot members to the United States;
- b) remove all “false commercial speech regarding the internal revenue laws” from SAPF’s website;
- c) post a copy of the injunction order on the website and notify all members and “individuals who have purchased defendants’ tax plans, arrangements, materials and services” of the entry of the injunction.

¹ See Save-A-Patriot Fellowship v. United States of America, MJG-95-935, United States District Court for the District of Maryland (962 F.Supp. 695).

3. Whether the court erred in making many factual findings without any evidence in the record, including (but not limited to):

- a) That “SAPF represents that these products and services, if used as SAPF instructs, will enable members to legally stop paying income tax on their ‘U.S.-source income.’”
- b) That Defendants claim a document called an "Affidavit of Revocation and Rescission" renders an individual “no longer obligated to file income tax returns or to have taxes or Social Security contributions withheld from his or her earnings.”
- c) That the IRS “sends notices to SAPF members exposing the frivolousness of the ‘U.S.-Sources’ argument.”
- d) That SAPF assists its “customers” in making “understatement[s] of liability.”
- e) That SAPF makes “filings on its members’ behalf.”
- f) That correspondence sent by SAPF contains “fraudulent position[s].”
- g) That Defendants are like the defendants in *United States v. Raymond*, 228 F.3d 804 (App. 7th, 2000) insofar as having for sale “forms and instructions to guide individuals through the process of ‘withdrawing’ from the jurisdiction of the federal government's taxing authorities and the social security system, so that the individual would, under the defendants’ view of the Tax Code, no longer be required to pay federal taxes.”
- h) That the government is sustaining “irreparable harm” in the form of “expenditures of time and money to respond to Defendants frivolous filings as well as the lost revenue from SAPF customers who either fail to file returns or file returns understating their tax liability.”
- i) That the “gravity of harm” to plaintiff includes “costs of dealing with these protest letters” and the “matter of unpaid or underpaid income taxes by SAPF adherents.”

4. Whether or not the court erred in issuing an injunction on the basis of a summary judgment motion, thereby ruling on disputed issues of material fact without a trial, including enjoining activities on the basis of the disputed issues such as:

- a) That Defendants acted fraudulently;
- b) That Defendants made statements about the income tax laws that they “know or have reason to know” are false;

- c) That Defendants make statements about the “legality of their efforts” that are false;
- d) That Defendants claim a document called an "Affidavit of Revocation and Rescission" renders an individual “no longer obligated to file income tax returns or to have taxes or Social Security contributions withheld from his or her earnings”;
- e) That “Defendants ... misrepresent Kotmair’s authority to represent others before the IRS”;
- f) That Defendant advises anyone not to file an income tax return or any other type of return, or advises anyone on tax matters;
- g) That Defendant Kotmair’s representative status has been revoked;
- h) That Defendant SAPF “promote[s] a tax-fraud scheme that involves preparing protest letters”;
- i) That Defendant SAPF prepares documents purporting to revoke “an individual’s application for their Social Security number, *in order to discontinue the withholding of income and employment taxes*” [emphasis added], or that Defendant claims that any document which rescinds a signature from such application *ipso facto* discontinues such withholding.

5. Whether an injunction can issue under § 6700 if the statements claimed to be false are *not* statements “with respect to the ... securing of any [] tax benefit *by reason of ... participating* in the plan or arrangement.”

6. Whether an injunction can issue under § 6701 if the documents in question are *not* returns, and are *not* prepared to affect the return of any individual or to result in any “understatement of a liability” shown on a return.

7. Whether the court erred in finding that not filing a return is the legal equivalent of understating a tax liability on a return.

8. Whether an injunction can issue under § 7402(a) which infringes the constitutionally protected rights and lawful actions of individuals, such as the right to petition government for redress, (including filing pleadings in courts), and to enlist the help of others in doing so (association), right to contribute to others, and to their legal defense, financially and otherwise.

9. Whether the jurisdiction of IRC § 7402(a) authorizes an order to turn over a membership list of a *bona fide* political organization engaging in free speech on the conjecture of possible harm to plaintiff.

10. Whether the court erred in allowing the complaint to be amended by affidavit, which are not formal pleadings.

11. Did the court err in allowing plaintiff to establish issues of fact through the admission of affidavits appended to its motion for summary judgment, when FRCP 37(c)(1) prohibits the use of witnesses on a motion when their identities were not disclosed pursuant to FRCP 26(e)(1), and witnesses were never disclosed by plaintiff in discovery nor made available to defendants for deposition or cross-examination?

12. Whether the court erred in allowing evidence otherwise inadmissible under the Federal Rules of Evidence to establish issues of fact in this case, including (but not limited to) the factual issues listed in #4, above, and also including claims of costs incurred by the IRS in responding to Defendants' letters.

13. Whether the court erred in allowing plaintiff to establish issues of fact through affidavits which contained hearsay, conclusory statements or legal conclusions, such as the declarations of Gary Metcalfe, Joan Rowe, and Thomas Newman.

14. Whether the court erred in enjoining activities under § 7402(a) for which no irreparable harm was shown.

15. Whether an injunction can issue under § 7402(a) without the identification of the particular sections of law to be enforced by the order, since subject matter jurisdiction extends only to those orders "necessary or appropriate for the enforcement of the internal revenue laws."

16. Whether an injunction can be issued under §7408 when the court acknowledges that SAPF made no false statements "with respect to the ... securing of any other tax benefit by reason of ... participating in the plan or arrangement," but only "implicit representations that only those that follow SAPF's plan will be able to reap those benefits."

17. Whether the permanent injunction order fails the specificity required by FRCP 65(d), and so does not give Defendants fair notice of what is enjoined.

18. Whether it is proper for the Court to rely on the precedence of other cases to claim that "courts have universally rejected Defendants' narrow reading" of IRC § 6700 when none of those cases ever specifically raised that issue.

19. Is it objectively unreasonable for a person to hold honest beliefs which are contrary to decisions of the courts? If not, can the fact that such beliefs are contrary to decisions of the courts be sufficient to support a finding of fraudulent intent?

20. Did the court err in denying Defendants' motion for a new trial, with respect to the insufficiency of the evidence in the record to support the findings of fact it made?

21. Did the court err in refusing to modify its order with respect to enjoining the sale or distribution of materials not in evidence?

22. Whether the principle of *res judicata* dictates the dismissal of John Baptist Kotmair, Jr. d/b/a Save-A-Patriot Fellowship and National Workers Rights Committee as a party from this matter, with respect to the finding by the district court in an earlier case that Defendant Kotmair is not conducting business as SAPF.

23. Whether the court erred in relying on precedents in *Schiff*, *Bell*, and *Estate Preservation Services*, and in finding that those cases were similar to SAPF.