No. 07-1156

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

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MEMORANDUM BRIEF FOR THE APPELLEE

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SAVE-A-PATRIOT FELLOWSHIP, an unincorporated association	)	
Defendant-Appellant	)	

MEMORANDUM BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

On May 13, 2005, the United States filed suit in the United States District Court for the District of Maryland, seeking a permanent injunction and other equitable relief against appellants John B. Kotmair ("Kotmair") and Save-A-Patriot Fellowship ("SAPF"). (A. 10–22.)[1] The District Court had jurisdiction under 28 U.S.C. §§ 1340

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1 "A." references are to the separately bound record appendix. "Doc." references are to the documents contained in the original record on appeal, as numbered by the clerk of the District Court. Pertinent
(continued...)

and 1345 and Sections 7402(a) and 7408 of the Internal Revenue Code ("I.R.C." or "Code") (26 U.S.C.).

On November 29, 2006, the District Court (Hon. William N. Nickerson) issued a permanent injunction order. (A. 473–77.) This order was a final judgment that disposed of all issues in the case. On December 13, 2006, Kotmair and SAPF moved for a new trial (Doc. 71) and to alter and amend the judgment (Doc. 72). These motions were timely pursuant to Fed. R. Civ. P. 59(b) and (e), respectively, as they were filed within 10 days of judgment. *See also* Fed. R. Civ. P. 6(a) (where period for filing is less than 11 days, intermediate Saturdays and Sundays are excluded).

The District Court denied the motions for a new trial and to alter and amend the judgment on February 7, 2007. (A. 503–05.) On February 16, 2007, within 60 days of the entry of this order, Kotmair and SAPF filed a timely notice of appeal. (A. 506.) *See* Fed. R. App. P. 4(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

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1 (...continued)
statutes are reproduced in this brief's addendum.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly held that the conduct of SAPF and Kotmair violated I.R.C. §§ 6700 and 6701 and warranted an injunction under I.R.C. § 7408.

2. Whether the District Court also correctly held that the conduct of SAPF and Kotmair interfered with the administration of the internal revenue laws and warranted an injunction under I.R.C. § 7402(a).

3. Whether the permanent injunction issued by the District Court enjoining SAPF and Kotmair from promoting their abusive tax scheme and requiring them to produce a list of their customers to the Government violated their rights under the First Amendment.

4. Whether a prior court decision respecting Kotmair collaterally estopped the District Court from issuing judgment against him in this case.

STATEMENT OF THE FACTS

A. Kotmair and SAPF's tax schemes

Kotmair, who claims to be a tax-law expert, is founder and self-described "fiduciary" of SAPF and director of the National Workers Rights Committee, a related entity. (A. 55, 56, 71; Doc. 6 ¶ 6; Doc. 8 ¶ 6; Doc. 43, Exs. 6E, 7.) Kotmair formed SAPF in 1984, after his release from prison following a conviction for willfully failing to file income tax returns for 1975 and 1976. (A. 68; Doc. 6 ¶ 6; Doc. 8 ¶ 6; *see also Kotmair v. Commissioner*, 86 T.C. 1253, 1254 (1986).)

Kotmair and SAPF market a scheme based on the "Section 861" or "U.S. sources" argument through their newsletter *Reasonable Action*, the save-a-patriot.org website, and SAPF's sales force. (A. 69–73, 104–23, 126–33, 146–84; Doc. 6, ¶¶ 8, 10; Doc. 8, ¶¶ 6, 10; Doc. 43, Ex. 6E.) They assert that, under the domestic-source income rules of I.R.C. § 861, U.S. citizens need not pay any taxes on income earned within the 50 states and advise members not to report or pay tax on such "U.S.-source" income. (A. 70, 122, 124–25.) Through SAPF's website and other publications, Kotmair and SAPF inform their customers, whom they call "members," of various products and services they offer for sale

and which they represent will enable customers legally to stop paying income tax on their U.S.-source income. (A. 70–71.) They also advise customers that participation in the Social Security system is "100% voluntary." (A. 380; Doc. 62, Ex. 43.)

To customers paying membership fees ranging from $99 to $697, Kotmair and SAPF sell, *inter alia*, an "Affidavit of Revocation and Rescission" and a "Statement of Citizenship." (A. 47, 49, 68–71, 76–77, 90–91, 93–121, 124–31; Doc. 6 ¶¶ 10, 16, 20; Doc. 8 ¶¶ 10, 16, 20; Doc. 43, Exs. 6E, 22–27.) 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." (A. 70–71, 77, 126–32.) The Affidavit of Revocation contains such statements as "the 16th Amendment does not authorize a tax on individual citizens living and working within the States united, but is applicable to nonresident aliens"; "there is no provision in the Code that imposes the tax on employees or requires them to make an application for a Social Security number"; and "I am not personally subject to an Income Tax and never was a 'taxpayer.'"

(A. 431–33, 463–70.) Kotmair and SAPF sell the Affidavit of Revocation for a fee of $35 with detailed filing instructions. (A. 270, 470.) Kotmair and SAPF also sell follow-up letters to the Secretary of the Treasury and advise customers that a lack of response from the Government is "conclusive proof" that their Social Security numbers have been revoked and that they are no longer required to file returns. (A. 70–71, 126–33.)

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. (A. 270, 470.) They advertise the Statement of Citizenship as a replacement for IRS Form W-4 in order to "claim to be a person not subject to withholding." (A. 76–77, 89–90, 236–38, 460, 470; Doc. 43, Exs. 22, 25.) For additional fees, 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. (Doc. 6 ¶ 16; Doc. 8 ¶ 16; Doc. 43, Exs. 22, 25–29; Doc. 44 ¶¶ 2–32 & Exs. 1–31; A. 85, 236–38, 246, 249, 252.)

Kotmair and SAPF offer to represent customers before the IRS and sell at least 10 form-letter responses to anticipated IRS inquiries, which Kotmair and SAPF describe as "power-of-attorney work." (A. 93–94.) Kotmair and SAPF charge customers between $38 and $48 for each letter purporting to represent the customer. (A. 68, 72-74, 85, 134–202, 230, 246–47, 249–50, 252; Doc. 6 ¶ 17; Doc. 8 ¶ 17.) The letters, all signed by Kotmair, espouse the U.S.-sources argument, stating that "income must be derived from one of the 'specific sources'" listed in Treas. Reg. § 1.861(f) or there is "no filing requirement." (A. 72–73, 146–52, 157–84, 233, 241–46, 248–49, 251.) SAPF's handbook explains that SAPF protest letters will help to "build[ ] a case" against IRS employees for their customers to bring in court. (A. 94.) Kotmair and SAPF mailed over 800 protest letters to the IRS during the course of the investigation underlying this case. (A. 70–76, 425–26.) They continue to advise customers that Kotmair is authorized to represent SAPF's customers before the IRS, although Kotmair has been notified that he is not so authorized. (A. 75–76, 203–06, 232, 240.)

Kotmair and SAPF also assist customers in filing pleadings in bankruptcy and federal district courts advocating the U.S.-sources

argument. (A. 230, 235, 253, 297–321; Doc. 6 ¶ 20; Doc. 8 ¶ 20.) They inform customers that the bankruptcy pleadings they sell require the IRS to prove that the taxes were properly assessed, thus delaying collection. (A. 96, 253, 271–75.) Kotmair and SAPF also state that customers can sue IRS employees responsible for assessing taxes on U.S.-source income, and they prepare complaints and motions for customers to file against individual IRS employees in district court. (A. 72–73, 95, 157–77, 251–52, 256–57, 260–66, 429–30, 435–45.)

Kotmair and SAPF also offer insurance-like coverage for customers who violate the tax laws. (A. 46–49, 378, 382–83, 403–10.) Participants in this program, variously called the Patriot Defense Fellowship, Victory Express, or Membership Assistance Program, must compensate claimants who suffer confiscation of property by the IRS or incarceration for a tax crime. (A. 46–49, 378, 382–83, 403–10.) Kotmair and SAPF require customers to use their materials and employ their delaying tactics in order to claim the benefits of this insurance-like coverage. (A. 48, 49, 85, 101, 104–21, 126, 130, 247, 249–50.)

B. Proceedings in the District Court

The United States brought suit in the District Court, alleging that Kotmair's and SAPF's activities violate I.R.C. §§ 6700 and 6701 and seeking an order pursuant to I.R.C. § 7408 permanently enjoining them from these activities. (Doc. 1.) The Government also sought an order pursuant to I.R.C. § 7402(a) requiring Kotmair and SAPF to identify members and others who had purchased SAPF's products; to remove false and fraudulent material from its website; and to post the court's order on its website and send copies to customers. (*Ibid.*) The parties each moved for summary judgment. (Docs. 36, 38, 42.)

The District Court granted summary judgment to the Government. (A. 478–502; Doc. 69.) The court determined that it was "abundantly clear" from the record that Kotmair's and SAPF's conduct violated I.R.C. §§ 6700 and 6701 and that injunctive relief under both §§ 7408 and 7402(a) was "appropriate and necessary." (A. 484–85.) The court noted that, to prove a violation of § 6700 subject to injunction under § 7408, the Government must show that: (i) the defendants organized or sold an entity, plan, or arrangement; (ii) they made false or fraudulent statements concerning tax benefits to be derived from the

entity, plan, or arrangement; (iii) they knew or had reason to know the statements were false or fraudulent; (iv) the false or fraudulent statements pertained to a material matter; and (v) an injunction was necessary to prevent recurrence of this conduct. (A. 485–86.) The court noted that "[c]ourts have . . . found tax schemes very similar to Defendants' to fall within the reach of § 6700." (A. 487–89.) The court observed that, "[w]hile Defendants may argue that the tax benefits it promotes are potentially available to any American citizen, implicit in SAPF's sale of its forms, letters, and 'paralegal' services is the representation that only those that follow SAPF's plan will be able to reap those benefits." (A. 488.)

The District Court further determined that it was "equally clear" that Kotmair's and SAPF's statements about the legality of their promotions were false, that they knew or had reason to know that the statements were false, and that the statements pertained to material matters. (A. 489.) In particular, the court cited statements in SAPF's handbook that taxable income is limited to "income that has been 'earned' while living and working in certain 'foreign' countries or in the U.S. possessions and territories'; that there is no requirement for most

Americans to file tax returns or have taxes withheld from their wages; and that one can 'quit' the Social Security program." (A. 490 (citations omitted).) The court noted that SAPF and Kotmair do not deny that courts interpret the Code completely contrary to their positions; "they simply choose to reject and ignore those holdings." (A. 490.) The court pointed out that Kotmair and SAPF also falsely represent that Kotmair is authorized to represent others before the IRS. (A. 490.)

Finally, the District Court concluded that an injunction was necessary to prevent recurrence of the offending conduct, because Kotmair and SAPF had shown "no inclination, whatsoever, to cease their activities despite their position being repeatedly rebuffed by the courts." (A. 491–92.) The court noted that Kotmair and SAPF boasted that their operation "'has grown into a complex containing a print shop, copy room, paralegal room, casework area, advanced 30 gigabyte video production studio, book shop, 150 person meeting room with stage, sound and video cameras and a complete law library, both on disk, hard copy and computer access to West Law,' and speak of SAPF's enrollment as 'exploding' with a goal of 100,000 members. (A. 491–92 (citing A. 85, 91).) The court further noted that the defendants did not

dispute the Government's representation that they had mailed over 800 letters to the IRS just during the course of the litigation. (A. 492 (citing A. 75).)

The District Court held that the Government had also established a violation of I.R.C. § 6701 warranting an injunction under § 7408. (A. 492–94.) The court noted that, under § 6701, the Government must prove that: (i) the defendant prepares, assists in, procures, or advises the preparation of any portion of a return, affidavit, claim, or other document; (ii) the defendant knows or has reason to know that such portion will be used in connection with a material matter arising under the internal revenue laws; (iii) the defendant knows that such portion (if so used) would result in an understatement of the tax of another person; and (iv) an injunction is necessary to prevent a recurrence of this conduct. (A. 492.) The court observed that SAPF prepares correspondence for its members that it knows will be used in connection with matters material to the internal revenue laws. (A. 492.) Rejecting as "preposterous" SAPF's argument that its filings on its members' behalf did not result in understatements of liability, the court held that

§ 6701 "penalizes the understatement of liability and SAPF assists its customers making those understatements." (A. 493–94.)

The court held that the Government was also entitled to an injunction under § 7402, which authorizes a court to issue "'writs and orders of injunction . . . and such other orders [ ] and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws.'" (A. 494 (quoting I.R.C. § 7402(a).) It noted that § 7402 "'has been relied on to enjoin activities of third parties that encourage taxpayers to make fraudulent claims.'" (A. 494–95.) The court observed that, under § 7402, the Government must establish the traditional equitable factors for issuance of an injunction, a requirement that was met here, because: (i) the Government was sustaining irreparable harm in the form of expenditures of time and money to respond to SAPF's "frivolous filings" as well as the lost revenue from SAPF customers who failed to file returns or filed returns understating their tax liability; (ii) SAPF and Kotmair "will not sustain any irreparable harm by being required to obey the law"; (iii) as to the merits, it was "without question" that Kotmair and SAPF were violating and interfering with the administration of the tax laws; and (iv) the public had a compelling

interest in preventing the promotion and sale of products that aid in avoiding lawful income taxes. (A. 495–96.)

Considering SAPF's constitutional challenges to the scope of the requested injunction, the court held that statements relating to the sale of SAPF products and services were commercial speech that, if fraudulent, may be enjoined. (A. 496.) Because Kotmair's and SAPF's representations about the tax laws and the efficacy of their products are "clearly fraudulent, that speech may be enjoined without running afoul of the First Amendment." (A. 496.) Noting that the Third Circuit had recently affirmed the issuance of an injunction against one of Kotmair's former employees who operated a website promoting the U.S.-sources argument, the court adopted language similar to that approved by the Third Circuit in that case. (A. 497–98 (citing *United States v. Bell*, 414 F.3d 464 (3d Cir. 2005).) The court stated that Kotmair and SAPF could express their opinions about the tax laws "as long as those opinions are not used to sell products or services or instruct others as to how to impede the collection of taxes." (A. 498.)

The court also determined that requiring Kotmair and SAPF to provide customer lists to the Government was an appropriate means to

alleviate some of the harm caused by their conduct and to mitigate further harm. (A. 498.) The court held that ordering SAPF to post a copy of the injunction order on its website for one year, to notify members and customers of the issuance of the order, and to provide them with copies, was proper under the First Amendment as "'mandated disclosure of factual commercial information.'" (A. 499 (quoting *United States v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004).)

Finally, the District Court rejected Kotmair's argument that the Government was collaterally estopped from seeking an injunction against him based on the court's finding in a prior case that SAPF "'is an unincorporated association (not just an alter ego or sole proprietorship of Kotmair).'" (A. 499–55 quoting *Save-A-Patriot Fellowship v. United States*, 962 F. Supp. 695, 699 (D. Md. 1996).)

The District Court issued a permanent injunction order. (A. 473–77.) In the order, the court determined that Kotmair and SAPF had engaged in conduct subject to penalty under I.R.C. §§ 6700 and 6701 in connection with their fraudulent promotion of the U.S.-sources argument. (A. 473.) The court further held that they had engaged in conduct that interfered with the enforcement of the internal revenue

laws and, absent an order restraining their activities, would continue such interference. (A. 473.) Accordingly, pursuant to I.R.C. §§ 7402(a) and 7408, the court enjoined Kotmair and SAPF from: (a) "Engaging in activity subject to penalty under IRC § 6700, including organizing or participating in the sale of a plan or arrangement and making a statement regarding the securing of any tax benefit that they know or have reason to know is false and fraudulent as to any material matter"; (b) "Engaging in activity subject to penalty under § 6701, including preparing or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that they know will, if used, result in an understatement of tax liability"; (c) "Promoting, marketing, organizing, selling, or receiving any payment for any plan or arrangement regarding the securing of any tax benefit that they know or have reason to know is false or fraudulent as to any material matter"; (d) "Engaging in any other activity subject to penalty under IRC §§ 6700 or 6701 or any other penalty provision of the Internal Revenue Code"; (e) "Representing or assisting any other person before the IRS in connection with any matter, including preparing or assisting in the preparation of

correspondence to the IRS on behalf of any person"; (f) "Preparing or assisting in the preparation of court filings related to the assessment or collection of income taxes on behalf of any other person";
(g) "Obstructing or advising or assisting anyone to obstruct IRS examinations, collections, or other IRS proceedings"; (h) "Advising anyone that they are not required to file federal tax returns or pay federal taxes"; (i) "Instructing, advising, or assisting anyone to stop the withholding of federal employment taxes from wages"; (j) "Providing aid or assistance, financial or otherwise, either directly or through the Member Assistance Program, the Victory Express, the Patriot Defense Fund, or any other plan or arrangement, for others to violate the internal revenue laws"; (k) "Selling or distributing any newsletter, book, manual, videotape, audiotape, or 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";
(l) "Organizing or selling any document purporting to enable the customer to discontinue payment of federal tax"; and (m) "Engaging in other similar conduct that substantially interferes with the

administration and enforcement of the internal revenue laws." (A. 473–74.)

The injunction order also required Kotmair and SAPF to notify all SAPF customers of the entry of the order and to furnish them with copies; to provide the Government with a list of SAPF's customers; to remove from SAPF's website and any other website over which they had control "all tax-fraud scheme promotional materials, false commercial speech regarding the internal revenue laws, and speech likely to aid or abet others in violating the internal revenue laws"; and to post the injunction order on the website. (A. 475–76.)

Kotmair and SAPF moved for a new trial, arguing that the court's decision and order were not supported by the record. (Doc. 71.) They also moved to modify the injunction order, arguing that the order lacked the specificity required under Fed. R. Civ. P. 65(d). (Doc. 72.) The District Court denied both motions. (A. 503–05).[2] With respect to the motion for new trial, the court found that it essentially raised and

2 Kotmair and SAPF also filed in this Court a request for an "emergency supervisory writ," which this Court denied on January 9, 2007. *In re: Save-A-Patriot Fellowship et al.* (4th Cir. – No. 06-2314).

reargued "the same meritless arguments" raised in their motions for summary judgment. (A. 503.) With respect to the motion for modification, the court observed that the injunction order was similar to those issued and upheld by other courts against other promoters "touting similar fanciful views of the federal tax laws." (A. 503.) As to Kotmair's and SAPF's "professed difficulty in understanding the scope of the conduct that was to be enjoined," the court concluded that their "confusion is self-induced." (A. 504.) Noting that Kotmair and SAPF had previously "offered as justification for their continued fraudulent conduct that 'just because courts have followed that course of conduct does not make it valid,'" the court concluded that "[i]t is doubtful that being told, yet again, that their view of the tax laws is spurious would have any meaningful effect." (A. 503.)

This appeal followed.

ARGUMENT

Standard of review

This Court reviews the District Court's grant of summary judgment *de novo*. *Bacon v. City of Richmond, Virginia,* 475 F.3d 633,

637 (4th Cir. 2007). It reviews a decision to grant or deny an injunction for abuse of discretion, reviewing conclusions of law *de novo*. *Id.* at 638.

I

The District Court correctly issued an injunction under I.R.C. § 7408 against Kotmair and SAPF enjoining them from engaging in conduct subject to penalty under I.R.C. §§ 6700 and 6701[3]

A. Introduction

Sections 6700, 6701, and 7408 of the Internal Revenue Code were enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-249, §§ 320–32, 96 Stat. 324, 611–12, 615–16. Congress enacted § 6700 to prevent, through the imposition of penalties, "[t]he

3 In his brief on appeal, Kotmair argues only that the Government is collaterally estopped from seeking judgment against him and that the District Court improperly determined that he was not authorized to represent SAPF's customers before the IRS. He makes no other arguments respecting the District Court's decision. Thus, he makes no attempt to show that he was not involved in the tax-avoidance scheme organized and marketed by SAPF. Indeed, the record shows that he is not only SAPF's founder but also its guiding force. In any event, any further arguments respecting the merits of the injunction order as it applies to Kotmair should be deemed waived. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999) (issue not argued in appellant's opening brief is abandoned); *see also Swimmer v. IRS*, 811 F.2d 1343, 1345 (9th Cir. 1987) (*pro se* litigants must abide by court rules).

widespread marketing and use of tax shelters," which "undermines public confidence in the fairness of the tax system and in the effectiveness of the existing enforcement provisions." S. Rep. No. 97-494, vol. 1 at 266 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1014. It enacted the penalty provisions of § 6701 to "help protect taxpayers from advisors who seek to profit by leading innocent taxpayers into fraudulent conduct" and to provide "more effective enforcement of the tax laws by discouraging those who would aid others in the fraudulent underpayment of their tax." S. Rep. No. 97-494, vol. 1 at 275, *reprinted in* 1982 U.S.C.C.A.N. at 1022. Congress included § 7408 in this framework because it believed that allowing the Government to seek injunctive relief against promoters was the most effective way to attack abusive tax-shelter schemes and to prevent further harm, because the Government would not be "required to await the filing and examinations of tax returns by investors." S. Rep. 97-494, vol. 1 at 268, *reprinted in* 1982 U.S.C.C.A.N. at 1016.

Section 7408 authorizes a court to enjoin persons who have engaged in any conduct subject to penalty under §§ 6700 or 6701 if the court finds that injunctive relief is appropriate to prevent the

recurrence of such conduct. I.R.C. § 7408(b). The traditional requirements for equitable relief need not be satisfied for § 7408 to apply, since § 7408 expressly authorizes the issuance of an injunction where the statutory requirements are met. *United States v. Gleason*, 432 F.3d 678, (6th Cir. 2005); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000).

To establish a violation of § 6700 warranting an injunction under § 7408, the Government must show that: (i) the defendants organized or sold, or participated in the organization or sale of, an entity, plan or arrangement; (ii) they made, or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (iii) they knew or had reason to know that the statements were false or fraudulent; (iv) the false or fraudulent statements pertained to a material matter; and (v) an injunction is necessary to prevent recurrence of this conduct. *Estate Pres. Servs.*, 202 F.3d at 1098 (citing I.R.C. §§ 6700(a), 7408(b).)

To establish a violation of I.R.C. § 6701 warranting an injunction under § 7408, the Government must show that the defendant prepared or assisted in preparing: (i) "any portion of a return, affidavit, claim, or

other document" that (ii) it "knows (or has reason to believe) . . . will be used in connection with any material matter arising under the internal revenue laws" and that (iii) it knows will, if so used, "result in an understatement of the liability for tax" of another person. I.R.C. § 6701(a). Additionally, the Government must show that an injunction is necessary to prevent recurrence of this conduct. I.R.C. § 7408(b).

B. SAPF and its founder Kotmair engage in conduct subject to penalty under I.R.C. § 6700 warranting issuance of an injunction under § 7408

As the District Court concluded, it is "abundantly clear" that SAPF's conduct at issue violates § 6700.[4] First, the undisputed evidence shows that SAPF organizes or sells, or participates in the organization or sale of, an entity, plan or arrangement. *See* I.R.C. § 6700(a)(1)(A); *United States v. Raymond*, 228 F.3d 804, 811–12 (7th

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4 An entity such as SAPF can act only through individuals. As far as the record shows, all decisions by SAPF are made by its founder and declared "fiduciary," Kotmair. The District Court accordingly properly enjoined Kotmair, as well as SAPF, from continuing to engage in conduct subject to penalty under I.R.C. §§ 6700 and 6701. Indeed, an injunction against SAPF, without a corresponding injunction against its guiding force, Kotmair, would be of very limited benefit, as Kotmair would be free to form a new organization to continue his unlawful conduct.

Cir. 2000) (describing the broad scope of § 6700(a)(1)(A).) SAPF has organized a scheme under which, it claims, customers can voluntarily withdraw from paying Social Security taxes and are not subject to income tax payment, withholding, or filing requirements on U.S.-source income, and sells services and products in furtherance of this scheme. (*E.g.*, A. 47, 49, 68–77, 85, 90–91, 93–202, 230, 236–38, 241–46, 248–53, 270–75, 470.)

Second, SAPF has made false or fraudulent statements concerning the tax benefits to be derived from its scheme. (*E.g.*, A. 69–73, 104–33, 146–84, 380; Doc. 62, Ex. 43.) *See* I.R.C. § 6700(a)(2)(A). Indeed, nearly every statement it has made respecting the tax benefits associated with its program is false and fraudulent. The gravamen of its scheme is that ordinary citizens are not subject to income tax payment or filing requirements for U.S-source income. (*See* A. 70, 122, 124-25.) The courts repeatedly have rejected the U.S.-sources argument and similar arguments as frivolous. *See e.g.*, *United States v. Bell*, 414 F.3d 474, 475 (3d Cir. 2005) (U.S.-sources argument "has been universally discredited"); *Raymond*, 228 F.3d at 812 (paying taxes is not voluntary); *United States v. Gerads*, 999 F.2d 1255 (8th Cir.

1993) (rejecting argument that taxpayers were state citizens and thus not subject to federal taxation); *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990) (rejecting host of frivolous arguments); *United States v. Schiff*, 919 F.2d 830, 834 (2d Cir. 1990) (filing of income-tax returns is not voluntary); *Sherwood v. Commissioner*, 90 T.C.M. (CCH) 512 (2005) (arguments raised by SAPF customer were "frivolous"); *Tolotti v. Commissioner*, 83 T.C.M. (CCH) 1436 (2002) (in case involving a SAPF customer, rejecting U.S.-sources argument as "frivolous and groundless"); *Narramore v. Commissioner*, 71 T.C.M. (CCH) 1722, 1724 (1996) (arguments of SAPF customer were "no more than stale tax protester contentions long dismissed summarily by this Court and all other courts which have heard such contentions"); *Kotmair v. Commissioner*, 86 T.C. 1253, 1262 (1986) (characterizing defendant Kotmair's "tax protester arguments" as "meritless, frivolous, wrongheaded, and even stupid").

SAPF also misrepresents the tax benefits of its Affidavit of Revocation and Statement of Citizenship, falsely stating that, by filing these documents, customers can establish that they are not subject to income-tax withholding and revoke their Social Security numbers to

evade employment-tax payment requirements. (A. 47, 49, 68–71, 76–77, 90–91, 93–121, 124–33, 270, 463–70.) Courts repeatedly have rejected arguments that taxpayers may avoid tax payment by seeking to revoke their Social Security numbers or filing statements of citizenship like those urged in this scheme. *E.g.*, *United States v. Ferguson*, 793 F.2d 828, 830–31 (7th Cir. 1986) (upholding conviction of taxpayer who submitted Affidavits of Revocation to IRS in lieu of tax returns); *United States v. Luman*, 95 A.F.T.R.2d 2414 (N.D. Ga. 2005) ("one may not remove oneself from the jurisdiction of the federal tax laws by filing a 'Notice of Rescission' with the Internal Revenue Service"); *United States v. Sasscer*, 86 A.F.T.R.2d 6174. 6175 (D. Md. 2000) ("a person may not elect to opt out of the federal tax laws by a unilateral act of revocation and rescission"); *Damron v. Yellow Freight Sys.*, 18 F. Supp. 2d 812, 818–19 (E.D. Tenn. 1998) (taxpayer "adopted this misguided philosophy and misinterpretation of the law from a tax protest organization known as Save-A-Patriot Fellowship," addressing Affidavit of Revocation); *Alaska Computer Brokers v. Morton*, 76 A.F.T.R.2d 6458 (D. Alaska 1995) (SAPF customer's Statement of Citizenship is "frivolous"); *Narramore*, 71 T.C.M. (CCH) 1722 (rejecting

arguments of SAPF customer who submitted Affidavit of Revocation to court).

Third, SAPF knew or had reason to know of the falsity of its statements. *See* I.R.C. § 6700(a)(2)(A). In determining whether the Government has established the "knew or had reason to know" standard, courts consider: (i) the extent of the defendant's reliance on knowledgeable professionals; (ii) the defendant's level of sophistication and education; and (iii) the defendant's familiarity with tax matters. *Gleason*, 432 F.3d at 683; *Estate Pres. Servs.*, 202 F.3d at 1103. This standard includes "what a reasonable person in the [promoter's] subjective position would have discovered." *Estate Pres. Servs.*, at 1102.

In this case, SAPF clearly knew or had reason to know that its statements in support of its tax scheme were false or fraudulent. SAPF's services and publications were all tax-related, and SAPF held out its "fiduciary," Kotmair, as knowledgeable about tax law in publications and in letters to SAPF's customers and to the IRS on behalf of customers. (A. 91, 102–03, 124–28, 143–44, 148–89, 203–04.) SAPF did not claim that they relied on any tax professionals. Not only

is SAPF sufficiently sophisticated to have located court decisions contrary to its assertions, but its publications routinely criticize such decisions, as well as correspondence from the IRS and other documents opposing its positions. (*E.g.*, A. 116, 128, 143–44.) Indeed, SAPF has more than a "reason to know" that its statements respecting U.S.-source income are false. Kotmair was convicted of willfully failing to file tax returns and to report income derived from a sole proprietorship and real property located in the United States, that is, U.S.-source income. *See Kotmair*, 86 T.C. at 1253. Moreover, two of SAPF's former employees, Thurston Bell and Richard Haraka, have been enjoined from conducting similar schemes. (A. 78, 104, 114, 209–27; Doc. 44 ¶¶ 34, 44 and Ex. 33; *see also Bell*, 414 F.3d at 474.) Indeed, Kotmair, as the director of the National Workers Rights Committee, was served with at least 30 decisions expressly rejecting his positions as frivolous. *See Shepherd v. Sturm, Ruger & Co.*, 1998 OCAHO LEXIS 27 at *4 (Feb. 18, 1998) (identifying complaints Kotmair filed against employers on behalf of SAPF members and noting that there was "no possibility that [Kotmair] was unaware" of the adverse decisions in those cases.)

Fourth, SAPF's statements are false as to a material matter. *See* I.R.C. § 6700(a)(2)(A). Statements with a "substantial impact" on the decision to purchase a tax package pertain to a material matter. *Gleason*, 432 F.3d at 683; *United States v. Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985). Here, SAPF's false and misleading statements with respect to the U.S.-sources argument, the effects of the Affidavit of Revocation and Statement of Citizenship, and SAPF's "assistance" in dealing with the IRS and the courts substantially affect its customers' decision to purchase SAPF's products and services. (*E.g.*, A. 245–55.) Further, these false statements resulted in customers' failure to file returns and to withhold and to pay taxes, clearly a material matter under the tax laws. The record contains statements from several SAPF customers asserting that they had failed to file returns and to pay tax based on SAPF's misrepresentations as to the validity of the tax laws. (*E.g.*, A. 245–55.)

Finally, an injunction is necessary to prevent recurrence of this illegal conduct. *See* I.R.C. § 7408(b)(2). In making this determination, courts consider such factors as "the gravity of harm caused by the offense; the extent of the defendant's participation and his degree of

scienter; the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transaction; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations." *United States v. Kaun*, 827 F.2d 1144, 1149–50 (7th Cir. 1987); *see also Estate Pres. Servs.*, 202 F.3d at 1105.

All of these factors argue for injunctive relief here. The record shows the extent of the harm caused, in the costs to the IRS of handling and responding to SAPF's protest letters, of defending court cases brought by SAPF members, of collecting unpaid tax liabilities of SAPF customers, and of course lost tax revenues. (A. 79–80, 85, 146–93, 228, 245–321, 428–43, 445–56.) Moreover, SAPF has a high degree of *scienter*, as it willfully misreads the law in a manner that supports the scheme, despite the consistent rejection of its interpretation of the tax laws by the IRS and the courts. Further, its conduct is far from isolated. SAPF's scheme is nationwide, involving hundreds, if not thousands, of customers, with dozens of decisions involving the scheme. *E.g. Damron*, 18 F. Supp. 2d at 818–19 (employee gave Affidavit of Revocation provided by SAPF to his employer); *United States v.*

Crosson, 1995 WL 756599, *1 (E.D. Pa. Dec. 20, 1995) (criminal defendant admitted sending IRS an SAPF affidavit stating that he was not required to pay taxes); *Alaska Computer Brokers*,76 A.F.T.R.2d 6458 (employee gave Statement of Citizenship to his employer; he stated that Kotmair was his agent in dealing with IRS); *Narramore*, 71 T.C.M. (CCH) 1722 (SAPF customer attached Affidavit of Revocation to motion). Further, SAPF's repeated insistence on the legality of its actions in the face of overwhelming contrary authority show a refusal to recognize its culpability. Finally, SAPF operates a complex billing system, oversees staff devoted to tax-related "case work," and promotes its scheme through the internet, publications, and appearances, all indicia of a mechanism in place for continuing the scheme. (*See* A. 91.)

SAPF argues that "none of the statements complained of . . . deal[s] with tax benefits resulting from participation" in SAPF and that "SAPF has never stated that any tax benefit accrues as a result of becoming a member." (Br. 31.) But the undisputed facts show that SAPF asserts that, by purchasing and using its Affidavit of Revocation and Statement of Citizenship, its protest letters, its pleadings and motions in court cases, and its other products and service, customers

can legally avoid paying taxes on U.S.-source income, opt out of the Social Security system, and otherwise defeat their obligations under the Code. (A. 245–54, 403–05, 411–13, 425–26, 428–34.) Indeed, its handbook touts SAPF's knowledge of the tax system as a means by which customers lacking such knowledge can obtain these benefits. (*See*, *e.g.*, A. 85 (offering "such member services as the proper procedure and paperwork to discontinue tax withholding or the proper response to an IRS notice of levy or to an employer's request for a social security number"); A. 86 (offering members "educational material" respecting "a thorough and accurate analysis of the limited liability of the U.S. citizen for internal taxation" and "paralegal assistance . . . in stopping tax withholding in the workplace; or in quitting Social Security"); A. 94 (touting the benefits of SAPF protest letters in building a case opposing assessment or collection of tax liabilities).)

Contrary to SAPF's assertion (Br. 29–30), the courts have held that the false promotion of such "tax benefits" arising from participating in this sort of "plan or arrangement" is well within § 6700's reach. *See*, *e.g.*, *Bell*, 414 F.3d at 475–76 (tax-avoidance promotions based on U.S.-sources argument could be enjoined under

§§ 7402 and 7408); *Schiff*, 379 F.3d at 625–26 (upholding preliminary injunction under § 7408 against promoters of tax-avoidance schemes purportedly teaching customers how to "legally" stop paying income taxes, as violative of § 6700); *Raymond*, 228 F.3d at 806–11 (holding that defendants violated § 6700 in making available for sale forms and instructions to guide taxpayers through process of "withdrawing" from jurisdiction of IRS and Social Security system); *Kaun,* 827 F.2d at 1147–50 (holding that group espousing tax-avoidance schemes constituted abusive tax shelter under § 6700 that could be enjoined under § 7408).

C. SAPF and Kotmair engage in conduct subject to the § 6701 penalty, warranting an injunction under § 7408

It is also "abundantly clear," as the District held, that SAPF's conduct, and that of its founder, Kotmair, violated I.R.C. § 6701 and warranted an injunction against them under I.R.C. § 7408. *See* p. 23 n.4. The undisputed facts show that SAPF prepares or assists in preparing: (i) "any portion of a return, affidavit, claim, or other document" that (ii) it "knows (or has reason to believe) will be used in connection with any material matter" under the tax laws and that

(iii) it knows will "result in an understatement of the liability for tax." *See* I.R.C. § 6701(a). It is also clear that an injunction is necessary to prevent recurrence of this conduct. *See* I.R.C. § 7408(b).

First, SAPF prepares Affidavits of Revocation purporting to remove its customers from the IRS's jurisdiction and to relieve them from the requirements of filing and paying income and employment taxes. (A. 431–33, 251–52, 463–70.) SAPF also prepares Statements of Citizenship as purported substitutes for Forms W-4 that declare that the customers have no income subject to withholding for income or employment taxes. (A. 89–90, 236–38, 251–52, 460, 470; Doc. 43, Exs. 22, 25.)

Second, SAPF knows that its customers use these documents in connection with a material matter under the tax laws. (A. 245–54, 428–70.) Indeed, SAPF's promotional materials and services guide customers in the use of the Affidavit of Revocation and Statement of Citizenship (A. 105, 107, 111–13, 126–130, 470, and SAPF admits that it touts its knowledge of the "proper administrative remedy if and when the IRS comes calling" (*see* Doc. 71 at 5–6; A. 94). Further, SAPF's "fiduciary" Kotmair has represented customers in disputes with the

customers' employers who refused to accept these documents (*see* A. 78 and cases cited therein) and in other cases involving the use of these documents to avoid tax filing and payment requirements (*e.g.*, *Alaska Computer Brokers*, 76 A.F.T.R.2d 6458; *Sherwood*, 90 T.C.M. (CCH) 512; *Tolotti*, 83 T.C.M. (CCH) 1436)).

Third, SAPF knows that these documents, if used as it directs, will result in the understatement of its customers' tax liabilities, withholding obligations, and filing obligations because its customers fail to file returns and request that employers stop withholding taxes. Relying on these materials, SAPF customers have failed to file tax returns, or have filed returns showing "zero" income and tax due, resulting in the understatement of their tax liability. (*E.g.*, A. 245–55, 397–402.) Although SAPF advertises its products and services as "proper" remedies to IRS assertions of customers' responsibilities under the Code (A. 94), it is well aware that its positions on the tax laws are considered "meritless, frivolous, wrongheaded, and even stupid" by the courts. *See Kotmair*, 86 T.C. at 1262. *See also Schiff*, 379 F.3d at 626 (given Schiff's extensive history of litigation with the IRS, there was little doubt that he knew that his theories were wrong).

Finally, as shown above, pp. 29–31, and as determined by the District Court, an injunction is necessary to prevent recurrence of this conduct by SAPF and Kotmair. *See* I.R.C. § 7408(b).

SAPF argues that, for there to have been an "understatement" of tax for purposes of § 6700, there must have been a "statement of an amount of tax . . . made on a return," a condition which (it suggests) is not met here. (Br. 33–34.) We note, however, that in a number of cases SAPF's customers have submitted returns in which they state their income and tax due as zero. *E.g.*, *Sherwood*, 90 T.C.M. (CCH) 512; *Tolotti*, 83 T.C.M. (CCH) 1436; *see* A. 397–402. In any event, however, as the District Court held, whether SAPF's customers "fil[e] a return indicating zero income and zero liability, or simply refuse to file a return, the result is the same — their tax liability is understated." (A. 493.) *See also, e.g.*, *Geiselman v. United States*, 961 F.2d 1, 5 (1st Cir. 1992) ("when a taxpayer fails to file any return, 'it is as if he filed a return showing a zero amount'" for purposes of determining that tax deficiency) (quoting *Schiff*, 919 F.2d at 832); *Roat v. Commissioner*, 847 F.2d 1379, 1381–82 (9th Cir. 1988) (to same effect).

SAPF's reliance (Br. 34–35) on *Commissioner v. Acker*, 361 U.S. 87, 91–92 (1959), is misplaced. In *Acker*, the Court held that the taxpayer's failure to file a declaration of estimated income tax did not subject him to a now-superseded penalty for filing a "substantial underestimate of estimated tax" in addition to the penalty for failure to file the declaration. *See* 361 U.S. at 88 n.2. The Court noted that "we are here concerned with an attempt to justify the imposition of a second penalty for the same omission for which Congress has specifically provided a separate and very substantial penalty." 361 U.S. at 92. That is not the case here. The Court in *Acker* further noted that "the courts, except the Tax Court, had almost uniformly held" that the penalty could not be imposed in the absence of a declaration of estimated tax, which is also not the case here. *See*, *e.g*, *Geiselman*, 961 F.2d at 5; *Schiff*, 919 F.2d at 832; *Roat*, 847 F.2d at 1381–82.

SAPF further contends (Br. 35–36) that the protest letters SAPF prepares for its members "could not result in such an understatement" because they "all occur after the point in time a return is not received by the IRS" and thus could not have brought about that failure. As SAPF acknowledges, however (Br. 35–36), these letters respond, *inter*

alia, to IRS requests that SAPF's customers file their returns. Accordingly, by providing these letters SAPF "aids or assists in, procures, or advises with respect to, the preparation or presentation" of documents that "result in an understatement of the liability for tax of another person." I.R.C. § 6701(a)(1), (3). Moreover, as noted above, the Affidavits of Revocation and Statements of Citizenship that SAPF sells also result in an understatement of the customers' liability for tax, because customers relying on them fail to file returns or file returns reporting zero income and tax.

II

SAPF's conduct and that of its founder Kotmair warrant entry of a permanent injunction under § 7402

A. Introduction

In addition to the relief specifically provided under I.R.C. § 7408 for conduct violating §§ 6700 and 6701, § 7402 authorizes federal courts to issue such injunctions "as may be necessary or appropriate for the enforcement of the internal revenue laws." This statute manifests "a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws." *Brody*

v. United States, 243 F.2d 278, 384 (1st Cir. 1957). Contrary to SAPF's assertion (Br. 25), the statute "has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute." *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984). *See also United States v. Kaun*, 633 F. Supp. 406, 409 (E.D. Wis. 1986) ("federal courts have routinely relied on [§ 7402(a)] . . . to preclude individuals . . . from disseminating their rather perverse notions about compliance with the Internal Revenue laws or from promoting certain tax avoidance schemes"), *aff'd*, 827 F.2d 1144 (7th Cir. 1987). Indeed, the legislative history of § 7408 expressly states that "the court will continue to have full authority [under § 7402] and will continue to possess the great latitude inherent in equity jurisdiction to fashion appropriate equitable relief." S. Rep. No. 97-494, *supra*, at 269.

According to "well-established principles of equity" applicable under § 7402(a), a plaintiff seeking a permanent injunction must show that: (i) it has suffered or will suffer irreparable injury in the absence of the injunction; (ii) remedies available at law are inadequate; (iii) the balance of the equities weighs in favor of the requested relief; and

(iv) the public interest "would not be disserved" by entry of the injunction. *eBay, Inc. v. MercExchange, L.L.C.*, __ U.S. __, 126 S. Ct. 1837, 1839 (2006); *see also Wilson v. CHAMPUS*, 65 F.3d 361, 364 & n.2 (4th Cir. 1995). These principles support injunctive relief in this case.

B. The District Court properly enjoined SAPF's conduct and that of Kotmair under § 7402

The District Court properly entered an injunction against SAPF and Kotmair under I.R.C. § 7402. The Government showed that it will suffer irreparable injury if Kotmair's and SAPF's conduct is permitted to continue. The U.S.-sources argument is frivolous, and the undisputed evidence established that SAPF uses this argument to instruct and aid a substantial number of customers to make fraudulent IRS filings and to evade tax payment. Kotmair's and SAPF's false tax advice and abusive programs interfere with enforcement of the internal revenue laws by delaying examination and collection and by encouraging its customers to violate the tax laws. SAPF's form protest letters are designed to throw obstacles in the path of IRS examiners, causing administrative and other expenses in addition to lost revenues.

SAPF argues (Br. 36–37) that the Government failed to show irreparable harm resulting from SAPF's tax-fraud scheme, asserting that the only record evidence of such harm is "a chart for which no evidentiary foundation has been laid." (Br. 37, citing A. 228.) In fact, the record is replete with evidence of the harm SAPF's scheme inflicts on the IRS. For example, there is evidence that SAPF sent over 800 protest letters to the IRS from May 2004 through November 2005 claiming that SAPF customers were not subject to income tax payment or filing requirements as U.S. citizens living and working in the United States. (A. 75, 425.) The IRS estimates that the cost of processing these letters exceeds $4,483, and the costs of filing substitutes for returns for the nonfiling customers is $1,359,522. (A. 75.) Moreover, the IRS Ogden Service Center alone received an additional 134 such letters during the period from December 2005 through May 2006. (A. 75–76.) Such letters have been exhibits in cases that the IRS was obliged to defend or bring in Tax Court or other courts. (A. 75 (citing cases).) The IRS has also lost revenues from uncollected taxes from SAPF's customers. (A. 75–76.) Moreover, its overall tax-collection ability has been undermined by SAPF's activities because of the time

IRS revenue officers must devote to collecting unpaid taxes from SAPF's customers.

Further, the Government's remedies at law are not adequate. These include actions against each individual who purchases or follows SAPF's program, a burdensome proposition. Because many of these persons do not file tax returns, even identifying them would be difficult. Moreover, as the District Court concluded, absent an injunction Kotmair and SAPF intend to continue promoting their scheme.

Finally, the Government showed that the balancing of harm and the public interest favored injunctive relief. Certainly Kotmair and SAPF suffer no legally cognizable harm in being required to comply with the tax laws. SAPF's customers will benefit from SAPF's compliance with the injunction: providing them with copies of the injunction will inform them that they could be subject to penalties or criminal sanctions for purchasing SAPF's products and services. And the general public interest favors enforcement of the internal revenue laws. Injunctive relief under § 7402 is therefore necessary and appropriate to prevent Kotmair and SAPF from continuing to interfere with, and cause others to interfere with, the federal tax system.

III

The injunctive relief ordered by the District Court will not interfere with SAPF's or Kotmair's First Amendment rights

In its permanent injunction order, the District Court: (i) enjoined Kotmair and SAPF from engaging in activity subject to penalty under I.R.C. §§ 6700 and 6701 or otherwise promoting their abusive tax-avoidance scheme and ordered them to remove from their website "all tax-fraud scheme promotional materials, false commercial speech regarding the internal revenue laws, and speech likely to aid or abet others in violating the internal revenue laws"; (ii) ordered them to produce to the Government a list of SAPF's customers; and (iii) required them to notify customers of the injunction, provide the customers with copies of the order, and post the order on SAPF's website. (A. 473–76.) As the District Court correctly held, these requirements do not impinge upon SAPF's or Kotmair's rights under the First Amendment.

A. The injunction preventing SAPF and Kotmair from promoting their abusive tax scheme affects only speech that is not protected under the First Amendment

1. The First Amendment does not protect false, fraudulent, or illegal commercial speech

Although the permanent injunction at issue here imposes a prior restraint on some of SAPF's speech, "[p]rior restraints are not unconstitutional *per se*." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). In particular, false commercial speech and speech related to illegal conduct are not protected by the First Amendment and thus may be banned. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980) ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"); *Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1325 (4th Cir. 1995) ("for commercial speech to be entitled to any First Amendment protection, the speech must first concern lawful activity and not be misleading").

The Supreme Court has not defined the "precise bounds" of commercial speech, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S.

626, 637 (1985), and has described it both as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 561, and as "speech proposing a commercial transaction," *id.* at 562. "[A]dvertising pure and simple [ ] falls within those bounds," *Zauderer*, 471 U.S. at 637. But, contrary to SAPF's argument (Br. 49–52), commercial speech is not limited simply to advertising. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (holding that law prohibiting use of a trade name was constitutional because such use "is a form of commercial speech"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421–22 & n.17 (1993) (noting that, although advertising is "core" commercial speech, the commercial-speech doctrine applies to "a somewhat larger category of commercial speech — 'that is, expression related solely to the economic interests of the speaker and its audience'" (quoting *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 561)).

SAPF argues (Br. 41–42, 47–48) that the materials it offers consist of noncommercial political advocacy and therefore cannot be subjected to restraint without violating the First Amendment. The courts have held, however, that commercial speech linking a product to

public debate still constitutes commercial speech, despite the presence of what otherwise appears to be noncommercial speech, so long as the two types of speech are not "inextricably intertwined." *Bd. of Trs. of the St. Univ. of N.Y. v. Fox*, 492 U.S. 469, 474–75 (1989); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983). Promoters of a product may not "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 68. Otherwise, all speech would receive core First Amendment protection, because "many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety." *Central Hudson*, 447 U.S. at 562 n.5. Just as "opening sales presentations with a prayer or a Pledge of Allegiance" does not "convert them into religious or political speech," *Fox*, 492 U.S. at 475, so, too, the presence of political passages in SAPF's materials does not bestow First Amendment protections on the commercial passages. The injunction at issue here, by its express terms, applies only to speech by Kotmair and SAPF that relates to "the securing of any tax benefit that they know or have reason to know is false or fraudulent" and to selling or distributing material "containing

false commercial speech regarding the internal revenue laws or speech likely to aid or abet others in violating the internal revenue laws." (A. 474–75.) As the District Court stated, the injunction does not prohibit SAPF and Kotmair from "express[ing] their opinions about the tax laws as long as those opinions are not used to sell products or services or instruct others as to how to impede the collection of taxes." (A. 498 (citing *Schiff*, 379 F.3d at 629, and *Bell*, 414 F.3d at 480.)

To be sure, the fact that SAPF sells its tax advice is not enough in itself to make the advice commercial speech. That fact, however, combined with the facts that the advice is fraudulent and that SAPF could communicate any political message it might have without instructing its customers on how to make illegal filings, is more than sufficient to justify the District Court's conclusion that its speech may be restrained. Similarly, while the Supreme Court has held that falsity, standing alone, does not deprive political advocacy of First Amendment protection, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964), it has also held that the Government may regulate or ban false or misleading commercial speech, *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

2. The First Amendment does not protect speech that constitutes fraudulent conduct or that aids and abets illegal activity

The Supreme Court has made clear that banning a course of conduct does not violate the First Amendment "'merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (citation omitted). The Court pointed to "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." *Ohralik*, 436 U.S. at 456 (citations omitted). *See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973) (order prohibiting newspaper from publishing discriminatory advertisements); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696–99 (1978) (injunction against publication of ethical canon that violated antitrust laws); *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 616 (1980) (ban on

secondary picketing). As particularly pertinent here, the Supreme Court has recently summarized that the First Amendment "does not shield fraud," because "'the intentional lie' is 'no essential part of any exposition of ideas.'" *Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

This Court has held that the First Amendment does not shield publishers who aid and abet crimes by distributing instructions on how to commit those crimes. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997). The Court observed in *Rice* that such "instructions" are unprotected by the First Amendment because teaching "techniques" is far different from mere "theoretical advocacy." 128 F.3d at 249. *See also United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982) (First Amendment does not protect sale of instructions for manufacture of controlled substance); *United States v. Spock*, 416 F.2d 165, 176–77 (1st Cir. 1969) (acquitting two defendants who had merely advocated resistence to the draft while permitting a new trial for defendants who had counseled, instructed, and assisted in the crime of nonpossession of a draft card).

As this Court observed in *Rice*, every circuit that has addressed the issue has "concluded that the First Amendment is generally inapplicable to charges of aiding and abetting violations of the tax laws." 128 F.3d at 245 (collecting cases). In a case concerning instructions on how to commit tax crimes, the Ninth Circuit has held that speech that goes beyond "advocat[ing] tax noncompliance as an abstract idea" and assists tax evasion is not protected by the First Amendment. *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985). Several courts have specifically held that tax advice that violates I.R.C. § 6700, like that of SAPF in this case, is fraudulent conduct and as such may be enjoined. *E.g.*, *Bell*, 414 F.3d at 481, 483–84; *Estate Pres.*, 202 F.3d at 1106; *Freeman*, 761 F.2d at 552.

The tax-evasion instructions in the SAPF materials are expressly marketed and sold as a how-to-do-it manual, not merely as a set of abstract statements advocating reform of or noncompliance with the tax laws. SAPF provides its clients with materials, instructions, and counseling on how to make tax filings based on the U.S.-sources argument. As discussed above, pp. 23–26, every court that has considered this argument has rejected it, and its utter lack of merit has

long been settled. Any representations on SAPF's website or in its newsletter or instructional materials to the effect that the U.S.-sources argument can reduce tax liabilities are false and fraudulent, and any incorporation of that argument into a tax filing causes the filing to become false and fraudulent as well. Submitting a false and fraudulent tax return or other tax filing is subject to both civil and criminal penalties under the Code. *See, e.g.*, I.R.C. §§ 6682, 6694, 6702, 7205, 7206, 7207. Kotmair and SAPF are no more entitled to assist in making these fraudulent filings than the newspaper in *Pittsburgh Press Co.* was entitled to publish advertisements that violated anti-discrimination laws, *see* 413 U.S. at 389, or the union in *Retail Store Employees Union* was entitled to engage in illegal secondary picketing, *see* 447 U.S. at 616. The First Amendment does not prevent the Government from enforcing the civil and criminal laws — including the tax laws — merely because actions that may violate those laws contain an expressive element. *Ohralik*, 436 U.S. at 456.

3. The courts consistently have upheld against First Amendment challenge injunctions involving speech that teaches and promotes tax evasion

Applying the commercial-speech and illegal-conduct doctrines to Congress's regulation of tax-evasion products, the courts of appeals have determined that speech incorporated into these products is not protected by the First Amendment and properly can be penalized under I.R.C. §§ 6700 and 6701 and enjoined under §§ 7408 and 7402. For example, in *Bell*, 414 F.3d at 478–79, the Third Circuit upheld an injunction against a tax-avoidance scheme based on the U.S.-sources argument, holding that the enjoined activity was unprotected commercial speech and that it aided and abetted violation of the tax laws. The court rejected Bell's argument that his program constituted protected noncommercial speech, observing that his website's "primary function was to sell fraudulent and illegal tax advice and services." *Id.* at 479. The court added that "[p]ackaging a commercial message with token political commentary does not insulate commercial speech from appropriate restrictions." *Id.* at 480. The court held that the speech was properly enjoined because it was both misleading and promoted unlawful activity. *Ibid.* It affirmed the district court's conclusion in

that case that Bell's website "invited visitors to violate the tax code, and sold them materials instructing them how to do so." *Ibid.*

Similarly, in *Schiff*, 379 F.3d at 626–31, the Ninth Circuit held that a book by a promoter of tax-avoidance schemes could be enjoined as fraudulent commercial speech. The court rejected Schiff's argument that unprotected commercial speech was limited to simple advertising, finding that his book "is an integral part of Schiff's whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax." *Id.* at 628. The court held that the expressive and political portions of Schiff's book were not "inextricably entwined" with its commercial elements and that Schiff "can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products." *Id.* at 629. Accordingly, Schiff could not use the protected portions of his book "to piggy-back his fraudulent commercial speech into full First Amendment protection." *Ibid.*

Other courts of appeals to whom the issue has been presented have agreed that tax-evasion schemes similar to the one marketed by SAPF and Kotmair may be enjoined without hazard to First

Amendment protections. *See Raymond*, 228 F.3d at 815 (holding that injunction prohibiting promotion of program advising that income is not taxable did not violate First Amendment; promotion and sale of promoter's book could be enjoined as false commercial speech, despite "political advocacy" contained in the book); *Estate Pres. Servs.*, 202 F.3d at 1096 n.3, 1097, 1099, 1106 (enjoining, as fraudulent conduct and misleading commercial speech, the marketing and selling of a training manual that provided false tax advice); *Kaun*, 827 F.2d at 1150–53 (holding that injunction prohibiting promotion of any plan based on various false and fraudulent claims about income taxation restrained only speech unprotected under First Amendment); *Buttorff*, 761 F.2d at 1057 n.1, 1065 n.11, 1066 (enjoining, as false commercial speech that promotes an illegal activity, written information respecting the subject tax program); *United States v. White*, 769 F.2d 511, 512, 516–17 (8th Cir. 1985) (enjoining, as false commercial speech and speech used to promote an illegal activity, a cassette tape and written materials, including sample tax forms and instructions laying out means to evade federal income taxes, even though materials also contained protected "arguments against the constitutionality and legality of the federal

income tax system"). *See also Abdo v. United States*, 234 F. Supp. 2d 553, 567–68 (M.D.N.C. 2002) (enjoining, as false commercial speech, statements that paying income taxes is voluntary), *aff'd mem.*, 63 Fed. Appx. 163 (4th Cir. 2003); *NCBA/NCE v. United States*, 843 F. Supp. 655, 666 (D. Colo. 1993) (holding that a book declaring the unconstitutionality of federal taxes was false commercial speech not protected by First Amendment), *aff'd mem.*, 42 F.3d 1406 (10th Cir. 1994); *United States v. Smith*, 657 F. Supp. 646, 648–49, 658 (W.D. La. 1986) (enjoining, as commercial speech that effectively promotes unlawful activity, a book containing false tax advice, although the book also described the benefits of trusts in general), *aff'd*, 814 F.2d 1086 (5th Cir. 1987); *United States v. Savoie*, 594 F. Supp. 678, 680, 682–83 (W.D. La. 1984) (enjoining, as illegal conduct and false commercial speech, two tax publications promoting fraudulent statements such as "Wages Not Income").

As the District Court below correctly concluded, the injunction order issued against Kotmair and SAPF "is similar to injunctions issued and upheld by other courts against others touting similar fanciful views of the federal tax laws." (A. 503–04.) The injunction

does not prevent SAPF or Kotmair from advising customers on legitimate tax-saving strategies or from discussing the internal revenue laws and advocating changes to those laws. (A. 495.) The injunction only prohibits Kotmair and SAPF from engaging in misleading or illegal commercial speech or illegal conduct. Accordingly, the injunction order does not violate the First Amendment's free-speech guarantee. *See Bell*, 414 F.3d at 478–79; *Schiff*, 379 F.3d at 626–31; *Raymond*, 228 F.3d at 815; *Estate Pres. Servs.*, 202 F.3d at 1106.

B. The injunction's requirement that SAPF and Kotmair provide the Government with a list of their customers does not violate their First Amendment rights of free association

There is no merit to SAPF's argument (Br. 53–58) that requiring Kotmair and SAPF to provide the Government with a list of customers who have bought their products or services violates their First Amendment associational rights. The record shows that SAPF operated as a commercial enterprise, not as a political organization. (*See*, *e.g.*, 88, 91, 93, 100–00, 428–71.) Declarations by its customers describe how they purchased SAPF's tax-evasion program. (A. 245–54, 428–71.) "Producing a customer list does not offend the First

Amendment because commercial transactions do not entail the same rights of association as political meetings." *Bell*, 414 F.3d at 485 (upholding order to furnish Government with promoter's customer list). *See also IDK, Inc. v. Clark County*, 836 F.2d 1185, 1193 (9th Cir. 1988) (escort/client relationship not protected by freedom of association); *In re PHE, inc.*, 790 F. Supp. 1310, 1317 (W.D. Ky. 1992) (holding that commercial relationship between publisher and customers was not protected association right under First Amendment); *In re Grand Jury Subpoena Served Upon Crown Video Unlimited, Inc.*, 630 F. Supp. 614, 619 (E.D.N.C. 1986) ("the commercial relationship arising from the sale of videotapes by the subpoenaed corporations to their customers is not protected by the first amendment's freedom of association guarantee," even though videotapes themselves were protected form of speech). Accordingly, given SAPF's purpose and activities, cases cited by SAPF concerning advocacy organizations, such as *NAACP v. Button*, 371 U.S. 415 (1963), *Bates v. City of Little Rock*, 361 U.S. 516 (1960), and *NAACP v. State of Alabama*, 357 U.S. 449 (1958), are immaterial here. *See also United States v. Hutchinson*, 633 F.2d 754, 757 (9th Cir. 1980)

(noting difference between customer list and list of political attendees at a tax-protest meeting).

Moreover, courts have held that the Government's interest in enforcing the tax laws outweighs any associational rights that may be implicated. *Bell*, 414 F.3d at 475. *See also, e.g.*, *Kerr v. United States*, 801 F.2d 1162, 1164 (9th Cir. 1986) (enforcing IRS summons even though it required producing names of organization's members); *St. German of Alaska E. Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1094 (2d Cir. 1988) (enforcing summons that sought disclosure of contributors' names because the IRS's compelling governmental interest in enforcement of the tax laws outweighed associational rights of organization's members).

In this case, disclosure of SAPF's customer lists is necessary, among other reasons, so that the IRS can monitor whether Kotmair and SAPF are complying with other provisions of the injunction, such as the requirement that the court's order be sent to all customers. *See, e.g., Abdo*, 234 F. Supp. 2d at 569 (ordering promoter to mail court's order to his customers and "provide evidence of his compliance with the foregoing" by filing a "complete list of names and addresses" of those

customers). Moreover, to the extent that Kotmair's and SAPF's customers have used SAPF's services and products to file false returns and other documents, or to avoid filing returns, the customers likely have violated the Code and are subject to possible civil and criminal penalties. The IRS's interest in investigating such potential violations is a "compelling interest" that outweighs any associational rights. *See First Nat'l Bank of Tulsa v. Dep't of Justice*, 865 F.2d 217, 220 (10th Cir. 1989). In sum, the District Court did not abuse its discretion in ordering SAPF to disclose its customer list.[5]

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5 SAPF makes no argument in its brief respecting the injunction's requirements that it place the injunction order on its website, inform customers of the order, and send them copies. Accordingly, any such argument should be deemed waived. *See Edwards*, 178 F.3d at 241 n.6. In any event, as the District Court recognized, "'mandated disclosure of factual commercial information does not offend'" the First Amendment. (A. 499 (quoting *Schiff*, 379 F.3d at 631).) In similar cases involving fraudulent tax schemes, courts have upheld orders requiring the publication of corrective information. *See Bell*, 414 F.3d at 485 (upholding requirement that Bell post injunction order on his website to give notice to readers that his tax advice is unlawful); *Schiff*, 379 F.3d at 631 ("the government does not offend the First Amendment when it requires the defendants to post the preliminary injunction on the websites where the product is sold, warning potential customers of the hazards of the product").

IV

Kotmair's argument based on collateral estoppel lacks merit

Kotmair appears to argue (Br. 10–11) that, because the complaint alleged that he was "doing business as" SAPF, the Government was collaterally estopped from seeking injunctive relief against him by the District Court's prior decision in *Save-A-Patriot Fellowship*, 962 F. Supp. 695. His argument, however, is misconceived. In the prior case, a wrongful-levy suit under I.R.C. § 7426, the court held that SAPF was entitled to recover certain property that the IRS had seized from SAPF's offices to apply to Kotmair's individual tax liabilities. The court rejected the Government's argument that SAPF was merely an *alter ego* of Kotmair, holding that SAPF was instead an unincorporated association that could own property under state law. *Save-A-Patriot Fellowship*, 962 F. Supp. at 698–99.

In the present case, the Government makes no argument that SAPF is Kotmair's *alter ego*. Instead, the Government acknowledges the result of the prior decision by seeking separately to enjoin both Kotmair and SAPF. (*See* A 11.) The complaint names Kotmair and

SAPF as separate defendants and makes separate allegations that Kotmair "organizes and sells tax-fraud schemes" and that "SAPF, an unincorporated association, also organizes and sells tax-fraud schemes." (A. 11.) Each paragraph of the complaint describes the conduct of Kotmair and SAPF as "defendants," or lists one if the conduct pertains only to that party. (A. 11–17.) The District Court issued two summonses for service of the complaint on Kotmair individually and on Kotmair as fiduciary of the Save-A-Patriot Fellowship. (Doc. 4.) Moreover, Kotmair and SAPF filed separate answers and amended answers to the complaint, showing that they understood from the start that they were being sued as separate defendants. (Docs. 6, 8, 9, 10.)

Fed. R. Civ. P. 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must give a defendant fair notice of what the claim is and the ground on which it rests. *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). Under Rule 8(f), all complaints are to be "so construed as to do substantial justice." Kotmair misreads the complaint in a manner that would preclude the doing of "substantial justice." He misreads the caption,

which lists him as "doing business as" SAPF, as an allegation that he and SAPF are a single entity, even though the caption and body of the complaint make clear that Kotmair and SAPF are being sued as separate entities. The District Court correctly rejected Kotmair's restrictive interpretation, reading the complaint as seeking the relief specifically stated, that is, to bar SAPF as well as Kotmair from activities subject to penalty under I.R.C. §§ 6700 and 6701. Indeed, if the District Court had regarded SAPF simply as Kotmair's *alter ego*, it would not have issued a separate injunction as to SAPF but, instead, would have enjoined only Kotmair, acting in his own name or through SAPF, from engaging in conduct subject to penalty under I.R.C. §§ 6700 and 6701. In enjoining both SAPF and Kotmair from engaging in such conduct, the District Court treated SAPF as an entity separate and distinct from Kotmair. Thus, the decision here is entirely consistent with the decision in the prior wrongful-levy suit brought by SAPF.

V

Kotmair's and SAPF's remaining arguments lack merit

A. SAPF argues (Br. 38–40) that the complaint fails to allege fraud with sufficient particularity to satisfy Fed. R. Civ. P. 9(b), which requires that "the circumstances constituting fraud . . . shall be stated with particularity." This claim is without merit. The complaint includes specific references to Kotmair's and SAPF's false statements with respect to the tax laws, identifies where they are made, and asserts that this conduct is ongoing. (A. 11–18.) Moreover, the complaint refers to Kotmair's and SAPF's Affidavit of Revocation and Statement of Citizenship, the Membership Assistance Program, and the various types of letters sold by Kotmair and SAPF as well as where, and to whom, they sell these documents. (*Ibid.*) Further, the complaint identifies the harm that is caused by Kotmair's and SAPF's conduct: their customers fail to file tax returns or file false returns and they obstruct the IRS's administration of the tax laws. (A. 17.)

Rule 9(b)'s requirements must be read in conjunction with Rule 8's requirement that the complaint set forth a "short and plain

statement of the claim." Fed. R. Civ. P. 8(a). *See Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 378 (2d Cir. 1974). To that end, a complaint is not required to plead evidence. *Ibid.* Thus, the inclusion of additional facts in the Government's motion for summary judgment is not improper, as SAPF asserts (Br. 16).

B. SAPF argues (Br. 41–44) that the District Court improperly granted summary judgment because the Government's case rested on disputed facts and inadmissible evidence. The only allegedly "inadmissible evidence" to which SAPF points, however, is the IRS chart setting forth the costs of handling frivolous protest letters (A. 228). As discussed above, however, quite apart from this chart, the record is replete with undisputed evidence of the injury to the Government caused by SAPF's fraudulent tax scheme.

Moreover, SAPF fails to identify any facts upon which the injunction is based that were in fact disputed. As SAPF notes, to defeat the Government's motion for summary judgment, Kotmair and SAPF were required to show sufficient facts for a reasonable jury to decide for them. (Br. 41 (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248–49 (1986), and *Matsushita Elec. Indus. Corp. v. Zenith Radio*

Corp., 475 U.S. 574, 587 (1986).) Although SAPF asserts (Br. 41) that SAPF "presented affidavits substantially controverting the facts alleged by the Government," it fails to point to any facts that were so controverted. For example, although SAPF argues that "what SAPF claims about the [Affidavit of Revocation] is a disputed issue" (Br. 42), SAPF does not point to any fact in the record showing such a dispute. Each fact upon which the injunction is based was supported by sworn declarations and often was taken directly from SAPF's materials. SAPF presented no contrary evidence that would create a triable issue of material fact.

C. Fed. R. Civ. P. 65(d) provides that an order granting an injunction "shall set forth the reasons for its issuance; shall be specific in its terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." SAPF argues (Br. 45) that, contrary to the requirements of Fed. R. Civ. p. 65(d), the injunction order entered by the District Court "is drawn in overbroad and vague terms, and so fails to give fair and precisely drawn notice of what it prohibits." SAPF's argument in this regard is meritless.

The District Court's decision explains in detail the proscribed conduct in which SAPF engages and how that conduct violates the Code. (A. 478–502.) It states why an injunction is necessary and what evidence supports the court's findings. (*Ibid.*) The injunction order itself sets forth the terms of the injunction, that is, what SAPF must do to comply and what it is barred from doing. (A. 473–77.) Foremost, it must close its abusive tax-program business. In addition, SAPF must remove from its website, newsletter, and other publications all advertising for its fraudulent tax programs. It must stop engaging in conduct that interferes with the administration and enforcement of the internal revenue laws, and stop instructing others to violate the tax laws, including offering insurance-like coverage to customers who violate the laws. It must cease encouraging and assisting individuals in disrupting or delaying IRS examinations by selling them frivolous IRS response letters. It must stop aiding in the preparation of false or fraudulent documents, such as Statements of Citizenship and Affidavits of Revocation. These mandates are not vague.

The injunction entered in this case is similar to those upheld by other courts of appeals. *E.g.*, *Gleason*, 432 F.3d at 681; *Bell*, 414 F.3d

474; *Schiff*, 379 F.3d 621; *Raymond*, 228 F.3d 804; *Estate Pres. Servs.*, 202 F.3d 1093; *Kaun*, 827 F.2d at 1150–53. Although SAPF claims (Br. 47) that the injunction orders in those cases "were more precise as to which acts were forbidden, and which speech was not protected by the First Amendment," it identifies no meaningful differences between the orders in those cases and the injunctive order here. As the District Court aptly concluded with respect to Kotmair's and SAPF's "professed difficulty in understanding the scope of the conduct that was to be enjoined," any such "confusion is self-induced." (A. 504.)

D. Kotmair argues (Br. 12–16) that his authorization to practice before the IRS has not been revoked in accordance with the regulations and that it was improper for the IRS to have introduced this "claim" on summary judgment rather than in the complaint. (Br. 12–13.) His argument is misconceived.

First, the Government did not assert a "claim" that Kotmair was unauthorized to practice before the IRS, but instead offered evidence of his false statements that he was so authorized as additional evidence of his and SAPF's fraudulent scheme. The Government showed that Kotmair had received notices from the IRS that he was ineligible to

represent SAPF's customers before the IRS. (*See* A. 205–06.) One such notice informed him that, under 26 C.F.R. § 601.502 and Treas. Dept. Circular 230, only certain categories of individuals are entitled to represent other persons before the IRS, including attorneys, certified public accountants, and enrolled agents. (A. 205.) The IRS informed Kotmair that, as he had not shown that he was properly included in any of these categories, he was not entitled to represent SAPF's customers before the IRS. (A. 205–06.) The notice concluded that, even if, as he claimed, Kotmair had been assigned an identification number, "it is not in itself an indication of authority to practice." (A. 206.) As this notice clearly stated, Kotmair never has had the authority to practice before the IRS. Accordingly, as the District Court observed (A. 490), Kotmair's statements that he was authorized to represent customers before the IRS constitutes yet more evidence of his fraudulent conduct in connection with the SAPF scheme.

There patently is no merit to Kotmair's argument that his "representative status" could only be "revoked" pursuant to 31 C.F.R. § 10.50(a), which provides that the IRS, "after notice and an opportunity for a proceeding, may censure, suspend or disbar any

practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with an intent to defraud, willfully and knowingly misleads or threatens a client or prospective client." (Emphasis added.) By its terms, this regulation is limited to "practitioners," defined as attorneys, certified public accountants, enrolled agents, and enrolled actuaries. *See* 31 C.F.R. §§ 10.2(3), 10.3(a), (b), (c), (d). Because Kotmair is not a "practitioner," as defined in 31 C.F.R. §§ 10.2 *et seq.*, 31 C.F.R. § 10.50 is inapplicable, and his entire argument in this regard necessarily fails.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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(s) Carol Barthel

Attorney for United States of America

Dated: 6/4/07

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STATUTORY ADDENDUM

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 6700. PROMOTING ABUSIVE TAX SHELTERS, ETC.

(a) *Imposition of penalty.*—Any person who—

(1)(A) organizes (or assists in the organization of)—

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)—

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter,

shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding

sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated.

* * * * *

SEC. 6701. PENALTIES FOR AIDING AND ABETTING UNDERSTATEMENT OF TAX LIABILITY.

(a) *Imposition of penalty.*—Any person—

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who know that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To issue orders, processes, and judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to

and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * *

SEC. 7408. ACTIONS TO ENJOIN SPECIFIED CONDUCT RELATED TO TAX SHELTERS AND REPORTABLE TRANSACTIONS.

(a) *Authority to seek injunction.*—A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in specified conduct. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) *Adjudication and decree.*—In any action under subsection (a), if the court finds—

(1) that the person has engaged in any specified conduct , and

(2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) *Specified conduct.*—For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is—

(1) subject to penalty under section 6700, 6701, 6707, ot 6708.

* * * * *

CERTIFICATE OF SERVICE

It is hereby certified that this brief was sent to the Clerk on this 4th day of June, 2007, by First Class Mail and that service of the brief was made on *pro se* appellant John B. Kotmair, Jr. and on counsel for the appellant Save-A-Patriot Fellowship on this 4th day of June, 2007, by sending each of them two copies by First Class Mail properly addressed as follows:

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