IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Appellant SAPF's Motion to Strike "Statement of the Facts"
in United States' Response Brief, and Several Appendix Pages

Appellant Save-A-Patriot Fellowship (SAPF) moves this Court to strike portions of the Statement of the Facts presented in the United States' response brief, filed on June 4, 2007, and pages 104–121 and 256–301 of the Appendix, for the reasons set forth below.

INTRODUCTION

SAPF filed an opening brief containing a Statement of the Facts, as required by F.R.A.P. 28(a), on April 30, 2007. The government introduced its own Statement of the Facts in its response brief filed June 4, 2007, as allowed by F.R.A.P. 28(b). The government's statement is replete with inaccuracies and counterfactual material. Distortions of the record and evident fabrication are

frequently employed by government's counsel. This, combined with the inclusion of "evidence" the government has previously conceded as immaterial, leads to SAPF's view that counsel is attempting fraud upon this Court.

ARGUMENT

From the initiation of this lawsuit, the government has attempted to shoehorn the lawful activities of SAPF into the scope of §§ 6700 and 6701,[1] in order to enjoin political speech and activities which it abhors. It is now evident in the Statement of the Facts that the government's attempt to squeeze SAPF's lawful activities into the jurisdictional framework of § 7408 (or § 7402(a)) has led the government to distort the facts.

While it is not uncommon for opposing sides to "spin" facts, the government here *contrives* facts unsupported by the record. Some of its distortions may be easily discerned by this Court upon review of the record, but the cumulative effect is a misleading picture of SAPF.

A. Pages 104–121 of the Appendix should be struck. The government inserted these pages from www.taxfreedom101.com, a website not controlled by SAPF, and now cites them as evidence. (Br. 4, 8). In the proceedings below, the government agreed this website did not belong to SAPF, and the court also acknowledged that the government "concedes that Defendants do not control these

[1] All references to statute sections refer to Title 26, unless otherwise indicated.

websites." (Memorandum, App. 483). These pages are therefore irrelevant, as well as prejudicial to SAPF.

B. On page 4, all text beginning with "Kotmair and SAPF market a scheme based on the 'Section 861' …" through and including "and advise members not to report or pay tax on such 'U.S.-source income.' " should be struck. The first "fact" here is that Defendants "market a scheme based on the 'Section 861' or 'U.S. sources' argument through their newsletters, website, and "sales force." All the record cited by the government in support thereof contains not even one sentence in support of this "fact": (a) App. 104–121 is from www.taxfreedom101.com, a website not controlled by SAPF or Kotmair, and should be struck, see *supra*; (b) App. 122–123 ("Federal Tax Law Basics" from SAPF website) contains only statements about *other* revenue code sections — neither the words '861' nor 'sources' appear — and SAPF sells nothing in these pages; (c) App. 126–33 are newsletter pages completely devoid of 'Section 861' or 'U.S. sources' arguments, much less anything SAPF sells based on those arguments; (d) App. 146–184 are all letters written to the IRS, and not marketing tools, regardless of their content; (e) Doc. 6, ¶¶ 8, 10 and Doc. 8, ¶¶ 8, 10[2] contain Defendants' *denials* of the complaint's allegation that they "market .. . tax-fraud schemes" through newsletters and websites; (f) Doc 43, Ex. 6E, makes no mention

[2] The government erroneously cited ¶ 6 of Docket 8; but it clearly meant ¶ 8.

of “861” or “U.S.-source income,” and is primarily the Kotmair-Brown radio debate transcript, see *supra*.

Another “fact” is that SAPF “advise[s] members not to report or pay tax.” The government again adduces “Federal Tax Law Basics” from the SAPF website (App. 122–123), but this 2-page document contains only general statements about the law, and concludes by warning: “The foregoing statements are NOT legal advice. They are merely factual statements about the law.” The only other cite is Agent Rowe’s declaration (App. 70, ¶16) and a copy of a letter she alleges “advis[es] an SAPF customer not to report U.S.-source income on an IRA withdrawal.” (App. 124–125). The letter in question belies her allegation, since it does not contain any advice. Instead, it states Kotmair’s opinion that “… if the sources of the funds that are deposited in your IRA are foreign, the income therefrom is taxable. If the funds are domestic, then the income is not taxable.” This demonstrates that Kotmair did not know the particulars of the IRA account or the withdrawals in question, and merely cited statutes and drew general conclusions about what he believes is taxable income with respect to IRAs in general; to claim that this constitutes “advice” to take some action is a deliberate misreading of the letter.

In fact, the government cannot and does not point to advice SAPF has given to any particular person not to pay or report income taxes, and has cited nothing

but general statements SAPF makes to the public at large (as well as to members) about the operations of the tax laws. On the other hand, the government ignores the parts of the record which show that SAPF has a strict policy *against* giving any advice, counsel or recommendation regarding an individual's decisions or course of action. For example, page 9 of the Member Handbook (App. 88) states:

> "However, neither our staff nor our Independent Representatives *can tell you whether or not you are required to file a return or pay a tax. YOU are the only person who can make this determination*." [emphasis added].

Under the protection of the First Amendment, SAPF does make assertions about the tax laws, so it has a powerful self-interest in making sure it does not cross the line into any activity which could be deemed illegal, as clarified at the top of page 9 of the Member Handbook (App. 88):

> "The Fellowship operates as a matter of RIGHT, which is protected under the 1st amendment, therefore among other considerations, the staff and Independent Representatives are prohibited from making actual legal determinations. This includes determining whether any given individual is subject to the internal revenue laws." [emphasis in original].

The Independent Representative Policy Agreement also states, at ¶ 5 (App. 340):

> "The Fellowship Does Not Determine Whether Any Given Person Has A Requirement To File A Return Or A Liability To Pay A Tax [sic]. The individual in question is the only one who can make that decision. An IR can show someone the law and explain the limited application of the law, but legal decisions must be left to the individual. Under no circumstances will IR's give legal advice or "consult" with members or prospective members."

The "Notice" contained in the newsletter cited above, Doc 43, Ex. 6E (p. 3), directly contradicts this "fact" as well:

> "The Save-A-Patriot Fellowship … strongly believe[s] that everyone must file whatever returns the law requires them to file and pay any tax due for any liability as shown thereon in a timely and conscientious fashion. We do not condone the willful non-filing of required returns nor evasion of such taxes."

C. On page 5, the phrase "and which they represent will enable customers legally to stop paying income tax on their U.S.-source income" should be struck. The government asserts that SAPF "represent[s]" that its "products and services [offered for sale]… will enable customers legally to stop paying income tax on their U.S.-source income." The government adduces Agent Rowe's declaration (App. 70–71), but it contains nothing to support this statement, nor any phrase that comes close to "stop paying." To date, no such statements have been identified by the government or the lower court. Rowe's declaration instead comprises conclusory allegations[3] that SAPF says "false" things about the tax laws, and that it prepares letters containing "false" statements about the tax laws, but even Rowe fails to swear that SAPF says anyone is "enabled" to stop paying income taxes, legally or otherwise, by reason of a single letter or document of SAPF.

[3] SAPF objected to Rowe's declaration as containing conclusory allegations, hearsay, and immaterial statements. (See Doc. 54, p. 10)

D. On page 5, all text beginning with "SAPF's newsletter advises that the Affidavit of Revocation …" through and including "from the presumed jurisdiction of the IRS and state taxing authorities" should be struck. On page 6, all text beginning with "advise customers that a lack of response" through and including "no longer required to file returns" should be struck. By page 5, the government identifies one document under the category of "product and services" for which it claims SAPF "advises" that it "revokes the customer's obligation to file income tax returns": the Affidavit of Revocation and Rescission (ARR). The government's cites (App. 70–71, 77, 126–32), however, contain no such statements by SAPF. The government covers over this inconvenient truth by offering another statement, taken out of context and made by SAPF over 17 years ago — in the March/April 1990 "Fellowship News."[4] This narrowly excised portion says that the ARR "is the first step in removing yourself from the presumed jurisdiction of the IRS and state taxing authorities." (App. 127). The words "*presumed* jurisdiction" are key, as the next sentence, ignored by the government, clearly emphasizes the presumption aspect: "If you do not break this presumption with the AFFIDAVIT's challenge, their presumption stands. Patriots who have executed affidavits, should press IRS for an answer!" Common sense provides that in rebutting another's presumption, one seeks to shift the burden of proof to that

[4] No longer published by SAPF.

other person. But a challenge to an existing presumption cannot operate to *remove* a legal obligation to file, and SAPF never says that it does. The *Reasonable Action* article by SAPF, cited (but not quoted) by the government, puts it this way (App. 126):

> SAP provides this legal instrument for every U.S. citizen and resident alien who has discovered the fact that there was NO legal requirement to file an income tax return and wants to revoke that [i.e., an income tax return *already* filed] and all other Internal Revenue Service documents ever filed [i.e., in the past] …and rescind his/her signature therefrom. The affidavit is an allegation of constructive fraud that confronts the presumption of liability head on. … when jurisdiction is challenged, the burden of proof reverts to the government agency, in this case the IRS." [emphasis in original].

Several things are clear — a) SAPF represents that this affidavit is only for persons who have *already* "discovered" that they have no legal requirement to file; b) it is intended to allow them to rescind their signature from *past* documents filed, alleging constructive fraud; and c) SAPF does *not* represent that this document can affect any *future* obligation to file an income tax return, or that it can revoke such an obligation.

The government claims as fact that Defendants "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." (Br. 6). Once again, the cites furnish no evidence of any such statement. Rather, the record shows that the government lifted just two words from an SAPF

newsletter, "conclusive proof" (App. 126), and invented the rest of its "fact." The actual quote reads:

> "Final Follow Up Letter … This is the final step when there is no response to your 60-day letter … It gives the Secretary an additional 30 days to respond. Advises him that his non-response to your AFFIDAVIT will be conclusive proof that he has no rebuttal to the facts." [sic] [emphasis in original].

From the context, it is clear that this describes the member's future letter to the Secretary. The only "advice" to be given is to the Secretary of the Treasury, by the member, that if there is no response, the member will consider it "conclusive proof" that the Secretary cannot *rebut* the affidavit — that is, the allegations of constructive fraud (see *supra*) and statements about the law. This is most emphatically *not* a statement by SAPF to a member that a non-response is "proof" that they are no longer obligated to file returns, or "proof" that their Social Security number has been "revoked." SAPF makes no such representations at any time.

On page 5, the government also claims that SAPF "advises" that the ARR "revokes the customer's Social Security number." It cites the same documents given for the companion claim that SAPF "advises" the ARR revokes the obligation to file returns, see *supra*. But those documents do not support this claim either. Instead, this "fact" is a distortion of SAPF's actual claim about the ARR (App. 126, 2nd column):

> "The AFFIDAVIT includes a paragraph with the proper wording to *revoke the original Form SS-5 application* for the Taxpayer

> Identification Number/Social Security Number *by rescinding your signature therefrom* …" [emphasis added]"

The paragraph from the document submitted by the government, which it identified as an ARR, states in part (App. 468, at ¶ 28):

> "I do hereby exercise my rights … upheld by various court decisions to revoke, rescind, cancel and render null and void, both currently and retroactively to the time of signing, based upon the constructive fraud perpetrated upon me … *all my signatures* on any of the aforementioned items, to include the Social Security Number application (Form SS-5) …" [emphasis added]

It is clear that SAPF truthfully represents what the ARR itself says, in that it claims the ARR can be used to revoke the member's *original application* for Social Security numbers by *rescinding his signature* therefrom.

The government distorts this into a "fact" that SAPF says that the ARR actually "revokes the customer's Social Security number." (Br. 5) In spite of this, the record contains SAPF's recognition that the government does *not* revoke the number: in the newsletter cited by the government (App. 132), this question is posed by SAPF: "Ever wonder why the social security administration will not expunge a person's number, even after a notice of revocation of application has been received?" On page 11 of the Member Handbook (App. 90), SAPF tells members: "However, the Social Security Administration, by ignoring the affidavit, will accept an application for benefits from those who have submitted the affidavit and have enough credits recorded within the agency records." Taking into account

the full record of SAPF statements, it is clear that SAPF does not represent that the ARR actually causes the Social Security Administration to revoke the number.

E. On page 6, all text beginning with "SAPF and Kotmair advise that a customer executing an Affidavit of Revocation" through and including "person not subject to withholding" should be struck. The government also misrepresents the ARR "Instructions." (App. 470). It snips the first portion of ¶4, which says that once the ARR is executed and forwarded, one "cannot file an IRS Form W-4 with an employer, or any other IRS or state income tax forms," but *omits* the rest of that instruction, which states that "the filing of any IRS or state income tax form(s) with anybody will invalidate the affidavit." With this qualifier properly in view, it is clear that the instruction does not advise or prohibit anyone from filing W-4s or other forms, but *warns* them that if they do, the entire affidavit (*i.e.*, their *own* statement of alleged constructive fraud) will be rendered invalid.

One of the ARR affiant's declarations (App. 468, ¶ 26) contains the following:

> "I am convinced and satisfied that I am not now, nor was I ever subject to, personally liable for, or personally required to pay any income/excise tax … I have never been notified by the [IRS] of any legal duty or obligation whatsoever to file or make an 'income tax return,' or sign any other Internal Revenue forms, …"

Since filing a return or other form under penalty of perjury would directly contradict the statement above, it is clear that filing such forms subsequent to executing the affidavit would "invalidate" the affidavit.

The government restates the next phrase of ¶ 4 of the ARR instructions in order to imply that SAPF advises members "*should* file" a Statement of Citizenship (SOC) rather than filing W-4s. The actual quote is not a command: "In lieu of the Form W-4, you *would* use a Statement of Citizenship pursuant to 26 CFR 1.1441-5." (App. 470). This misrepresentation may seem minor, but it reflects, again, a distortion of the record to make it appear that SAPF "advises" not to file.

The government also states as "fact" that SAPF "advertise[s] the Statement of Citizenship as a replacement for IRS Form W-4 'in order to claim to be a person not subject to withholding.' " (Br. 6). Although the government repeatedly cites the SOC itself (App. 460, 470, Doc. 43, Ex. 22), nothing it cites supports such "advertising" nor contains such statements. Page 11 of the Member Handbook (App. 90) notes the SOC is explained in IRS Publication 515 and "regulation 1.1441-5," but does not say it is a "replacement" for the W-4.

F. On page 6, the phrase "and file complaints against employers who continue to withhold taxes after having received the customer's Statement of

Citizenship" should be struck. The government cites numerous OCAHO cases[5] in support (Doc. 44, Ex. 1–31). As SAPF showed in the lower court, it stopped filing such complaints some eight years ago (Doc. 54, Ex. 1, ¶61) and the OCAHO record itself bears this out. Therefore, this "fact" is immaterial to the appeal.

G. Appendix 256–301, and all text on pages 7–8, beginning with "Kotmair and SAPF also assist customers in filing pleadings" through and including "for assessing taxes on U.S.-source income," should be struck. Since the lower court made no finding with respect to assisting in bankruptcy courts, and *declined to enjoin* SAPF from such activity ("it is questionable whether any injunction issued under §§ 7402 or 7408 would reach that conduct,") (App. 484), all references to bankruptcy pleadings, and the pleadings included as Appendix 256–301, are immaterial to SAPF's appeal (the government has not appealed).

The government also states as "fact" that SAPF assists in filing pleadings in federal district courts "advocating the U.S.-sources argument." None of the government's cites contain this phrase or concept; the only pleading in the record (App. 435–443) contains no such argument. The government also asserts that Defendants say members "can sue IRS employees responsible for assessing taxes on U.S.-source income." Such a statement is nowhere found in any of the cites given, and is contrived. Further, the pleading proffered (App. 435–443) claims

[5] The Office of the Chief Administrative Hearing Officer.

denial of due process by appeals — *not* assessment — employees with respect to a collection hearing. Since the government did not advance any argument or evidence regarding "court pleadings" in the lower court, there are no "facts" for the appeal other than that SAPF offers to assist members in court and it "prepares certain court documents for members," (Doc. 8, ¶ 20). Therefore, the government's "facts" are immaterial to this appeal.

H. On page 8, the last paragraph should be struck in its entirety. The government states as "fact" that SAPF offers insurance-like coverage for customers "who violate the tax laws," that members "must" compensate claimants who suffer property confiscation or incarceration, and that SAPF "requires[s] customers to use their materials and employ their delaying tactics in order to claim the benefits of this [] coverage." (Br. 8). The record cited does not support this, and these multiple distortions cause the entire paragraph to be immaterial with respect to the appeal.

The SAPF agreement (App. 46) states that "members pledge to reimburse other members for losses … incurred from illegal confiscation by the IRS and/or … state taxing agencies. [It helps] members recoup their losses due to the illegal actions of the IRS." Clearly, the focus is on *IRS employees* who violate the tax laws, and there is no pledge here to reimburse a *member* who violates any laws. The entire program is also based on voluntary participation. (See Doc. 54, Ex. 8,

¶19). That is, participants are *not* required by SAPF to compensate claimants; they merely pledge to do so. Pursuant to that agreement (App. 46, 382), a member in "good standing" pays others' claims in order to remain eligible to make a claim himself, if it becomes necessary.

Moreover, the "fact" that SAPF *requires* its members to use *SAPF* "materials" and "delaying tactics" in order to make a claim is a fabrication. The Member Handbook provides a direct contradiction on p. 28, informing the "associate member": "you have access to all member benefits except casework, N.W.R.C., and/or paralegal services. … Associate Membership includes: … 8. The right to file a claim for loss of property due to certain illegal IRS activities." (App. 101–102). Thus, an associate member, who does *not* even have access to SAPF services is still eligible to file a claim under the agreement.

I. The total effect of the government's misrepresentations is a specious picture of SAPF. As noted *supra*, SAPF acts within the arena of the freedoms guaranteed by the First Amendment. Therefore, the inaccuracies and counterfactual material in the government's Statement of the Facts greatly concerns SAPF, in that the sum total of these distortions presents a misleading picture to this Court.

For example, the record shows that SAPF does not give any person advice regarding their personal decisions or actions, and has a strict policy against doing so (B, *supra*). Therefore, it can be inferred that the "fact" that SAPF "advise[s]

members not to report or pay a tax" is intended to prejudice this Court by implying that SAPF "aids" or "abets" the violation of some (undesignated) tax law.

The greater concern, however, is with those invented "facts" which could be deemed possible violations of § 6700. Under that section, SAPF was accused of making "false or fraudulent" statements about "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."[6]

As shown *supra* (C and D), the government invented its own statements, and then attributed them to SAPF. These include claims that SAPF represents: (a) that its "products and services … will enable customers legally to stop paying income tax on their U.S.-source income" (Br. 5); (b) that the ARR "revokes the … Social Security number and obligation to file income tax returns" (Br. 5); (c) that a lack of response to the ARR "is 'conclusive proof' that their Social Security numbers have been revoked and that they are no longer required to file returns" (Br. 6); and (d) that the "Statement of Citizenship is a replacement for IRS Form W-4." (Br. 6).

It is noteworthy that without the aforesaid statements, the government would have ***no statements at all*** made by SAPF regarding the alleged "securing of tax benefits" by reason of "participation in" its "products and services" (including

[6] For the exact wording of § 6700, see Addendum 21 to SAPF's opening brief.

ARR and SOC). Without such statements to lay before the court, the government would not have a case under § 6700.

It is also noteworthy that without the invented "fact" that SAPF "market[s] a scheme based on the 'Section 861' … argument," (B, *supra*) and the disingenuous labeling of every SAPF activity as involving the "Section 861" or "U.S.-sources" argument, this case would not bear any similarity to *United States v. Bell*, a precedent the government strongly relies on. Bell was enjoined under § 7408 for preparing returns using the 861 argument, see *United States v. Bell*, 414 F.3d 474 (3rd Cir. 2005). This contrived similarity serves to tarnish SAPF with the actions of Bell, a former SAPF worker.

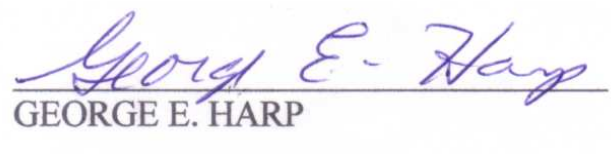
STATEMENT OF COUNSEL

Before filing this motion, I consulted John B. Kotmair, Jr., and he consents to the granting of the motion. On June 25, 2007, I attempted to contact Appellee's counsel, Carol A. Barthell of the U.S. Department of Justice, but was unable to reach her.

CONCLUSION

WHEREFORE, for the reasons set forth herein above, SAPF prays this Court strike the above-named portions of the Statement of the Facts presented by the government, and Appendix pages 104–121 and 256–301.

Respectfully submitted this 25th day of June, 2007,



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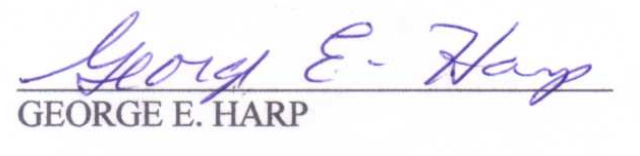
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a printed copy of "Appellant SAPF's Motion to Strike 'Statement of the Facts' in United States' Response Brief, and Several Appendix Pages" was sent to counsel for the Appellee, Carol A. Barthell, Attorney, Appellate Section, U.S. Department of Justice, Post Office Box 502, Washington, DC, 20044, and to Defendant/Appellant John B. Kotmair, Jr., Post Office Box 91, Westminster, MD 21158, by facsimile and U.S. mail, with sufficient postage affixed, this 25th day of June, 2007.



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