Appellate No. 07-1156

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee.

v.

JOHN BAPTIST KOTMAIR, JR.,
and SAVE-A-PATRIOT FELLOWSHIP,
Defendants/Appellants.

Appeal from the United States District Court for the District of Maryland
Senior Judge William M. Nickerson

PETITION FOR REHEARING EN BANC OF DEFENDANT-APPELLANT JOHN B. KOTMAIR, JR.

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STATEMENT PURSUANT TO FRAP RULE 35(b)

The decision of the three judge panel in this case conflicts with the following decisions of the 4th Circuit Court of Appeals: *In re Microsoft Corp. Antitrust Litigation*, 355 F.3d 322 (4th Cir., 2004); *Adkins v. Allstate Ins. Co.*, 729 F.2d 974 (4th Cir. 1984); *United States v. Tatum*, 943 F.2d 370 (4th Cir. 1991); *Davis v. Zahradnick*, 600 F.2d 458 (4th Cir. 1979); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390 (4th Cir., 1950); and *Charbonnages de France v. Smith*, 597 F.2d 406 (4th Cir., 1979).

Therefore, consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

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INTRODUCTION

Pursuant to Federal Rules of Appeal Procedure Rules 35 and 40, Appellant John Baptist Kotmair, Jr. (hereinafter Kotmair) hereby petitions this Court for a rehearing en banc, on the grounds that the decision of the three-judge panel in this case is in conflict with numerous prior decisions of this Circuit and of the Supreme Court, as discussed below.

First and foremost, the panel affirmed the District Court's grant of summary judgment to Appellee United States of America (hereinafter, "United States" or "the government"), despite the existence of disputed issues of material fact, and a lack of proper evidence to support its findings of fact.

ARGUMENT

Res Judicata

The government alleged in its complaint seeking a permanent injunction that "John Baptist Kotmair, Jr. [was] d/b/a Save-A-Patriot Fellowship (hereinafter SAPF) and National Workers Rights Committee." Kotmair disputed this allegation in his motion for summary judgment, giving evidence of the fact that in a prior decision in the District Court for the District of Maryland, *Save-A-Patriot Fellowship v. U.S.*, 962 F.Supp 695

(1996) (Exhibit A attached). That Court held that Kotmair was not doing business as Save-A-Patriot Fellowship, but was instead its Fiduciary.

The United States filed an Appeal of this judgment to this Circuit, and then later filed a motion to dismiss its appeal with prejudice (Exhibit B attached). In response to the government's motion, this Circuit issued an Order dismissing the United States' appeal (Exhibit C attached). Thus the government's complaint for injunctive relief in this instant action against Kotmair doing business as SAPF is barred by the doctrines of res judicata and collateral estoppel. The United States gave no evidence to the contrary, and the District Court, completely disregarding Kotmair's res judicata and collateral estoppel arguments, granted the government's motion for summary judgment.

That being the case, this Court's affirmance of the lower Court's grant of summary judgment for the government is in conflict with the Fourth Circuit's prior decision in *In re Microsoft Corp. Antitrust Litigation,* 355 F.3d 322, 326 (4th Cir., 2004):

> *Under the traditional rubric of res judicata, once a matter -- whether a claim, an issue, or a fact -- has been determined by a court as the basis for a judgment, a party against whom the claim, issue, or fact was resolved cannot relitigate the matter. Judicial efficiency and finality have demanded such a policy.*
>
> The doctrine of "collateral estoppel" or "issue preclusion," which the district court applied in this case, is a subset of the res judicata genre. Applying collateral estoppel "forecloses the

> relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate." *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998) (internal quotation marks and citation omitted).
>
> To apply collateral estoppel or issue preclusion to an issue or fact, the proponent must demonstrate that (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding. See *id*.; *Polk v. Montgomery County, Maryland*, 782 F.2d 1196, 1201 (4th Cir. 1986) (using "necessary, material, and essential" for the third prong); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, (using “critical and necessary”); *C.B. Marchant Co. v. Eastern Foods, Inc.*, 756 F.2d 317, 319 (4th Cir.1985) (using “necessary and essential”).

In *Save-A-Patriot Fellowship v. U.S., Id*., these five standards outlined in *Microsoft Corp.* were consummated, giving rise to the protection of the res judicata and collateral estoppel doctrines. The District Court committed error in ignoring this doctrine, and granting summary judgment against Kotmair, and this Circuit erred in upholding the lower court.

The evidence in the attached Exhibit A and Exhibit B reveals that the government *had a full and fair opportunity to litigate*, did so, asking this Circuit to dismiss its appeal of the 1996 Order with prejudice, and this Circuit obliged that request.

This Court's affirmance of the lower Court's grant of summary judgment against Kotmair is also in conflict with the prior decision in *Adkins v. Allstate Ins. Co*., 729 F.2d 974 (4th Cir. 1984), as the Judgment in *Save-A-Patriot Fellowship v. U.S.*, rendered after a full and complete hearing, bars any further related actions, such as the allegations in this permanent injunction complaint. Neither the SAPF or Kotmair, as its fiduciary, altered or changed the functional operation of this unincorporated association since that 1996 Judgment.

> Both the Supreme Court and this circuit have consistently recognized the importance of these principles. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Court reiterated: [W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound " not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352 [24 L.Ed. 195] [1876]. The judgment puts an end to the cause of action .... 414 U.S. at 578-79, 94 S.Ct. at 812, quoting *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948). See also *Thomas v. Consolidated Coal Co.*, 380 F.2d 69 (4th Cir.1967); *Bartsch v. Washington Metropolitan Area Transit Commission*, 357 F.2d 923 (4th Cir.1966). *Id*., at 976.

In *United States v. Tatum*, 943 F.2d 370, 381 (4th Cir. 1991) this Court declares very clearly:

> The doctrine of res judicata applies to bar a second attempt to relitigate the same cause of action between the parties.

> *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948); *Mumford*, 630 F.2d at 1027. It applies to bar not only issues that were raised, but also issues that could have been raised in the earlier action. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). Stated fully, the rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Because the district court ruled over ten years ago that Kotmair is not doing business as Save-A-Patriot Fellowship, and that Save-A-Patriot Fellowship is an unincorporated association, separate and distinct from him, Kotmair should have been dismissed from this action under Federal Rules of Civil Procedure Rule 17(a) and the doctrine of *res judicata* — specifically, the collateral estoppel doctrine precludes Plaintiff United States from bringing suit against Kotmair in that capacity. Until now, this Circuit has consistently held that issues of res judicata and collateral estoppel prevent litigation such as this permanent injunction complaint against Kotmair.

Representation

Kotmair, in his capacity as fiduciary of SAPF, has represented members of the Save-A-Patriot Fellowship before the IRS. The Internal Revenue Service recognized Kotmair's representative status on November 5, 1990 assigning him Representative Number *2605-47815R.* (Docket *51,* Exhibit 4).

Since then, and to this day, Kotmair continues to represent members who give him power of attorney to do so.

By letter dated June 3, 1994, IRS District Director Paul Harrington claimed that Kotmair is ineligible to have representative status. Since 31 CFR §10.50(a) authorizes revocation of representative status only "after notice and an opportunity for a proceeding," and Kotmair had not been afforded such, he wrote to Harrington on June 15, 1994, explaining the basis of his authority to represent SAPF members before the IRS. He informed the IRS of his intention to continue, and requested an appeal proceeding in the event the IRS was opposed. (Docket 51, Exhibit 4, p. 4). Despite this and many other letters to the IRS over the years on this issue, the fact remains that IRS has never pursued a proceeding, as is required by 31 CFR §10.50(a), to revoke Kotmair's representative status or number. The government does not contest the fact that the IRS did *not* move to revoke representative status via 31 CFR § 10.50(a).

In its complaint, the United States did not make any charges relative to Defendant Kotmair's representing members of SAPF before the IRS (in his official capacity as SAPF fiduciary), nor did the government allege anything with regard to Kotmair's statements about his authority to represent those members. Subsequently, the United States introduced these issues on its

motion for summary judgment through the affidavit of Revenue Agent Joan Rowe, who claimed, *inter alia,* that Kotmair was "not authorized" to represent SAPF members before the IRS. (Docket 43, p. 7, ¶ 37).

Kotmair's answering declaration substantially disputed each of the "facts" sought to be established by Rowe. This being the case, this Court's affirmance of the lower Court's grant of summary judgment for the government is in conflict with the 4th Circuit's prior decision of *Davis v. Zahradnick,* 600 F.2d 458, 460 (4th Cir. 1979), which held that "summary judgment under Rule 56 … may not be invoked where … affidavits present conflicting versions of the facts which require credibility determinations." See also, *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir., 1950):

> It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the court than is possible upon pleadings and affidavits. … [S]ummary judgment … should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. … As was said by Mr. Justice Jackson, speaking for the Supreme Court, in *Sartor v. Arkansas Nat. Gas. Co.*, 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967: 'Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'

This Circuit has consistently held that issues of disputed facts can not be resolved by summary judgment, and has, in fact, held that the non-movant is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from it drawn in his behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence as considered." *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir., 1979). In conflict with that decision, this Court upheld the lower Court's grant of summary judgment against SAPF and Kotmair, even though it is clear that there are disputed issues that precluded summary judgment.

CONCLUSION

Wherefore, for the foregoing reasons, this petition for a rehearing en banc should be granted, and so prays the appellant.

Respectfully submitted this 7th day of September, 2007.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,723 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Windows in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I, John B. Kotmair, Jr., a Citizen of the state of Maryland, am over the age of 21, and do hereby certify that I have sent my PETITION FOR REHEARING EN BANC with attachments and certificate of service, to the parties indicated hereinafter, via the United States Postal Service, postage having been paid, on September 7, 2007.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAVE-A-PATRIOT FELLOWSHIP *

Plaintiff *

vs. * Civil Action No. MJG-95-935

UNITED STATES OF AMERICA *

DEFENDANT *

* * * * * * * DEC 1 1996 *

JUDGMENT

This action came on for trial before the Court on September 20, 1996, Honorable Marvin J. Garbis, United States District Judge presiding. On this date, the Court has issued its Memorandum of Decision in this case.

In view of the foregoing, Judgment is hereby entered in favor of Plaintiff SAVE-A-PATRIOT FELLOWSHIP against Defendant United States of America in the total amount of $634.00 plus interest as provided by law, the parties to bear their own costs.

SO ORDERED this 18th day of December, 1996.

Marvin J. Garbis
United States District Judge

DEC 20 1996

cc: filed
Dist'd

jrw

I hereby attest and certify on 5/24/05 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody

FELICIA C. CANNON
CLERK, U. S. DISTRICT COURT
DISTRICT OF MARYLAND

By K. Owens Deputy

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SAVE-A-PATRIOT FELLOWSHIP	*	
Plaintiff	*	
vs.	*	Civil Action No. MJG-95-935
UNITED STATES OF AMERICA	*	
Defendant	*	

* * * * * * * * *

MEMORANDUM OF DECISION

This case was tried before the Court without a jury. The Court has heard the evidence, reviewed the exhibits, considered the materials submitted by the parties and had the benefit of the arguments of counsel. The Court now issues this Memorandum of Decision as its findings of fact and conclusions of law in compliance with Rule 52(a) of the Federal Rules of Civil Procedure.

I. BACKGROUND

At all times relevant to this case, the Save-A-Patriot Fellowship ("the SAP Fellowship") has been based in a rented facility at 12 Carroll Street ("the Office") in Westminster, Maryland. Mr. John B. Kotmair, Jr. ("Kotmair"), was the founder and is the leader (called the "Fiduciary"), of the SAP Fellowship, Kotmair resides at 2911 Groves Mill Road ("the Residence") in Westminster, Maryland.

On December 10, 1993, the Internal Revenue Service ("I.R.S.") executed search warrants at the Office and the

c/m 12/18/96

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Residence in connection with an investigation of Kotmair. The execution of the search warrants resulted in litigation by Kotmair seeking the return of a vial of Holy Qettorett[1] allegedly seized by the I.R.S. in the raid. Kotmair v. United States, MJG-94-447. The Court decided, in the Kotmair case, that the Plaintiff had not established that the substance had been taken by the I.R.S.[2]

The instant case, which involves subject matter more mundane than Holy Qettorett, is brought by the SAP Fellowship. In the December 10, 1993 raid, the I.R.S. seized at the Office various documents, computer disks, files, papers, and other materials relating to the operations of the SAP Fellowship. There was also seized at the Office $384 of currency, 40 Susan B. Anthony dollars, and 5 money orders valued at $210.[3]

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[1] The sacred substance used in the Temple prior to its destruction and, some believe, necessary to sanctify the Temple upon its reconstruction so that the Messiah can perform prophesied miracles upon his/her return.

[2] In the Kotmair case, the Plaintiff presented the testimony of Professor Vandyl Jones who claimed to be the original for "Indiana Jones." Professor Jones, was, in fact, searching for the Ark of the Covenant and actually found the ancient "factory" at which the Israelites manufactured and stored Holy Qettorett for Temple use. He found stored there a large quantity of "Holy Qettorett mix" needing only the addition of Sodom Salt and other ingredients. Dr. Jones entrusted a small vial of the substance to a "follower" of Kotmair, Scott Hucklebee, who brought it to America. However, the Court did not find that the vial was in the Residence at the time of the raid. Also, there was a sufficient supply left in Israel for use if, and when, needed so that the loss of the Hucklebee vial would not cause irreparable harm.

[3] In the search warrant return this is described as "APPLICATION & 4 MO - $175." The $210 value is found because it is used in the parties' Joint Statement of Facts.

At the Residence the I.R.S. seized various papers and the following items:

1. The sum of $44,115 of U.S. currency found in one location in the safe.

2. The sum of $377 of U.S. currency found in another location in the safe.

3. Various numismatic coins and items found in the safe and elsewhere in the Residence.

The items seized in the raid were taken by the Criminal Investigation Division of the I.R.S. for use in a criminal investigation. On December 22, 1993, the I.R.S. Collection Division served a Notice Of Levy on the Criminal Investigation Division so as to take the $44,115 in currency for application to the outstanding tax liabilities of Kotmair. On September 2, 1994, the Collection Division levied upon the remainder of the above-mentioned seized property for application to the tax liabilities of Kotmair.

The SAP Fellowship filed this law suit on March 29, 1995, a date beyond the nine month limitation period[4] following the December 22, 1993, levy but within nine months of the September 2, 1994, levy. By Memorandum and Order of May 10, 1996, this Court dismissed the Plaintiff's claim as to the $44,115 in currency due to the expiration of limitations. There remained for trial the SAP Fellowship's claim to the assets levied upon on September 2, 1994.

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[4] 26 U.S.C. § 6532(c)(1).

II. NATURE OF THE CASE

As stated in Saltzman, "IRS Practice and Procedure," ¶15.07[2][a] (2nd ed. 1991):

> In general, if a levy has been made on property . . . any person other than the taxpayer [against whose tax liability the levy was made] who claims (1) an interest in or lien on the property and (2) that the property was wrongfully levied upon by the Service may bring a civil action directly against the United States in federal district court."

The statutory authority for a wrongful levy action is provided by Section 7426 of the Internal Revenue Code. See 26 U.S.C. § 7426. In a wrongful levy action the underlying assessment against the taxpayer (here Kotmair) is "conclusively presumed to be valid." § 7426(c) Hence, the only issue in the case is whether or not the subject property is the property of the wrongful levy claimant (here the SAP Fellowship).

III. DISCUSSION

A. The SAP Fellowship Activities

The SAP Fellowship has been proven to exist, have members, and to function. The organization has assets, leases property, has a defined membership, publishes a newsletter, and has produced at least one video tape program, twelve hours of "Just The Facts."[5]

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[5] That is the "facts" according to the Fellowship as led by Kotmair.

There is no doubt that Kotmair is the major figure in the SAP Fellowship. As far as the Fellowship is concerned, he is, as Theodore Roosevelt aspired to be[6], the corpse at every funeral, the bride at every wedding and the baby at every christening."

The SAP Fellowship operates without any written governance structure or financial records. Operating assets, such as files, equipment etc. are located at the Office. Money, money orders, and other valuables are received at the Office, but not kept there. Kotmair is free to, and does, take funds from the SAP Fellowship for personal use. However, the evidence does not disclose that Kotmair maintained a high standard of living or that such funds as were accumulated were necessarily his personal hoard.[7]

The SAP Fellowship describes itself[8] in the following terms:

> The SAP Fellowship is a national organization of American patriots who have joined together to resist the illegal actions of the IRS and other government agencies who would attempt to deceive the public.

The evidence, including testimony and a recent (Fall of 1996) membership newsletter, "Reasonable Action," establishes that the SAP Fellowship has organizational activities, including

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[6] As stated by Alice Roosevelt Longworth, Theodore Roosevelt's daughter.

[7] The SAP Fellowship claims that the $44,115 "hoard" was set aside for Fellowship use, noting that it has engaged in expensive activities, such as the production of the "Just The Facts" video tape. The Court makes no finding as to this contention in view of the denial of the claim for these funds on limitations grounds.

[8] See the SAP Fellowship Program Agreement.

the providing of "information" regarding tax procedures[9], views on the U.S. Constitution, and similar matters. The Fellowship offers for sale, or in its lingo "exchange for FRNs"[10], various publications as well as video tape programs and audio recordings. The material includes its own publications, an 1828 dictionary[11], a deposition of an F.B.I. Agent and a tape of the motion picture "Harry's War"[12] in which a citizen victimized by unscrupulous I.R.S. employees obtains an armored vehicle and takes on, and wins over to his viewpoint, the U.S. Army.

The Fellowship also offers the written works of Irwin A. Schiff who calls himself "America's leading untax expert."[13] Schiff can be viewed as a "prophet" of the tax protester movement and a "guru" for Kotmair. Although convicted of tax felonies[14]

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[9] For example, a "press release" stating that a Washington State attorney had concluded that the I.R.S. has no authority to seize property in that state for income tax liabilities of "most citizens." This conclusion, it is said, was presented to, and not refuted by, the Washington State Bar Association and Attorney General.

[10] Presumably Federal Reserve Notes since the Fellowship has an unorthodox view of "dollars."

[11] Useful, presumably, in supporting arguments as to the original meaning of words in the Constitution and related documents.

[12] The Court notes that the actor Edward Herrman played the role of a grass roots tax protestor in "Harry's War" and, more recently, the role of the President of the United States in "Pandora's Clock."

[13] See the dust jacket to Irwin A. Schiff How Anyone Can Stop Paying Income Taxes (Freedom Books 1982).

[14] United States v. Schiff, 801 F.2d 108 (2nd Cir. 1986), cert denied. 480 U.S. 945 (1987)

and out of step with legal reality (as seen by federal judges), Schiff presents a most entertaining view of the tax law. He has been described by Judge Guerfein of the Second Circuit[15] in the following terms:

> [Schiff] was in the insurance business. He also fancied himself a "constitutionalist", an extremist who reserved the right to interpret the decisions of the supreme court as he read them from his layman's point of view regardless of and oblivious to interpretations of the judiciary. One can describe his attitude either as contumacious of governmental authority for the purpose of advancing the common weal, or as that of a clever faker who used his own distortions of the Constitution as a flimsy excuse for failing to pay his income taxes.

In addition to affording its membership access to the philosophy of Irwin Schiff and his disciples, the Fellowship offers a program by which, supposedly[16]:

> Fellowship members pledge to reimburse other members for losses of cash or property incurred from illegal confiscation by the IRS and/or their nasty little brothers in state governments. This is done by spreading the reimbursement costs to all members.

Essentially, when a member suffers a "qualified" loss of property or freedom, he/she submits a claim to the SAP Fellowship which, after validation, supposedly results in reimbursement for civil losses (to a $150,000 maximum) and a stipend of $25,000 per year of incarceration. The payments are to be made by the

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[15] Schiff in United States v. Schiff, 612 F.2d 73, 75 (2nd Cir. 1979) (reversing conviction of tax crimes and remanding for new trial).

[16] The Court is not finding that the program operates as asserted, but only that such a program is presented to members.

membership directly to the validated claimant or the claimant's family.

A civil claim is validated:

> . . . only after S.A.P. has determined that a judgment does exist and that the claimant, to the best of his ability, dragged the plunderers through every agency and court proceedings feasibly possible, using delaying tactics in each and everyone.

A criminal claim is validated:

> . . . only after S.A.P. has determined that the claimant member is actually incarcerated and is given physical proof that said member, to the best of his/her ability, resisted and delayed the tyrants at every step through the criminal investigation and all other agency and court proceedings feasibly possible.

The Fellowship also conducts activities for its "Independent Representatives."[17] For example, in October of 1996, the Fellowship offered a series of seminars for members, a Saturday night meeting open to the public, a Sunday social and, as a highlight of the function, the wedding of two of the Independent Representatives.[18]

B. The SAP Fellowship Is An Unincorporated Association

The Government contends, at the threshold, that the SAP Fellowship is not an organization at all, but is solely a name used by Kotmair for his own "sole proprietorship" operation. The Court does not agree, even though it is readily apparent that Kotmair is the major figure in the Fellowship.

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[17] Presumably, its membership or a class of members.

[18] Kotmair's role in the nuptials is not specified.

As noted above, the evidence established that there is an organization and not simply an operation by Kotmair personally. The SAP Fellowship, and not Kotmair personally, leased the Office. There are members, other than Kotmair, who engage in Fellowship activities. This Court observes, also, that the I.R.S. itself, quite appropriately, returned to the Office the operating assets seized from the Office (other than cash and numismatic items). These assets, at least some of which had more than nominal value, were simply (and correctly) assumed to be Fellowship property, as distinct from Kotmair's personal property.

The Government's arguments regarding the absence of a written instrument of governance is noted but, in the context of this case, is not determinative. Moreover, the absence of records and record keeping, while significant in terms of the ability of the SAP Fellowship to carry its burden of proof does not overcome the evidence establishing that there is an actual unincorporated association distinct from its members.

In sum, the Court finds as a fact that the SAP Fellowship is an unincorporated association (not just an alter ego or sole proprietorship of Kotmair), has members, and does things through persons in addition to Kotmair.

C. An Unincorporated Association In Maryland Can Own Property

The Government's second line of defense is that even if the evidence established that the SAP Fellowship is recognized as an

unincorporated association, such an entity cannot own property as a matter of law.

There is little precedent -- in Maryland law or elsewhere -- regarding property ownership by unincorporated associations. Presumably, those organizations that have significant assets find it beneficial to formalize their status, as a corporation, trust or other entity. However, the Court can take judicial notice of the fact that there are a multitude of unincorporated associations that function in spite of their informality. For example, there are many PTA's and other affiliations of persons with common interests that have not formalized their existence. Who would, sensibly, argue that a PTA treasury cannot be the property of the PTA?

While the situation may be different in some other jurisdictions[19] in Maryland the legislature has recognized that an unincorporated association can own property in its own right.[20]

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[19] For decisions holding that an unincorporated association cannot own property, see Krumbine v. Lebanon County Tax Claim Bureau, 663 A.2d 158, 160 (Pa. 1995) (real property); Rock Creek Gardens Tenants Assoc. v. A.M. & L.A. Ferguson, 404 A.2d 972 (D.C. App. 1970) (per curium) (real property); United States v. Thevis, 474 F. Supp. 134, 138 (N.D. Ga. 1979); Libby v. Perry, 311 A.2d 527, 531-32 (Me. 1973). But See Loving Saviour Church v. United States, 556 F. Supp. 688, 690 (D.S.D. 1983) (holding that an unincorporated association is a legal entity and therefore can own property).

[20] Compare, Motta v. Samuel Weiser, Inc., 768 F.2d 481, 485-86 (1st Cir. 1985) (stating that "[c]ourts may determine that ownership vests in the individuals who comprise the organizations.")

The Maryland Code, Md. Cts. & Jud. Proc. Code Ann. § 6-406 provides:

> An unincorporated association . . . or other group which has a group name may sue or be sued in the group name on any cause of action affecting the common property, rights and liabilities of the group.

Moreover, Md. Cts. & Jud. Proc. Code Ann. § 11-105 provides:

> In any cause of action affecting the common property, rights and liabilities of an unincorporated association, or other group which has a recognized group name, a money judgment against the group is enforceable against the assets of the group as an entity, but not against the assets of any member.

This Court concludes that, as a matter of law, an unincorporated association in Maryland can own property.

The Government's reliance upon Bourexis v. Carroll County, 625 A.2d 391 (Md. App. 1993), is misplaced. The Maryland Court of Appeals did not hold that an unincorporated association cannot own property. Rather, it held that in Bourexis, in which there was no evidence offered as to the "governance, powers, financing, or property" of the organization, there was "nothing to show it [was] an entity that may be sued. Id. At 395.

For reasons stated herein, this Court concludes that the SAP Fellowship is an unincorporated association and, as such, is legally capable of owning property. It is, therefore, necessary to determine the extent to which the SAP Fellowship has carried its burden of proving that it owned the property at issue.

D. What Did The Fellowship Prove It Owned?

The SAP Fellowship chose not to maintain any bank accounts or even maintain records of its finances. That decision may well be consistent with the group's philosophy.[21] The absence of bank accounts or records may also, whether as a deliberately sought "benefit" or not, make it more difficult for law enforcement to investigate its activities. Whatever the reasons for an absence of records -- be they philosophical or otherwise -- the decision has a price which goes beyond the inability to earn interest on bank deposited funds. That price certainly includes the inconvenience that results when the Fellowship finds itself involved in a legal proceeding in which it has the burden of proof.

In this case, had the SAP Fellowship had its own bank account in which it maintained its funds it might have little problem in prevailing as to those funds.[22] Similarly, although perhaps less conclusively, had the SAP Fellowship maintained records of its funds and had Kotmair as Fiduciary keep the association funds completely separate from his own, the Fellowship would have at least a possibility of carrying its burden of proof. However, the Fellowship presents no records whatsoever. Nor does the evidence establish that its funds were

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[21] The Fellowship appears to have a distrust of banks.

[22] Compare Arth v. United States 735 F.2d 1190, 1193 (9th Cir. 1984), in which the claimant's funds were deposited into the taxpayer's account and were held to have properly been levied upon.

maintained separately from those of Kotmair. And, most significantly, there is no evidence from which the Court can determine at what point after Fellowship funds leave the Office in the possession of Kotmair that they cease to be held exclusively as the property of the SAP Fellowship.

The record establishes that Kotmair was entitled to, felt free to, and did, take funds from the Fellowship and use them for his personal sustenance. Kotmair espouses a doctrine that would have funds that he takes to spend for personal use remain the property of the SAP Fellowship. Indeed, in the world according to Kotmair, if he uses Foundation funds for his food, the Foundation ownership extends to the food even as it proceeds through his digestive system. For example:

> THE COURT: [W]e are trying to get an understanding of when something belongs to you and when it doesn't. When it belongs to [the SAP Fellowship], so I just want you to try and help me understand that. If you go to the grocery store and you buy Wheaties [with fellowship funds], when is it yours, after you eat it or . . .
>
> Kotmair: That is a hard question to answer.
>
> THE COURT: That is why we ask it.
>
> Kotmair: If the energy from it goes to the Fellowship, and it does, I would say it is to the benefit of the fellowship.

The Court declines to follow the "logic" of Kotmair's position or to dwell upon the point in the digestive process at which Kotmair would agree that the I.R.S. could effect collection. Rather, the Court must conclude that once Kotmair takes Fellowship funds for personal use, those funds can no

longer be found to be Fellowship property immune from levy for Kotmair's tax liabilities.

The Court finds from the evidence that the SAP Fellowship obtained, and had ownership of, the cash and money orders it received for memberships and the sales of goods, and, possibly services. If the Fellowship had established that Kotmair's possession of particular assets was solely as Fiduciary for the SAP Fellowship the ownership could remain in the Fellowship. However, at such point as Kotmair took the assets and did not place them in a location[23] that was exclusively used for the maintenance of Fellowship assets, the ability of the SAP Fellowship to establish ownership in this case was lost. In the context of this case, once the cash and money orders were taken from the Office and placed in something other than a Fellowship depository, the funds were available for the immediate personal use of Kotmair, mingled with his own assets, and no longer had the character of Fellowship assets sufficient to avoid levy.

In this case, the cash and money orders that had been removed from the Office prior to the raid were found in the Residence in various locations, none of which have been established to be exclusive association depositories. However, the Court finds that the $384 of cash, the $210 of money orders and $40 of Susan B. Anthony Dollars found at the Office were, when found, property of the SAP Fellowship which had not yet been

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[23] Be it an office, a safe, a designated part of a safe, or other container plainly labeled to show Fellowship ownership and rigorously kept as Fellowship property.

mingled with Kotmair's personal assets. Accordingly, the Court concludes that the SAP Fellowship has carried its burden of proof and proven ownership with regard to these assets found in the Office, but not as to the cash and money orders found in the Residence.

The evidence regarding the numismatic items is not sufficient to permit any finding for the SAP Fellowship. There are references in the evidence to some association receipts of numismatic items. But, there is an absence of specific evidence relating to any particular item sufficient to carry the burden of proof. Moreover, the evidence is not adequate to establish that any of the numismatic items were maintained in a location that can be found to be a Fellowship depository. There was no record of which items belonged to the association. And, there was nothing, not even a sign, a label, a wrapping, or anything else that would indicate that the ownership of the items was other than that of Kotmair in whose home the items were found. Accordingly, the Court cannot find for the Plaintiff with regard to the numismatic coins and items.

IV. COSTS AND LEGAL FEES

The history of this case, and the related litigation, leads the Court to address the matter of costs and legal fees at this point to avoid further proceedings. The Court has found for the Plaintiff in part and the Defendant in part. Therefore, the parties shall bear their own respective costs.

To the extent that the Plaintiff has prevailed, the Government had a reasonably justified position. Accordingly, there shall be no award of legal fees.

V. CONCLUSION

For the foregoing reasons:

1. The Court determines that the Plaintiff, the SAP Fellowship, is entitled to recover the $384 in currency, $40 in Susan B. Anthony Dollars, and $210 in money orders seized from the Office and levied upon to satisfy the tax liabilities of Kotmair on September 2, 1994.

2. Judgment shall be entered by separate Order awarding the Plaintiff a recovery of $634, plus interest thereon as provided by law, the parties to bear their own respective costs.

SO DECIDED this 18th day of December, 1996.

Marvin J. Garbis
United States District Judge

jrw

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

SAVE-A-PATRIOT FELLOWSHIP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No MJG-95-935
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MOTION FOR DISMISSAL OF APPEAL

Pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, the United States of America, the appellant in the above-entitled case, hereby moves that the appeal from the judgment of the United States District Court for the District of Maryland be dismissed with prejudice; that an order of dismissal be made and entered herein by the Clerk of this Court; and that notification of the entry of this order be transmitted to the Clerk of the United States Court of Appeals for the Fourth Circuit with conforming copies to each of the parties.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 3, 1997

No. 97-1303
CA-95-935-MJG

SAVE-A-PATRIOT FELLOWSHIP, an unincorporated association

Plaintiff - Appellee

v.

UNITED STATES OF AMERICA

Defendant - Appellant

ORDER

The appellant has filed a motion of dismissal. The appellee has filed a response to the motion.

The Court dismisses this appeal pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. The Clerk of this Court will issue a certified copy of this order to the Clerk of the District Court as and for the mandate.

For the Court - By Direction

/s/ Patricia S. Connor

CLERK

I hereby attest and certify on 5/24/05 that the foregoing document is a full, true and correct copy of the original on file in my office and in my legal custody

FELICIA C. CANNON
CLERK, U. S. DISTRICT COURT
DISTRICT OF MARYLAND

By K. Davis Deputy

A True Copy, Teste:
Patricia S. Connor, Clerk
BY Barbara Rose
Deputy Clerk

FILED ENTERED
RECEIVED

APR 07 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

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