IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

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

DEFENDANTS' OPPOSITION TO UNITED STATES MOTION FOR SANCTIONS FOR DISCOVERY VIOLATIONS

Defendants Save-A-Patriot Fellowship and John Baptist Kotmair, Jr., for the reasons set forth in the attached memorandum and exhibits, oppose the United States' Motion for Sanctions and pray that this Court deny plaintiff's motion.

Respectfully submitted on this 26th day of June, 2006.

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CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Defendants' Opposition To United States Motion For Sanctions For Discovery Violations" was sent to counsel for the plaintiff, Thomas Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 7238, Washington, D.C., 20044, by first class U.S. Mail with sufficient postage affixed this 27th day of June, 2006.

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MEMORANDUM IN SUPPORT OF DEFENDANTS' OPPOSITION TO UNITED STATES *MOTION FOR SANCTIONS FOR DISCOVERY VIOLATIONS*

On June 8, 2006, plaintiff moved for sanctions pursuant to Federal Rule of Civil Procedure 37(b) and (c). Defendants John Baptist Kotmair, Jr., *pro se*, and Save-A-Patriot Fellowship (SAPF), represented by its counsel, George Harp, oppose the motion entered by the United States, and pray that this Court consider Local Rule 105.8(a) in making its decision.

Introduction

Disregarding the local rules, plaintiff has presented to this Court a motion for sanctions unfounded in fact or law. Local Rule 105.8(a) states: "The Court expects that motions for sanctions will *not be filed as a matter of course*. The Court will consider in appropriate cases imposing sanctions upon parties who file *unjustified* sanctions motions." (emphasis added) Defendants will herein show the lack of foundation for plaintiff's allegations of noncompliance with discovery and demonstrate that it is plaintiff which has abused the discovery process and is deserving of sanctions.

Standard for sanctions

As plaintiff points out, Federal Rule of Civil Procedure 37(b)(2)(C) provides for sanctions in the event a party "fails to obey an order to provide or permit discovery," and such sanctions are permitted against parties who are unjustifiably resisting discovery. United States counsel, despite the fact that defendants have timely appealed the magistrate's discovery order to this Court and defendants have concurrently and timely requested a motion to stay, has brought this motion on the sole basis that "[b]ecause a stay is not automatic, ... noncompliance with the Court's Order continues." Nevertheless, due to the severe harm "automatic" compliance to the order poses to the First Amendment rights of its members (and potential members), while a decision by this Court on defendants' motions is pending, constitutional considerations have a bearing on sanctions.

On page 12 of its motion, plaintiff refers to *Mutual Federal Sav. & Loan Ass'n v. Richards & Assoc., Inc.*, 872, F.2d 88, 92 and enumerates the four factors the Fourth Circuit established for imposing default judgment as a sanction—bad faith, the amount of prejudice caused an adversary, which necessarily involves an inquiry in the materiality of the evidence not produced, the need for deterrence, and the effectiveness of less drastic sanctions.[1] None of these factors are present here.

In its attempt to support its request for sanctions, plaintiff attempts to impute bad faith to defendants for merely invoking, by timely motions, the proper procedures to file a motion to compel discovery from plaintiff, further addressed *infra*; to object to Magistrate Bredar's order; and to request a stay until the objection is decided. However, it is *plaintiff's* rush to threaten and move for sanctions, even before the time elapsed in which defendant's motion for stay could be decided, which indicates bad

[1] In its introduction, plaintiff indicates that it is bringing this motion under Rule 37(c) as well, but it does not make any direct argument regarding the applicability of this rule to the instant case.

faith.[2]

What is the ultimate subject of the magistrate's order?

The documents and items of information subject to Magistrate Bredar's order can be broadly categorized as: (1) requests to elicit private information about the members of SAPF, such as names, addresses, phone numbers, etc.,[3] (2) requests to elicit the identities of members who filed actions in U.S. courts,[4] and (3) requests to elicit private financial information, such as amounts paid to defendant Kotmair, SAPF staff, and claimant members.[5]

As has been addressed previously, defendant Kotmair has no records of the financial information requested of him, [6] and defendants keep no records of amounts paid to claimant members.[7] Further, although defendant SAPF objected to the discovery of amounts paid to SAPF staff as irrelevant, it must be noted that SAPF has never kept records responsive to this request. Defendant Kotmair has previously provided sworn testimony to this in 1996, and plaintiff should be aware of it:[8]

> "THE COURT: Okay, the answer is that some people who render services for other members might receive money --
> THE WITNESS [Kotmair]: From the members, right.
> BY MR. HREBINIAK:
> Q But do you keep any records of this at all?

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[2] By letter dated May 16, 2006, the very day the magistrate's order was filed, plaintiff threatened to seek sanctions even before the time to object to the magistrate's order had elapsed (or even begun). See Exhibit 9.

[3] Interrogatories propounded on SAPF, numbers 6, 9(b), 10, 21, 22, 24; requests for production propounded on SAPF, numbers 7 and 16; interrogatories propounded on Kotmair, numbers 7(a), 9, 10, 12; requests for production propounded on Kotmair, number 7.

[4] Interrogatories propounded on SAPF, number 11; requests for production propounded on SAPF, number 10.

[5] Interrogatories propounded on SAPF, numbers 9(a), 24; interrogatories propounded on Kotmair, number 3.

[6] See Docket 34, appeal of magistrate's decision, p. 6; also Exhibit 2, affidavit of John B. Kotmair, ¶ 21.

[7] Docket 34, appeal of magistrate's decision, p. 10; Exhibit 2, affidavit of John B. Kotmair, ¶ 21.

[8] Exhibit 6, Hearing transcript, MJG-95-935, U.S. District Court of Maryland, at p. 33:2-10. See also pp. 39:18-40:8, 44:6-8, and 45:1-8.

A I don't, no. The members, the persons who is there might keep a record, but I didn't keep a record of it, no."

SAPF has not changed its practice in this regard since 1996. Since it is a maxim of law that *impossibilium nulla obligatio est*,[9] even in the event their objections are overruled by this Court, defendants could never fail to comply with these discovery items, since they don't exist in the first place. Thus sanctions relating to these discovery items would be inappropriate at any and all times.

Further, as Mr. Kotmair testified in his deposition, SAPF has not been involved, to his knowledge, in drafting bankruptcy pleadings during the time covered by the complaint. Since there were no filings, no lists of members who have filed for bankruptcy and/or documents filed exist.[10]

Finally, since court filings are a matter of public record, the requests by plaintiff for a list of *all* court cases and *all* documents filed by members who were assisted by SAPF in drafting court materials is simply a backdoor for obtaining a convenient list of the identities of such members. Subsequently, the only outstanding discovery requests simultaneously able to be produced (in some fashion) *and* the subject of Magistrate Bredar's order are those which, one way or another, are propounded to obtain the entire membership list of SAPF—a political association protected by the First Amendment.

Constitutional considerations

The imposition of sanctions involves a deterrent aspect for any particular litigant, as well as litigants generally, from resorting to unfair, unethical, or negligent compliance with discovery. However, in the instant case, there are compelling constitutional considerations which, at the very least, mitigate the alleged "noncompliance" with magistrate's order.

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[9] "There is no obligation to perform impossible things." *Black's Law Dictionary*, 7th Edition.
[10] Exhibit 3, Kotmair deposition, pp. 39:7-20, 203:4-18.

Defendants enjoy the right to freedom of speech and association, as guaranteed by the First Amendment, and our courts have consistently held that First Amendment violations constitute irreparable harm. Therefore, there can be no "willfulness" or "bad faith" where violations of the constitution—the supreme law of the land—may result from adherence to discovery rules.

While there is not an abundance of case law regarding First Amendment ramifications with respect to noncompliance with discovery, it can be fairly said that provisions of the Bill of Rights may not be disregarded in considering sanctions. Indeed, the Supreme Court of Vermont stated:

> *"Personal concerns, other than possible self-incrimination, must yield to deposing procedures, but legitimate objections to disclosure based on grounds under this [First] amendment require careful evaluation by judicial officer before answers are compelled or sanctions of fine or imprisonment are involved." State v. St. Peter*, 315 A.2d 254, 132 Vt. 266 (Vt. 1974).

Consistent with this rationale, the Supreme Court, in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) found that "willfulness" or "good faith" are relevant in considering the path to follow with regard to imposing sanctions. It also noted that there are constitutional limitations upon the power of the court with respect to Rule 37 and sanctions generally:

> "The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in *Hovey v. Elliott*, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, and *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See *Notes of Advisory Committee on Rules, Rule 37*, 28 U.S.C. (1952 ed.) p. 4325, 28 U.S.C.A." *Societe Internationale v. Rogers, supra*, at p. 209.

Although the court came to this conclusion in the context of the Fifth Amendment, this principle is equally applicable to the First Amendment.

While *Societe Internationale* dealt with the old Rule 37, the Supreme Court affirmed the validity

of this rationale in applying the revised rule:

> "This Court held in *Societe Internationale v. Rogers,* 357 U.S. 197, 212, 78 S.Ct. 1087, 1096, 2 L.Ed.2d 1255 (1958), that Rule 37 'should not be construed to authorize dismissal of (a) complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.' While there have been amendments to the Rule since the decision in Rogers, neither the parties, the District Court, nor the Court of Appeals suggested that the changes would affect the teachings of the quoted language from that decision." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976)

Accordingly, the principles set forth in *Societe Internationale* and *State v. St. Peter* are applicable here; and rules of discovery ought to be applied so as to comport with the provisions of the First Amendment.

Further, courts ought not impose such drastic remedies as plaintiff here demands unless the party's failure to provide court-ordered discovery results from bad faith or gross negligence. See *T.E. Quinn Truck Lines v. Boyd, Weir & Sewell,* 91 F.R.D. 176, 178 (W.D.N.Y. 1981), *Unicure, Inc. v. Thurman,* 97 F.R.D. 7, 10-11 (W.D.N.Y. 1982).

Timeliness and certification of defendants' responses

In its introduction, plaintiff begins its accusations by claiming defendants' responses were late and not certified. However, plaintiff is wrong on both counts.

Plaintiff mailed its interrogatories to defendant Kotmair on October 25, 2005, and Kotmair responded on November 28, 2005. FRCP Rule 33 (b)(3) allows 30 days to respond to interrogatories; if the 30th day is a weekend or holiday, the period ends instead on the first day which is not a weekend or holiday.[11] Since the 30th day was Thanksgiving Day, the period within which to respond ended on

[11] "The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other

November 25. However, since defendant Kotmair was served by mail (per FRCP Rule 5(b)(2)(B)), Rule 6(e)[12] adds 3 days to the period within which he must respond, extending it to November 28, 2005. Thus, the response to the October 25, 2005 interrogatories served on defendant Kotmair was due on November 28, 2005—the exact date it was served.

Likewise, the interrogatories to defendant SAPF were mailed October 27, 2005, making the end of the period within which to respond November 26, a Saturday, and so the period was extended until Monday, November 28, 2005. Again, accounting for the 3 days added by Rule 6(e), the period for response to the October 27, 2005 interrogatories ended December 1, 2005—the exact date it was served.

As for certification of discovery responses, FRCP Rule 26(g)(2) states, "[t]he signature of the attorney or party constitutes a certification ..."[13] Thus, plaintiff is incorrect in its assertion that defendants "failed to certify" their discovery responses. It should also be noted that the only certification

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conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days." FRCP Rule 6(a).

[12] "Additional Time After Certain Kinds of Service. Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the period." FRCP Rule 6(e).

[13] "Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. *The signature of the attorney or party constitutes a certification* that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed." FRCP Rule 26(g)(2) (emphasis added).

on plaintiff's response to defendant SAPF's interrogatories is the certification that service has been made. Thus, if any further certification is necessary in responding to interrogatories, plaintiff has also failed to comply with it.

Failure to provide discovery documents and to answer interrogatories

On page two of its motion for sanctions, plaintiff claims: "In response to numerous requests for documents, SAPF only produced three copies of their newsletter, *Reasonable Action*, and audio and video tapes." This statement is contradicted by plaintiff's own Exhibit 1, wherein 18 separate documents are listed, and by ¶4 of the declaration of Thomas M. Newman, where he admits he received six issues of *Reasonable Action*. Plaintiff's current contention is also contradicted by Magistrate Bredar's order,[14] page three:

> "Kotmair Request for Production No. 13 seeks copies of all audiotapes, videotapes, books and other products that Mr. Kotmair, SAPF or NWRC (National Workers Rights Committee) offer for sale. Plaintiff's counsel, upon inquiry by the Court, has advised that this request no longer is at issue, so, as to this request, the motion to compel is denied as *moot.*"

Immediately after plaintiff again incorrectly claims that defendants have "provided *only* newsletters, videos, and audiotapes," plaintiff refers to SAPF's Member Handbook, but neglects to mention that it was received from defendants in discovery. Plaintiff also unreasonably claims that defendants have not described the services which it admits are described in that handbook.

Moreover, although plaintiff complains that defendant has not provided certain documents "related to these services," or "documents related to every service it offers,"[15] it has only specifically requested copies of correspondence sent to the IRS on behalf of members (request for production no. 7) and bankruptcy petitions or court filings (SAPF request for production no. 10). Those requests are still

[14] Docket 33.

the subject of the appeal of the magistrate's order and the motion to stay submitted to this Court. As for the "Affidavits of Revocation" and "Statements of Citizenship" plaintiff claims have not been provided, defendants can locate only request which could be construed to include these specific documents, request for production number 8, which asked for "copies of all files or records, including electronic records, pertaining to all SAPF members and all other persons who have purchased SAPF's products or services at any time since January 1, 2000." With regard to that request, Magistrate Bredar stated, on pages three and five of his order: "The Court is troubled by the scope of this request inasmuch as in [sic] appears to take in the full universe of records in SAPF for more than five years. The objection is sustained." Therefore, it appears that defendants cannot be held, with respect to these documents, as having "refused" to disclose them.[16]

Plaintiff also claims, on page two: "Defendants have refused to answer the United States' requests for *over seven months* and on April 25, 2006, the United States filed a motion to compel discovery responses which the Court granted in part on May 16, 2006." Of course, plaintiff is resorting to hyperbole, since defendants have indeed answered all of plaintiff's discovery requests, albeit with appropriate objections where warranted. In addition, for a number of the interrogatories/requests, there is nothing that can be provided—that is, no responsive documents or records exist, see *supra*. The real issue here is whether or not defendant's answers and actions taken to date *comply with discovery rules*. Obviously, defendants' position is that they *are* in compliance.

Kotmair's alleged failure to cooperate in discovery

[15] Plaintiff's motion for sanctions, page 12.

[16] For the record, defendants do not keep copies of these documents unless a member sends it to them specifically for inclusion in the file. See Exhibit 2, affidavit of John B. Kotmair, ¶ 19.

Plaintiff alleges on page four that defendant Kotmair "failed to cooperate" in discovery by falsely stating (1) that he does not sell "Affidavits of Revocation" or "Statement of Citizenship"; (2) that he has "never" represented customers who have used these documents in employer-employee disputes; and (3) that he was assigned a representative number by the IRS. Remarkably, while accusing Kotmair of lying, plaintiff has failed to show in what manner, if any, this has prejudiced plaintiff or hindered discovery.

Without any evidence, plaintiff first alleges that Kotmair falsely stated in his deposition that he does not sell affidavits or statements of citizenship. In fact, Kotmair freely discussed both documents. When asked, regarding the affidavit of revocation and rescission, "You don't charge for that, that's just available to members, is that right?", Kotmair answered, "They [SAPF] might charge a fee for printing it out."[17] When asked, regarding statements of citizenship, "Who prepares the statement?", Kotmair answered, "I don't know if they do them at the office or not, because normally we just tell people it's a statement."[18]

Since it is not defendant Kotmair's personal responsibility to prepare either affidavits of revocation and rescission or statements of citizenship for SAPF members, it is entirely true that he does not personally sell them.[19] Further, he never stated that SAPF does *not* provide such documents to members, just that SAPF "might charge" for them and that he doesn't know if they do statements or not.

Second, plaintiff states that Kotmair said he "never" represented customers who have used these documents in disputes with their employer, and presents excerpts from the deposition as evidence. Those excerpts show that in answer to the query, "But you have represented employees in administrative

[17] Exhibit 3, Kotmair deposition, 160:16-161:1.
[18] Plaintiff's Exhibit 15, excerpt from Kotmair Deposition, 183:20-184:7.
[19] See Exhibit 2, affidavit of John B. Kotmair, ¶ 19.

hearings before administrative law judges; is that right?", Kotmair replied, "But that's not employers, nothing to do with employers."[20] Since Kotmair admitted to representing employees in hearings, yet stated in the same breath it had nothing to do with employers, it might appear he contradicted himself (as opposed to lying outright). Nevertheless, this seeming contradiction is resolved by a careful reading of the interchange regarding "statements of citizenship" which immediately preceded the foregoing answer.[21] In that interchange, Kotmair asserted, *inter alia*, that neither NWRC nor he gets involved in direct disputes between employee and employer, but simply responds to employers' questions: "The employer, you know, if they have any questions about this, then we send them the regulations. That's all it amounts to."[22] Thus, Kotmair's answers were aimed at whether or not he is *personally* involved *directly* in employer-employee disputes regarding those documents. In that frame of mind, he answered the question "Well, between the employer and employee?" with "No, never." If he had been asked, instead, whether he had ever filed a complaint for discrimination on the basis of national origin under the civil rights act, he would have answered yes.

Moreover, considering that defendant Kotmair has not represented anyone before an administrative law judge during the period covered by the complaint filed in this case,[23] it is easy to see why he answered "no." Even if plaintiff could show, *arguendo*, that Kotmair intended to make a false statement (which he certainly did *not*), no hindrance to discovery can be shown, since the matter is one of public record. In short, plaintiff plucked two words from their immediately preceding context in order to discredit Kotmair in the eyes of this Court.

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[20] Plaintiff's Exhibit 15, excerpt from Kotmair deposition, 188:17-21.
[21] See Plaintiff's Exhibit 15, excerpt from Kotmair deposition, in its entirety, p. 182 to end.
[22] Plaintiff's Exhibit 15, excerpt from Kotmair deposition, 186:9-11.
[23] Exhibit 2, affidavit of John B. Kotmair, ¶15.

Lastly, plaintiff alleges Kotmair lied to this Court about his representative number, since he was sent a letter on June 3, 1994, informing him he was ineligible to practice before the IRS. Since Kotmair's representative status forms no part of the complaint before this Court, this allegation is entirely immaterial. Nevertheless, with apologies to this Court for taking its time, defendant Kotmair feels it necessary to set the record straight on his reputation and truthfulness.

The declaration of Thomas M. Newman, at ¶15, states that on page 139 of Kotmair's book *Piercing the Illusion*, Kotmair acknowledges that his IRS representative number was "revoked." Reading that page[24] reveals that Kotmair did not acknowledge the revocation, but rather the fact that he received a letter from the IRS, to which he responded by asking for the formal reason for the action. He further stated that he has been "stonewalled" in all requests regarding the "revocation." The correspondence from this period, including the document which assigned the number to Mr. Kotmair in the first place, has been attached as Exhibit 4.

In order for representative status to actually be revoked, a complaint must be served in accordance with IRS Circular No. 230 at § 10.60, and a hearing pursuant to § 10.71 must be conducted before an Administrative Law Judge.[25] As Mr. Kotmair pointed out in his deposition, no such complaint has ever been served upon him, nor has any hearing taken place.[26] Finally, since plaintiff thoroughly deposed Kotmair regarding his representative status (in spite of the fact that it has no bearing on the complaint), it has reason to know that Kotmair's representative status has never been so revoked.[27] In view of the deposition, it is startling that plaintiff alleges Kotmair lied. Plaintiff's unsupported allegation serves only to besmirch defendant's reputation before this Court.

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[24] Plaintiff's Exhibit 5.
[25] Exhibit 5, Subpart D of Circular 230.
[26] Exhibit 2, affidavit of John B. Kotmair, ¶17.

Defendants' Past Misconduct

Plaintiff continues its attempt to justify sanctions by resorting to a recitation of old court cases and administrative hearings where magistrates and judges have decried something or other done by defendant Kotmair. The Fourth Circuit case, *Doyle v. Murray*, 938 F.2d 33 (App. 4th, 1991) is cited by plaintiff to support its contention that the "existence of a drawn out history of deliberately proceeding in a dilatory fashion" warrants sanctions. Plaintiff construes that quote as if the history referred to means a history from previous cases, yet the court clearly said just the opposite, stating that whatever conduct had happened in another case, the attorney "did none of those things here":

> "In a memorandum order granting the motion, the district court made reference to El-Amin's behavior in an unrelated litigation, *Claitt v. Newcomb*, CA-89-788-R (E.D.Va. Aug. 10, 1990), stating that he "once again ... demonstrated a clear disregard for this Court's directives and for basic principles of courtesy among litigants and their counsel." Concluding that El-Amin's failure "to give advance notice of his absence or to make other arrangements suggested deliberate delay on his part, or at least a reckless disregard for this Court's orders," it held that "other potential sanctions, such as the assessment of costs, would be insufficient in this case.
>
> *"We think the court's reliance on El-Amin's behavior in Claitt as a justification for the ultimate sanction levied in this case was not warranted.* In *Claitt*, El-Amin allegedly failed to supplement interrogatory answers on time, submitted untimely revised witness lists, failed to notify defendant's counsel of plaintiff's decision to waive a jury trial, and supplemented the exhibit list in an untimely fashion. Whatever El-Amin may have done in the *Claitt* case, *however, he did none of those things here.* Indeed, his failure to appear at the pretrial conference appears to be his first and only dereliction in this short case." *Doyle v. Murray, supra*, at p. 34. (emphasis added)

The Supreme Court, where the *Doyle* court's reference to "drawn out history" appears to have originated, makes it clear that said history is only the history of the case at hand:

> "And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation (see note 2, *supra*),[FN9] that petitioner had been deliberately proceeding in dilatory fashion.
>
> FN9. The record shows that this was the 'oldest' case on the District Court's civil docket." *Link v. Wabash Railroad Company*, 370 U.S. 626, 633 (1962).

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[27] Exhibit 3, Kotmair deposition, pages 25-30, 108-119.

According to note 2 of *Link*, the complaint in the case had been filed in August 1954, and by October 1960, a pre-trial conference was just being scheduled. Naturally, six years is quite a drawn-out history, especially in light of the delay tactics counsel employed there. This is not so in the instant case, which is proceeding according to schedule. Thus, plaintiff's request for sanctions against defendants is unwarranted and should be denied.

Furthermore, the three cases plaintiff cites in support do not evidence a pattern of "dilatory" behavior, much less bear any similarity to the primary issue here: whether or not SAPF is in compliance with a magistrate's order compelling discovery.

Moreover, in its attempt to paint defendants' "past misconduct" as black as possible, plaintiff contorts its logic past the breaking point. It begins with an out-of-context quote from this Court's decision in *Save-A-Patriot Fellowship v. United States*, 962 F. Supp. 695 (D. Md. 1996). In context, the actual quote[28] was set forth to describe the Save-A-Patriot Fellowship membership assistance program, and it contains quotes from the membership agreement. This Court made it plain that the purpose of this description was as part of the "evidence established that there is an organization and not simply an operation by Kotmair personally."[29] From this, plaintiff concludes that "SAPF's dilatory conduct, under Kotmair's supervision, is not limited to that case."

However, neither the quote, nor the case, concerns itself with SAPF's or Kotmair's "dilatory conduct." There is no evidence anywhere that this Court considered Kotmair or SAPF to be dilatory in that case.

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[28] See page 5 of the motion for sanctions, also *Save-A-Patriot Fellowship v. United States, supra,* at p. 698.

[29] *Save-A-Patriot Fellowship v. United States, supra*, at p. 698.

Next, plaintiff attempts to discredit defendant Kotmair by exhuming a 1993 bankruptcy court opinion, *In re Weatherley*, 1993 WL 268546 (E.D. PA,1993), and implying that SAPF was dilatory in that case. To the contrary, the court's opinion notes that Save-A-Patriot timely served answers to the court as well as objections to the contempt order. This was in spite of the fact that SAPF had no legal duty to comply with the orders issued, since, as both they and the bankruptcy court acknowledged, SAPF was not a party to the case.

Plaintiff also seeks to smear defendant Kotmair by quoting two opinions from OCAHO hearings which took place nearly a decade ago. In the first, Judge Barton took Kotmair to task for informing the judge he needed more advance notice for a hearing. However, Judge Barton also admitted that he gave notice of the hearing a mere two days (or less) before the 9 AM conference was scheduled, and yet Kotmair timely faxed a response the very next day to inform the court that he needed more notice. This is hardly "dilatory" conduct. Nevertheless, the biased cast of Barton's opinion recalls to mind what this Court noted about Save-A-Patriot in 1996: "we have to remember, we are dealing where an organization that has expressed views, views that are unpopular with federal law enforcement and that is the nature of this organization."[30]

In the second opinion, Judge Morse characterized pleadings submitted by Kotmair as "frivolous," "disingenuous, and irresponsible." Nevertheless, even if Judge Morse were correct, plaintiff has not even alleged that such pleadings were submitted by defendant Kotmair here. Thus, the sole intent of this cite is to damage defendant Kotmair's reputation before this court.

Finally, in spite of plaintiff's contention that Kotmair continued to file "identical pleadings in other cases," Kotmair has not represented, to his recollection, any persons before the Executive Office

[30] See Exhibit 6, Hearing transcript, MJG-95-935, U.S. District Court of Maryland, at p. 73:5-8.

for Immigration Review since 1998, nor has plaintiff cited any recent pleadings. Since even this alleged past misconduct is not further occurring, how could it warrant any sanctions now? This alone exemplifies the utter lack of any need, much less a "substantial" one, as plaintiff alleges, for "deterrence" by this Court.

"Bad faith" allegations are groundless

Finally, plaintiff sums its case for defendants' alleged "bad faith" by stating that defendant is guilty of failing to timely provide responses and documents during discovery, failing to cooperate during depositions, "promising but failing" to provide documents and responses, filing numerous requests for extension, and a refusal to comply with court orders. As shown above, all of defendants' discovery responses have been timely. The "failure to cooperate during depositions" is merely an allegation that Kotmair lied, and it has been shown, supra, that he did not. Defendants have only asked for *one* extension, a mutual request by plaintiff and defendants, in a telephonic conference with this Court on March 22, 2006, to file pretrial dispositive motions. Finally, defendant has not "refused" to comply with *any* orders, but has merely availed itself of an appropriate objection regarding one order: Magistrate Bredar's order filed May 16, 2006.

Variations on a theme: turning over the membership list

The real push by plaintiff in this case has been a continual attempt to obtain through discovery the information that it seeks in its prayer for relief in the complaint: the names, addresses, social security account numbers, etc. of all SAPF's members. Moreover, this information has been sought in numerous different ways, as shown below.

The interrogatories propounded on SAPF numbers 6, 9(b), 10, 21, 22 and 24, request for production from SAPF numbers 7 and 16, interrogatories propounded on Kotmair numbers 7, 9, 10 and

12, and request for production for Kotmair number 7, are merely transparent variations of the same central theme: give up your membership list. This is the only matter substantially in controversy here with respect to plaintiff's prayer for sanctions, insofar as discovery is concerned. SAPF constitutes an unincorporated First Amendment political organization. It is well-established in case law that such organizations are protected by the First Amendment. This matter was argued extensively in defendant SAPF's motion for summary judgment, pp. 8-15, and also in SAPF's appeal of the magistrate's order, its motion to stay, and its reply to the United States opposition to the motion to stay,[31] incorporated herewith by reference thereto.

Clean hands doctrine

Plaintiff asks this court to sanction defendants in this case for what it calls "dilatory conduct." Plaintiff further describes this conduct on page 13 of its motion for sanctions in the following language:

> "Defendants have demonstrated an unwillingness to conform to the federal rules and to abide by the orders of the court. If parties were permitted to routinely ignore discovery, make false statements during depositions, routinely ask for stays, fail to certify responses, and file frivolous motions to compel, the court would be required to intervene in the discovery phase of every case."

However, the description above more closely resembles the actions of plaintiff in this case rather than that of the defendants.

Plaintiff's response to SAPF's interrogatories, served by mail upon plaintiff on January 15, 2006, was due, including the three days added by Rule 6(e), on February 17, 2006, the last day of discovery. However, plaintiff's response to those interrogatories was not provided until February 28, 2006—11 days late. Plaintiff has offered several reasons for being late: first, it was claimed that the discovery

[31] Docket 34, 35, and 41.

request had not been received until February 17, 2006,[32] and yet, mailing receipts and tracking data faxed to United States counsel on that date show the requests were indeed received by plaintiff—on January 17, 2006 at 10:02 am.[33]

Then, between March 2, 2006—two days after filing an untimely response—and April 17, 2006, United States counsel engaged in a series of one-sided letters to defendants in an attempt to cover up the lateness of his response.[34] These letters alleged agreements to extend plaintiff's time to respond, yet, even if the claims in these letters were true,[35] they still do not conform with the requirements of this Court's Discovery Guideline 8(a), which states:

> "... attorneys seeking additional time to respond to discovery requests shall contact opposing counsel as soon as practical after receipt of the discovery request, but *not later than three days before the response is due.*
> ... If a request for additional time is granted, the requesting party shall *promptly prepare a writing* which memorializes the agreement, which shall be served on all parties but need not be submitted to the Court for approval.
> Unless otherwise provided by the Local Rules of this Court, *no stipulation which modifies a Court-imposed deadline shall be deemed effective unless and until the Court approves the stipulation.*" (emphasis added)

Plaintiff violated all of these provisions — counsel failed to request an extension before answers were due, he failed to promptly memorialize in writing the alleged agreement, and he well knew that even if requested and agreed to, only the Court could authorize an extension beyond the Court-ordered February 17, 2006 deadline.[36] *Despite this, the docket is bereft of any such request filed with this Court.* Since the United States failed to seek or obtain an extension for the filing of its answers and objections, it *has* waived all its objections.

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[32] See Docket 32, p. 3, also Docket 24, p. 2.
[33] Exhibits 7 and 8, See also Docket 24, p. 2.
[34] See Docket 32, declaration of Thomas M. Newman, ¶¶ 19-23, with corresponding exhibits.
[35] Exhibit 1, declaration of George E. Harp, and Exhibit 2, affidavit of John B. Kotmair, ¶¶ 1-8.
[36] See Dockets 28 and 29.

Nevertheless, in spite of the facts demonstrated here, plaintiff continues to misrepresent the facts concerning its untimely response and defendants' motion to compel.[37] On page three of its motion for sanctions, plaintiff states:

> "On April 25, 2006, [sic] SAPF served the United States with a Notice of Service of Motion to Compel Discovery which erroneously asserted that the United States' responses were untimely. The attached declaration to the United States' response reveals that SAPF's counsel was asked, at least four times, to correct this misstatement. However, he failed to do so, causing further delay because the United States was required to respond to this frivolous motion."

As already shown, plaintiff's responses *were* untimely, no matter how many times it contends otherwise. Thus, no corrections are needed to be made by defendants. Plaintiff was required to respond to defendants' motion to compel because of its own failure to comply with the discovery requests, not because of anything defendants did or did not do.

Yet, even though all of its objections were waived due to untimeliness, plaintiff still responded with little more than objections to all of defendants' interrogatories and requests for production.[38] Plaintiff further ignored the mandate of FRCP Rule 26(b)(5)[39] and local Discovery Guideline 9(c)(ii) in claiming work-product exceptions, by failing to provide a description of the withheld documents so that the applicability of its claims of privilege could be assessed.

Plaintiff also continues to refuse to provide copies of documents in its possession. One such document, the referral created by IRS Agent Gary Metcalfe, and approved by his superiors, instigated the present suit. Yet even after defendant Kotmair wrote to plaintiff a number of times in an attempt to

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[37] See Docket 27.
[38] See Docket 27.
[39] FRCP Rule 26(b)(5): "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not

obtain this document, plaintiff stubbornly refuses to provide it.[40] Further, since receiving a copy of plaintiff's motion for summary judgment, it is apparent that the government has identified potential witnesses, since the motion included affidavits from Nicolas Taflan, Joseph Nagy, and Camille Nagy.[41] Yet plaintiff has not supplemented its discovery to inform defendants of any of these additional prospective witnesses, nor were they identified in time so that defendant might depose them.

Further, it is plaintiff that has repeatedly requested extensions for time. On April 10, 2006, plaintiff moved for extension of time to respond to defendants' motion to compel discovery requests,[42] which was granted on April 12, 2006. On June 9, 2006, plaintiff again moved this court for an extension of time to file its summary judgment motion, which it subsequently withdrew on June 20, 2006.[43] It is noteworthy that plaintiff, in requesting this latter extension,[44] as well as in its motion for sanctions, claimed that it was "*unable* to file a substantive motion because of defendants' refusal to comply with the discovery process."[45] This statement appears untrue, since plaintive was able to, and indeed did, timely file said substantive motion on June 19, 2006.[46]

Likewise, plaintiff's present motion for sanctions is premature. It requests sanctions to be imposed on defendant even before defendant's time to oppose it has elapsed.[47] The justifications alleged

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produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

[40] Exhibit 2, affidavit of John B. Kotmair, ¶¶ 9-13, also Exhibit 9.

[41] Docket 43-48.

[42] See Docket 28.

[43] See Docket 40 and 49.

[44] "Defendants' willful failure to cooperate and the filing of last-minute motions for stay and motions for reconsideration, frustrate the preparation of any substantive motion." See Docket 40, p. 2.

[45] Page 12 of plaintiff's motion for sanctions.

[46] See Docket 42.

[47] By letter dated May 16, 2006, the very day the magistrate's order was filed, plaintiff threatened to seek sanctions even before the time to object to the magistrate's order had elapsed (or even begun). See Exhibit 9.

have been shown to be unfounded. Most importantly, as outlined above, plaintiff comes to this court with unclean hands in this matter. According to *Black's Law Dictionary*, 6th Edition:

> "**Unclean hands doctrine.** Doctrine simply means that in equity, as in law, plaintiff's fault, like defendant's, may be relevant to question of what, if any, remedy plaintiff is entitled to. Principle that one who has unclean hands is not entitled to relief in equity. ... Under this doctrine, a court of equity may deny relief to a party whose conduct has been inequitable, unfair, and deceitful, but doctrine applies only when the reprehensible conduct complained of pertains to the controversy at issue."

The Fourth Circuit stated the counterpart to that doctrine as follows:

> "The clean hands doctrine is one which the court applies, not for the protection of the parties, but for its own protection. Its basis was well stated by Professor Pomeroy (Equity Jurisprudence, 4th Ed., sec. 397) as follows: 'It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in *limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' *MAS v. Coca-Cola Co.*, 163 F.2d 505, 507 (App. 4th, 1947)

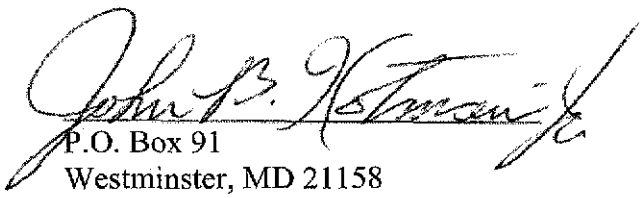
Due to plaintiff's unclean hands in this case, especially with respect to discovery issues, this court should refuse to award it any of the sanctions it seeks. In fact, the court might properly impose sanctions against plaintiff for its actions in this case, pursuant to Local Rule 105.8(a). Certainly, if defendants acted in the same manner as plaintiff in this case, plaintiff would have sought—and most likely would have been granted—sanctions against defendants. Yet, since defendants have not been guilty of the type of conduct plaintiff has exhibited, nor guilty of the conduct alleged in plaintiff's motion, sanctions are not warranted.

CONCLUSION

Plaintiff admits that "[t]he purpose of the rule is to impose sanctions against parties or persons who are unjustifiably resisting discovery." (emphasis added) Thus, the underlying question is whether

defendants' timely objection to Magistrate Bredar's order—as provided for in the rules—can be deemed "unjustifiable." If it cannot, then this entire motion for sanctions is inappropriate. If it can, then provisions for objecting to such orders are meaningless, since doing so subjects a person to sanctions. Wherefore, defendants ask this court to deny plaintiff's motion for sanctions, and thereby reject plaintiff's attempt to abuse the court's process (and defendants) in this manner.

Respectfully submitted on this 26th day of June, 2006.



P.O. Box 91
Westminster, MD 21158
(410) 857-4441

/s/ George Harp
GEORGE HARP Bar number 22429
Attorney for Save-A-Patriot Fellowship
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Memorandum in Support of Defendants' Opposition To United States Motion For Sanctions For Discovery Violations" was sent to counsel for the plaintiff, Thomas Newman, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 7238, Washington, D.C., 20044, by first class U.S. Mail with sufficient postage affixed this 27th day of June, 2006.

/s/ George Harp
GEORGE HARP Bar number 22429
Attorney for Save-A-Patriot Fellowship
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

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

DEFENDANTS' OPPOSITION TO UNITED STATES MOTION FOR SANCTIONS FOR DISCOVERY VIOLATIONS

INDEX OF EXHIBITS

Exhibit	**Description**
1.	Declaration of George Harp.
2.	Affidavit of John B. Kotmair.
3.	Excerpts from Kotmair Deposition.
4.	Various correspondence regarding Kotmair representation before IRS, November 5, 1990 through June 19, 1997.
5.	Subpart D of IRS Circular 230.
6.	Hearing transcript, MJG-95-935, U.S. District Court for the District of Maryland (excerpts)
7.	Mailing receipt and confirmation of delivery for SAPF interrogatories served on United States.
8.	Fax cover sheet dated 2/17/06 from George Harp to Thomas Newman.
9.	Kotmair-Newman correspondence between May 10, 2006 and June 15, 2006.
10.	Letter dated May 16, 2006 from Thomas Newman to defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

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

AFFIDAVIT OF JOHN B. KOTMAIR, JR., IN SUPPORT OF DEFENDANTS' OPPOSITION TO UNITED STATES MOTION FOR SANCTIONS FOR DISCOVERY VIOLATIONS

I, John B. Kotmair, Jr., do hereby depose and state as follows:

1. As a defendant in this action, I participated by telephone in the court-ordered conference on February 17, 2006. Also present were Mr. Harp, counsel for Save-A-Patriot Fellowship, and Mr. Newman, counsel for the United States.

2. During the conference, Mr. Harp asked for the whereabouts of the United States answers to the 1st set of interrogatories and requests for production propounded upon plaintiff, since February 17, 2006 was the due date of the government's response.

3. In response to Mr. Harp's inquiry, Mr. Newman stated that he had never received the interrogatories and request for production of documents. Mr. Harp agreed to fax them to him, along with the mailing documents which verified the sending and delivery of those documents.

Exhibit 2

4. I have no recollection of Mr. Newman requesting an extension, at any time during the above –mentioned conference, for the filing of answers to Save-A-Patriot's 1st set of interrogatories and requests for production.

5. At no time during the above-mentioned conference did Mr. Newman either ask for an extension of the objection cut-off time, or state that "he did not consider the objections waived."

6. At no time during that conference, nor at any time thereafter, did I ever agree to an extension of the time for serving the answers to the interrogatories and requests for production of documents.

7. At no time during that conference, nor at any time thereafter, did I ever agree to an extension of the objection cut-off time. I always considered any untimely objections raised by the United States to be waived.

8. I have reviewed the status report submitted to the Court by all three parties on February 17, 2006, and can find no mention of any extension being requested or agreed to within it.

9. From the very first phone calls discussing discovery matters with United States counsel Mr. Newman, I have continually requested a copy of the referral made by the IRS to the Department of Justice. Initially, he told me that there was no such document, and that the Department of Justice alone initiated the action against me and Save-A-Patriot Fellowship.

10. In subsequent phone conferences and conversations involving discovery and deposition matters, I asked Mr. Newman repeatedly for the referral document(s). At various times, he insisted that the referral was irrelevant. At others, he stated that the referral was protected under the work-product doctrine.

11. During the deposition of Joan Rowe on February 14, 2006, it was obvious from her answers that she knew that there had been a referral. I asked Mr. Newman, off the record, for the referral document(s) once again.

12. During the deposition of Gary Metcalfe on March 16, 2006, he stated that he prepared the referral document(s). The defendants asked Mr. Newman again, off the record, for the referral document(s). On that date, he stated that he would supply the referral document(s) as soon as he found them. At this date, more than 3 months later, he has still not provided them to the defendants.

13. On May 10, 2006, I mailed a letter to Mr. Newman requesting the official referral. On June 7, 2006, I mailed a follow-up letter, to which he replied on June 13, 2006, indicating that he would not forward the referral. I mailed a further letter to him on June 15, 2006. Copies of these letters, which evidence Mr. Newman's failure to cooperate in discovery, are attached to this affidavit.

14. In the deposition conducted on February 14, 2006, I was asked questions regarding affidavits of revocation and rescission and statements of citizenship, and NWRC's involvement with those documents. Since my mind was on the documents themselves, and how NWRC handles them, I answered "No, never" to the question "Well, between the employer and employee?" because I perceived that I was being asked if I was ever involved directly in disputes between employers and employees. My answer was such because it is not the intent of NWRC, or me, to interfere in an employer's business.

15. Many years ago, I represented SAPF members before the Executive Office for Immigration Review. To the best of my recollection, I have not represented anyone before that office, nor in any OCAHO hearings, since 1998.

16. The IRS issued me a representative (CAF) number in 1990 and I have used this number in representing SAPF members before the IRS. I have never been ordered by an Administrative Law Judge to stop using that number.

17. I have never been served with a complaint by the Director of Practice regarding my representation of SAPF members, nor have I ever been given a hearing pursuant to Circular 230, §§ 10.60 and 10.71. According to Subpart D of the Circular, these rules must be followed in any disciplinary procedure concerning representation before the IRS.

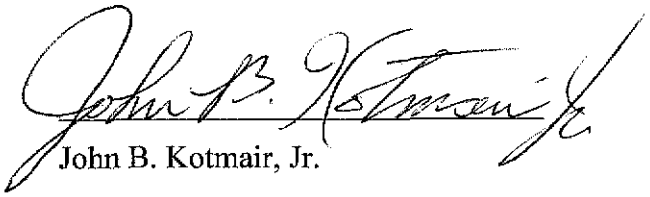
18. Attached as an exhibit to the accompanying brief is various correspondence regarding the CAF number and my representative status before the IRS during the years 1990 through 1997. I hereby certify that the copy of a letter to Paul Harrington dated June 15, 2004, is, with the exception of a signature, a true and correct copy of that letter.

19. I do not personally prepare or sell "Affidavits of Revocation and Rescission" or "Statements of Citizenship." Further, as far as I am aware, these documents are not routinely filed at the Save-A-Patriot Fellowship office.

20. No records exist with respect to amounts paid to me. No records exist with respect to amounts paid to Save-A-Patriot staff or paralegals. No records exist with respect to amounts paid to claimant members.

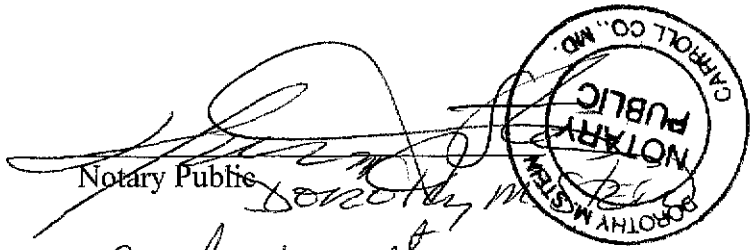
21. I hereby declare that the foregoing is correct and true to the best of my knowledge, information and belief.

Dated this 26th day of June, 2006



John B. Kotmair, Jr.

Subscribed and sworn to before me, a Notary Public, of the State of Maryland, County of Carroll, this 26th day of June, 2006, that the above named person did appear before me and was identified to be the person executing this document.



Notary Public

My Commission Expires On: October 1st, 2009

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.) Civil No.

JOHN BAPTIST KOTMAIR, JR.,) WMN 05 CV 1297

et al.,)

Defendants.)

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VOLUME 1

- - - - -

The deposition of JOHN BAPTIST KOTMAIR, JR. was taken on Monday, February 13, 2006, commencing at 4:00 p.m., at the Office of the United States Attorney, District of Maryland, 36 South Charles Street, Baltimore, Maryland, before Josett F. Whalen, Registered Merit Reporter and Notary Public.

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Exhibit 3

A. Oh, they have never done -- they have never lived up to their mission in the manual.

Q. Why would you assume that the IRS representative or appeals officer would send you notice of any adverse determination?

A. If I'm representing them, don't you think that he would do that? Shouldn't he do that? If I was representing the person, had power of attorney, don't you think it should come back to me?

Q. And what if they didn't accept your power of attorney as being valid?

Do you think that they aren't accepting --

A. Well, that's an argument. Hold on.

Q. Please let me finish the questions.

A. I know where you're going and I can answer it.

Q. I just want to make sure just so that she's --

A. Oh, I understand it.

Q. -- one voice at a time. Let me finish

the question, and then you answer it.

A. Go ahead.

Q. I asked the question. It was just that, don't you think that they are rejecting some of these powers of attorney and that you are not getting --

A. I understand that.

Now -- do you want me to answer it now?

Q. Yes.

A. Okay. I first started representing with a power of attorney from our members. Philadelphia sent me a representative number. They told me to use that number, which I did. They said you can only use one, so I sent the one back to Philadelphia and kept the one from Ogden. Okay?

So I represented people with that number, oh, a dozen times maybe. Then I get a letter saying that they sent it to me in error.

So then I said, well, according to the rules, you're supposed to get a hearing.

So I told -- they said that I didn't have the right to represent them at all. Then I showed them in the circular where it said that an officer of the organization can represent the organization.

Well, in a fellowship, the members are the organization, and I'm an officer of that organization and I have a right to represent them.

So that's where it stands. I never got a hearing. I never got due process. That's the end of it. It just lays there.

Q. I think what you're telling me is that your right to practice or that your CAF -- it's C-A-F -- number was revoked?

A. No. It wasn't revoked. In order for it to be revoked they'd have to charge me with something and give me a hearing. They never did. I'm still waiting for my due process. It isn't -- it never came.

Q. They didn't send you a letter stating you're --

A. They never gave me a hearing. I went back to them -- hold on. They're supposed to give me a hearing. That's not a hearing. I'm supposed to have due process, and they didn't give it to me.

Q. They --

A. A letter is not a hearing, because I have a right to be heard and give my arguments. That there was no hearing.

Q. But you received a letter stating that --

A. I received a letter saying that it was issued in error.

Q. Mr. Kotmair, please let me finish the question before you answer.

You received a letter stating that it was -- that you received two numbers in error, but you never --

A. No, no, no. I only used the one.

Q. And then you received the letter saying the other one was revoked.

A. No. They said it was issued in error.

Q. Some years ago --

A. Some years ago they said it was issued in error. Then I told them that I had a right to represent these people, and we argued about that through the mail, but they never -- they never gave me a hearing.

Q. So you do understand that the IRS may not send you any of this information --

A. They may not, but the thing of it is they never gave me a hearing as far as that number was concerned.

Q. You have to let me finish asking the question before you answer.

A. Go ahead.

Q. And we cannot both speak at the same time.

A. All right. Go ahead.

Q. You do understand that the IRS may not be sending you these letters because your representative number is not valid.

A. That's a possibility. But I still have the right to represent these people and power of

attorney as the circular says.

Q. I understand that. I understand exactly --

A. All right. So -- and you still have to -- should -- have to accept that according to their own circular. The number I was told only kept track of the --

Q. The organization.

A. And the mail.

In other words, it was a number to track everything that was coming in so it could be all put in one file folder. I was told that was the purpose of the number.

Q. Okay. And I'm going to refer just to the second page of what I marked as Exhibit 3.

A. All right.

Q. And what you have described here or what is described in the handbook is that one of the membership assistance programs that began --

A. Which page are you on?

Q. 5.

A. Okay. Where at on 5?

tax court?

A. I guess they have, but they do that. We don't do anything with that.

Q. But you don't assist them with any kind of petition to the tax court?

A. No. No tax court at all.

Q. In your materials you say that the paralegals assist in drafting bankruptcy petitions, but you're saying --

A. No. We did bankruptcy -- we had a member who was a paralegal there up until maybe around '93 or '94 and he was an expert at bankruptcy. He did bankruptcy. When he left, we haven't done bankruptcy since then.

Q. Okay. So you just don't do that anymore?

A. No. If members call in and ask us about bankruptcy, we tell them that this person does it or that person does it, but we don't do it.

Q. And the other kind of work is the power of attorney work that you already

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.) Civil No.

JOHN BAPTIST KOTMAIR, JR.,) WMN 05 CV 1297

et al.,)

Defendants.)

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VOLUME 2

\- - - - -

The deposition of JOHN BAPTIST KOTMAIR, JR. was resumed on Tuesday, February 14, 2006, reconvening at 10:20 a.m., at the Office of the United States Attorney, District of Maryland, 36 South Charles Street, Baltimore, Maryland, before Josett F. Whalen, Registered Merit Reporter and Notary Public.

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Q. And I don't understand that again. Can we talk about that for a minute?

A. All right. Go ahead.

Q. You didn't apply for a CAF number?

A. No. They sent me two of them.

Q. And you describe this in your book. You received one from the Ogden service center and you received another one from another service center, and I don't know where that is.

A. In Philadelphia.

Q. You returned the one from Ogden?

A. Because in the letter they say I can only have one.

Q. Because you know you can only have one, so you sent one back, you kept one?

A. They told me the reason for it was to track everything because I was using the power of attorney and claiming to have that because I'm an officer of an association.

Q. Right. I understand that. I understand. I'm familiar with the section of

circular 230 you're referring to.

A. Okay.

Q. A director of an association can represent the association before the IRS.

A. An officer I think it says.

Q. But what you're referring to now with not having a hearing, did some years ago you receive a letter that said you cannot --

A. They said it was issued in error. Yes.

Q. But that would be referencing the second one or both of the letters that you received authorizing you to practice?

A. No. They sent me -- they sent me a letter telling me to use this number. I got power of attorney from the individual.

Q. I just want to understand this.

They sent you two letters and you returned one?

A. Right.

Q. So now there's still one left?

A. Right.

Q. And you're saying that with respect to that one that you kept, which is the number that you're probably to --

A. According to the circular, which -- like I was arguing with them, is according to this circular, I should have a hearing to show where I violated any of the regs. That's what it says here.

Q. Is that with respect to the representative number that you're referring to at the top which is 26 --

A. I suppose because they sent it to me. Now they want to take it away without giving me a hearing.

Q. But this happened some years ago? Because you discuss this in your book.

A. Yeah. Sure, it happened some years ago. It happened -- I don't know where it -- it might have even happened before they raided us.

Q. And that was -- so that was --

A. '93.

Q. '93.

It may have happened before 1993?

A. It may have.

In fact they still send us letters talking about representation that the caseworkers get.

Q. The IRS sends you letters?

A. Yeah. They have our number still listed there.

In fact, one told us yesterday she's receiving --

Q. Can I ask you to clarify that? You're saying the IRS sends you letters that have taxpayer information because you sent in a power of attorney?

A. I don't know exactly. I'd have to check it out. In fact I didn't -- we'll try to locate the letters and send them to you.

Q. I'm just asking you about the statement that you just made.

Are they sending you letters saying that you're not authorized to practice?

A. No.

Q. Or is it they're sending you information as if you sent in a power of attorney?

A. As if the number was -- they still look at it. Some offices still look at the number; some don't.

Q. That's what I was asking.

A. Right.

Q. So they still send you information as if there's a representative number or not.

So with respect to this second CAF number, at some point in time -- and it may have been more than 15 years ago, it may not have been, but sometime between 10-15. We don't know really know when -- you got another letter saying that you are not authorized to practice or send letters in --

A. Then I went back to them -- no. I got a letter saying that the number was sent in error.

Q. Oh, okay. You got a letter saying --

A. Then I went back to them and said,

well, I have the right to represent as an officer of an association, and we started arguing about that. But they never gave me any hearing. They just said you can't represent anybody, but I'm saying I was representing them as an officer of the association. That's what the letters say.

Q. And this is --

A. So they never did revoke that ability under that section. They just -- just stopped.

Q. Right.

A. They stopped writing to me. They wouldn't argue anymore. They wouldn't give me a hearing.

Q. I only -- I refer to it that way, Mr. Kotmair, because you in your book -- excuse me --

A. A book is not a law brief.

Q. No. But that's how you refer to it --

A. I understand.

Q. -- as being revoked.

A. Well, them saying -- not that it was

revoked, them saying it was revoked.

Q. So they told you that it was revoked?

A. No. I don't -- I'm not even -- I think that they said -- I'm thinking back all these years -- that the number was issued in error. "Revoked" is just a figure of speech to make it simple for the reader.

Q. Okay. But that's how you refer --

A. I'm not sure if they said that or not. I'm just -- it's just a way of expressing it to the reader in the book.

Q. No. I understand that.

A. Okay.

Q. And I'm just explaining to you that that's how I'm expressing it because you refer to it as being revoked in your book.

A. But I'm telling you don't put real credence on that.

Q. You received a letter saying --

A. To the best of my recollection, they said it was issued in error.

Q. Okay.

A. To be revoked, obviously, according to this circular, I'd have to make some kind of an act against the regs or commit some kind of a fraudulent act for the revocation, which I would have to have a hearing for it, which I never had a hearing. I never had any due process.

Q. And when you write these letters where you're taking power of attorney or when you sign them, this would be how you're referring to acting as the fiduciary for the fellowship.

A. No. No.

Q. No?

A. Not at all.

Q. Whereas a director --

A. No, not at all. Not at all.

The -- as I just take power of attorney, not as the fiduciary, but just by -- they gave me power of attorney just like if they give anybody else a power of attorney. I have the right to use that power of attorney, is what I'm saying, under this circular, being an

officer of an association.

Q. Right.

But under the --

A. But not as the fiduciary. Somebody else could become an officer --

Q. Oh, okay. Then --

A. -- and do the same thing, but it's not conditioned on being a fiduciary.

Q. Right. Okay. Then let me clarify.

Then what you're doing is taking the power of attorney as a director or officer of the fellowship.

A. Right.

Q. Because you're reading the circular 230 as authorizing you to do that because you're an officer.

I didn't mean to -- when I'm referring to fiduciary, I meant that that is -- in some way that you're acting as some kind of officer of a corporation.

A. Okay.

Q. So it is in that capacity, that you're

acting as some kind of officer or authoritative role?

A. Right.

Q. And you're taking the power of attorney to represent these individuals before the IRS?

A. Right.

Q. And this is --

A. Well, because the circular says that.

Q. Right.

A. Right.

Q. And this is separate from -- and you've made this distinction -- you acting as an individual.

A. I wrote letters to them saying this, you know, when -- back -- way back when.

Q. To who? To the IRS?

A. To the IRS, yes.

Q. That you're acting in a representative capacity as --

A. Officer of the association. Right.

Q. And these letters -- particularly this

one which is marked as Exhibit 11, this is referencing a dispute with respect to this person's individual proposed tax liability, it's not actually a liability at this point?

A. No. It's a proposed assessment.

Q. For their individual and it's proposed --

A. Right. It hasn't gone to deficiency yet.

Q. Can I ask you to look at page 2 of Exhibit 11. And I think that we've already talked about this enough just now, but I think that I'm going to ask the questions anyway.

You are representing here that you're authorized to represent this individual --

A. According to the circular, right.

Q. -- using your power of attorney which you have listed on this second page as number 3.

A. Right. I even cite the circular.

Q. In number 4 you cite the circular 230 section, which is section 10.7(c)(1)(iv)?

A. Right. Unless we're using this one

here, took it out of that (indicating).

Q. Can I ask you to look at page 4 of Exhibit 11, or it's what you have marked as page 4.

And as we already talked about, this letter is responsive to an individual that has not filed a return and the dispute between the individual and the IRS is over the proposed assessment based on the -- I believe a substitute for return?

A. Right.

So it's citing all the code sections that I'm relying on here saying that.

Q. So this would -- the schedule of disputes, would you have drafted the original this is now incorporated from or this was written --

A. Not all of it. Some of it was a cumulative act. Some of the old paralegals we had and all came up with a lot of research and what have you, and we put it together.

Q. For the sections, the section

A. Oh, of course. If they don't, I think they're crazy or just wasting their filing fee; right?

Q. If you don't --

A. If they file a petition and don't follow it through on anything, then they're wasting their filing fee.

Q. What you're referring to, though, is them keeping --

A. The individual.

Q. -- the individual keeping the fellowship apprised of what's happening with the litigation?

A. Oh, sure. Because they're the ones handling it either pro se or through a lawyer.

Q. And just to change topics here for just a moment, one of the documents that you offer is a rescission or revocation --

A. Revocation and rescission.

Q. You don't charge for that, that's just available to members; is that right?

A. They might charge a fee for printing it

out.

Q. So it's just printing it out?

A. Yes.

Q. And the person, it's up to them to deal with it in any way that they can?

A. Right.

Q. But I'll ask you explain that.

That's revoking your own --

A. No. It doesn't revoke anything.

Q. Explain it to me then so it's in your words.

A. In other words --

Q. And can I ask you first --

A. You watched Just the Facts. We address it in Just the Facts.

Q. I didn't watch the whole thing.

A. Oh, now you confess.

Q. No. I told you I didn't watch the whole thing.

A. That's all right. I'm kidding you.

Q. What you're referring to is the social security number. I just want to make it

question again, whether or not you recognize the document.

A. The same answer.

Q. Okay. In what's listed as subheading V, it's action V: Petitioning Bankruptcy Court to Stop Collections and Challenge IRS Claim, we talked about this yesterday.

A. Yeah. We don't do this.

Q. You don't do them anymore?

A. No. We haven't done that since back in the early to mid-'90s.

Q. And the person that did it no longer works at the fellowship?

A. No.

Q. That was the only question I wanted to ask you about it.

A. All right.

Q. Mr. Kotmair, could you turn to Plaintiff's Exhibit 21.

A. Yes.

Q. Can you identify it?