

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' REPLY BRIEF— DEFENDANTS' MOTION FOR NEW TRIAL

In reply to “The United States’ Response in Opposition to Defendants’ Motion for New Trial,” Defendants state as follows:

Plaintiff is correct, in the second paragraph of its response, that Rule 52 allows a court to correct manifest errors of law. There are “manifest errors” present here; these were discussed with particularity in Defendants’ Motion for New Trial, and therefore, it is clear that Defendants do not seek to relitigate matters already decided or to argue new legal theories. However, it is necessary not only to look to Rule 52, but also to Rule 56 (and Rule 59) in conjunction, since one of those errors is that the case was not ripe for summary judgment. In a nutshell, virtually all of the most essential findings of this Court have been based upon factual conclusions that:

1. are not supported by any evidence in the record of this action;
2. are based upon documentation, affidavits and other material evidence that were either

untimely or improperly made part of the record, contrary to the provisions of the Federal Rules of Civil Procedure and Federal Rules of Evidence; or,

3. are based upon facts which are in dispute.

Plaintiff is simply wrong when it states, on page two of its response, that this Court found that Defendants “made false or fraudulent statements concerning the tax benefits associated with the schemes.” Rather, as pointed out in Defendants’ motion, the Court found only that *implicit representations* were made. Implicit representations are insufficient to support a finding of violation of IRC § 6700, since the penalty of § 6700 is explicitly confined by Congress to the making of “a *statement* ... which ... is false or fraudulent.” Statutory construction begins with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses legislative purpose. See *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 541 U.S. 246 (2004).¹ Accordingly, a “statement” is “an oral or written assertion” (Federal Rules of Evidence 801(a)) and “a declaration of matters of fact.” See *Black’s Law Dictionary*, 6th Edition. Moreover, a “false statement” is a “statement knowingly false, or made recklessly without honest belief in its truth, and with purpose to mislead or deceive.”² Given these definitions, it is difficult to arrive at any conclusion but that § 6700 expressly penalizes *direct expressions* which are “false or fraudulent,” not *implicit*³ *representations*.

Plaintiff is also simply wrong when it states, also on page two, that Defendants “argue that the government’s summary judgment motion was unsupported.” Defendants do not claim that Plaintiff did

¹ See also *United States v. Resnick*, 299 U.S. 207 (1936), p. 209. “Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L.Ed. 37; *Fasulo v. United States*, 272 U.S. 620, 628, 47 S.Ct. 200, 201, 71 L.Ed. 443.”

² *Black’s Law Dictionary*, 6th Edition.

not submit many declarations and documents as evidence (the inadmissibility of much of it has been extensively argued, Dockets 54 and 64). Rather, Defendants submit that the factual conclusions of this Court are unsupported by the evidence submitted.

Likewise, Plaintiff misstates Defendants' reference to the extent of the evidence introduced into the record as being an argument "that [Defendants] possess information warranting a new trial, based on evidence that was never disclosed."⁴ The actual point made by Defendants,⁵ and avoided by the Plaintiff, was that without the actual video (*Just the Facts*), book (*Piercing the Illusion*), content of SAPF's website, or other materials not entered into evidence — that is, without the materials which *were* disclosed to Plaintiff, who declined to present them to the Court in support of its allegations — there is no factual basis on which this Court could possibly find that "*much* of th[at] speech ... is commercial speech [emphasis added]," let alone enjoined fraudulent commercial speech.

Thus, Defendants are challenging the *sufficiency* of the evidence to support a finding that "much" of SAPF's speech is in fact commercial speech; certainly, the "numerous" declarations introduced by Plaintiff—containing a great deal of conclusory allegations rather than statements of fact—cannot be held to be substitutes for the books and videos themselves. Even if Plaintiffs had produced truckloads of materials, the Court would be unable to rule on materials it had never been given.

Plaintiff is in error again when it claims that Defendants did not refute the evidence presented in its summary judgment motion. The declarations of Mr. and Mrs. Nagy, and Mr. Taflan, for example,

³ Implicit is generally defined as "to involve or intimate a meaning not expressed," or as "implied though not directly expressed."

⁴ See footnote 2, on page 2 of Plaintiff's response in opposition.

⁵ Docket 71, p. 4.

were indeed refuted by sworn affidavits,⁶ despite the fact that Defendants were never properly notified of the identities of these witnesses, nor provided an opportunity to cross-examine them.⁷

Plaintiff also addresses whether this Court's order lacks sufficient specificity. Plaintiff's statements in this regard are not substantive; rather, the government appears to be asserting its own interpretation of the injunction order, since it merely states that the order is not vague, and proceeds to list a number of activities it believes the order enjoins.⁸ Most significantly, however, Plaintiff's statements about the specificity of the injunction order are unrelated to the motion for new trial and tend to obfuscate the issue of whether a trial is warranted.

In its written reasons to grant Defendants' motion to stay the permanent injunction order,⁹ this Court said that "[The motion for modification of the injunction order] however, might prove to have some merit, particularly as it relates to assisting Defendants in discerning what is protected political speech and what is prohibited false commercial speech." In that same Order, the Court noted that "the government has yet to respond." The government has now failed to respond to Defendant's motion for modification of the injunction order, or to address any of the arguments set forth therein, and said motion is ripe for judgment.

Moreover, this Court, in its Order granting stay, indicated "Once that Motion [Motion for Modification] is fully briefed, the Court may find it necessary to hold a hearing to assure clarity as to

⁶ See Docket #54, Exhibit 1, ¶¶ 57–59, and Exhibit 9.

⁷ Thus, this "evidence" is precluded from being introduced under Federal Rules of Civil Procedure 37(c)(1).

⁸ For example, on page 4, Plaintiff states Defendants make "false sales pitches" that include "payment of federal income taxes is voluntary," "the Internal Revenue Code applies only to federal enclaves," and "individuals who revoke their Social Security numbers are not required to file income tax returns."

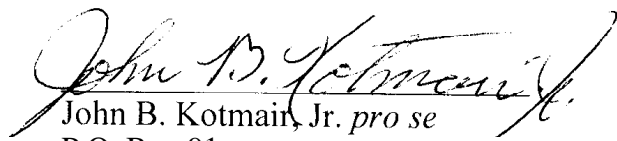
Nothing in evidence shows that these three statements have ever been made by Defendants.

⁹ Docket 74.

what is prohibited under the injunction.” Plaintiff evidently concedes the necessity for a hearing on this matter, since it filed no opposition to “Defendants’ Motion for Modification of the Permanent Injunction Order.”

WHEREFORE, this Court should grant “Defendants’ Motion for New Trial.”

Respectfully submitted on this 12th day of January, 2007.



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CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing “DEFENDANTS’ REPLY BRIEF— DEFENDANTS’ MOTION FOR NEW TRIAL” 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 13th day of January, 2007.

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