

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	
JOHN B. KOTMAIR, JR.,	)	
dba Save-A-Patriot Fellowship	)	No. 07-1156
dba National Workers Rights Committee	)	
	)	
Defendant-Appellant	)	
	)	
SAVE-A-PATRIOT FELLOWSHIP,	)	
an unincorporated association	)	
	)	
Defendant-Appellant	)	

**APPELLEE’S OPPOSITION TO MOTION OF  
APPELLANT SAVE-A-PATRIOT FELLOWSHIP  
TO EXCEED TYPE-VOLUME LIMITATION**

Appellant Save-A-Patriot Fellowship (“SAPF”) has filed a motion to exceed the type-volume limitation for opening briefs provided in Fed. R. App. P. 32(a)(7)(B). SAPF requests leave to extend the word limit for its opening brief to 21,000 words. For the reasons discussed below, the United States, as appellee herein, opposes SAPF’s motion to exceed the type-volume limitation.

## STATEMENT

### 1. Background

Appellant John B. Kotmair, Jr. (“Kotmair”), has been a proponent of an anti-tax argument known as the “Section 861” or “U.S. sources” argument, arguing that U.S. citizens need not pay any taxes on income earned within the 50 states. (Doc. 68 at 1.)<sup>1</sup> In 1984, shortly after having served a two-year prison term for willful failure to file income tax returns, Kotmair founded SAPF, which operates in part on the basis of membership fees and donations. (*Id.* at 1–2.) Through its website and other publications, SAPF informs its members of various products and services that it offers for sale and which it represents will enable members legally to stop paying income tax on their “U.S.-source income.” (*Ibid.*)

When the Internal Revenue Service advises SAPF members that the “U.S.-sources” argument is frivolous and requests that they file properly completed returns, SAPF (upon payment by its members of

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1 “Doc.” references are to documents contained in the original record on appeal, as numbered by the clerk of the District Court.

additional fees) submits to the IRS on behalf of its members several different formletter responses. (Doc. 68 at 3.) These letters are usually signed by Kotmair as “power-of-attorney” for the SAPF member. (*Ibid.*) For the payment of additional fees, SAPF also offers to prepare and file customized pleadings for its members advancing the U.S.-sources argument. (*Ibid.*) In addition, SAPF also offers an insurance-like program under which members pledge to reimburse other members should they suffer a loss of cash or property to IRS collection activities. (*Id.* at 4.) To obtain these benefits, members ““must prove they used every Court proceeding and delay tactic possible.”” (*Ibid.* (citation omitted).)

## **2. Proceedings in the District Court**

The United States brought suit in the District Court for the District of Maryland, alleging that Kotmair’s and SAPF’s activities violated Sections 6700 and 6701 of the Internal Revenue Code (“I.R.C.” or “Code”) (26 U.S.C.) and seeking an order pursuant to I.R.C. § 7408

permanently enjoining them from these activities.<sup>2</sup> (Doc. 1.) The Government also sought an order pursuant to I.R.C. § 7402(a) requiring Kotmair and SAPF to identify members and others who had purchased SAPF's products and services and to notify them of the court's ruling; to remove false and fraudulent material from its website; and to post a copy of the court's order on its website. (*Ibid.*) The parties each moved for summary judgment. (Docs. 36, 38, 42.)

The District Court granted summary judgment to the Government. (Doc. 68.) The court noted that, under I.R.C. § 7408(b), a court may grant injunctive relief if it finds that the defendants “engaged in any conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 (relating to penalties for aiding and abetting understatement of tax liability)” and “that injunctive relief is appropriate to prevent

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2 Sections 6700 and 6701 provide penalties for promoting abusive tax shelters and for aiding and abetting the understatement of tax liabilities, respectively. Section 7402(a) grants district courts jurisdiction to issue injunctions to enforce the tax laws, and Section 7408 authorizes the Government to bring actions to enjoin conduct subject to penalty under, *inter alia*, Sections 6700 or 6701.

recurrence of such conduct.” (*Id.* at 8.) The court further noted that, to prove a violation of § 6700, the government must show that: (i) the defendants organized or sold an entity, plan, or arrangement; (ii) they made false or fraudulent statements concerning tax benefits to be derived from the entity, plan, or arrangement; (iii) they knew or had reason to know the statements were false or fraudulent; (iv) the false or fraudulent statements pertained to a material matter; and (v) an injunction was necessary to prevent recurrence of this conduct. (*Id.* at 8–9.)

The court held that it was “abundantly clear” from the record that Kotmair’s and SAPF’s conduct violated I.R.C. § 6700 and that injunctive relief under I.R.C. § 7408 was “appropriate and necessary.” (Doc. 68 at 7–8.) Rejecting Kotmair’s and SAPF’s arguments, the court noted that “[c]ourts have . . . found tax schemes very similar to Defendants’ to fall within the reach of § 6700.” (*Id.* at 10–12 (citing, *inter alia*, *United States v. Raymond*, 228 F.3d 804 (7th Cir. 2000).)

The court held that it was “equally clear” that Kotmair’s and SAPF’s statements about the legality of their promotions were false,

that the statements pertained to material matters, and that they knew or had reason to know that the statements were false. (Doc. 68 at 12.) In particular, the court cited statements in SAPF's handbook that taxable income is limited to "income that has been 'earned' while living and working in certain 'foreign' countries or in the U.S. possessions and territories"; that there is no requirement for most Americans to file tax returns or have taxes withheld from their wages; and that one can 'quit' the Social Security program." (*Id.* at 13 (citations omitted).) The court noted that SAPF and Kotmair did not deny that courts have interpreted the Code completely contrary to their positions; "they simply choose to reject and ignore those holdings." (*Ibid.*) Finally, the District Court concluded that an injunction was necessary to prevent recurrence of the offending conduct, because Kotmair and SAPF had shown "no inclination, whatsoever, to cease their activities despite their position being repeatedly rebuffed by the courts." (*Id.* at 14–15.)

The District Court further held that the Government had established a violation of I.R.C. § 6701 warranting an injunction under § 7408. (Doc. 68 at 15–17.) Under § 6701, the Government must prove

that: (i) the defendant prepares, assists in, procures, or advises the preparation of any portion of a return, affidavit, claim, or other document; (ii) the defendant knows or has reason to know that such portion will be used in connection with a material matter arising under the internal revenue laws; (iii) the defendant knows that such portion (if so used) would result in an understatement of the tax of another person; and (iv) an injunction is necessary to prevent a recurrence of this conduct. (*Id.* at 15.)

The court observed that SAPF prepares correspondence for its members that it knows will be used in connection with matters material to the internal revenue laws. (Doc. 68 at 15.) Rejecting as “preposterous” SAPF’s argument that its filings on its members’ behalf did not result in understatements of liability, the court held that § 6701 “penalizes the understatement of liability and SAPF assists its customers making those understatements.” (*Id.* at 16–17.)

The court further held that the Government was also entitled to an injunction under § 7402, which more generally authorizes a court to issue “writs and orders of injunction . . . and such other orders and

decrees as may be necessary or appropriate for the enforcement of the internal revenue laws.” (Doc. 68 at 17 (quoting I.R.C. § 7402(a).) It noted that § 7402 “has been relied on to enjoin activities of third parties that encourage taxpayers to make fraudulent claims.” (*Id.* at 17–18 (citation omitted).) The court concluded that the Government was sustaining irreparable harm in the form of expenditures of time and money to respond to SAPF’s “frivolous filings” as well as the lost revenue from SAPF customers who failed to file returns or filed returns understating their tax liability. (*Id.* at 18.) The court also held that SAPF and Kotmair “will not sustain any irreparable harm by being required to obey the law.” (*Id.* at 18.) As to the merits of the case, the court stated that it was “without question” that Kotmair and SAPF were violating and interfering with the administration of the tax laws. (Doc. 68 at 18–19.) The court held that the public had a compelling interest in preventing the promotion and sale of products that aid in avoiding lawful income taxes. (*Id.* at 19.)

Considering constitutional challenges Kotmair and SAPF raised respecting the scope of the requested injunction order, the court held



that statements relating to the sale of SAPF products and services were commercial speech that, if fraudulent, may be enjoined. (Doc. 68 at 19.)

Because Kotmair's and SAPF's representations about the tax laws and the efficacy of their products "is clearly fraudulent, that speech may be enjoined without running afoul of the First Amendment." (*Ibid.*)

Noting that the Third Circuit had recently affirmed the issuance of an injunction against one of Kotmair's former employees who operated a website promoting the U.S.-sources argument, the court adopted language similar to that approved by the Third Circuit in that case.

(*Id.* at 20–21 (citing *United States v. Bell*, 414 F.3d 464 (3d Cir. 2005).)

The court stated that Kotmair and SAPF could express their opinions about the tax laws as long as those opinions were not used to sell products or services or instruct other as to how to impede the collection of taxes. (*Id.* at 21 n.9.) The court further held that requiring Kotmair and SAPF to provide customer lists to the Government was an appropriate means to alleviate some of the harm caused by their conduct and to mitigate further harm. (*Id.* at 21.) Finally, the court held that ordering SAPF to post a copy of the injunction order on its

website for one year, to notify members and customers of the issuance of the order, and to provide them with a copy, was proper. (*Id.* at 22.)

Accordingly, the District Court issued an order that, *inter alia*, granted the Government's motion for summary judgment and denied Kotmair's and SAPF's motions for summary judgment. (Doc. 69.) It also issued a permanent injunction order, enjoining Kotmair and SAPF from engaging in certain activities that interfere with the enforcement of the internal revenue laws. (Doc. 70 at 2–3.) This order also required Kotmair and SAPF to take certain affirmative actions, including notifying all SAPF members and other individuals who had purchased SAPF's tax plans and services of the outcome of the litigation, posting the injunction order on their website, and providing the Government with a list of SAPF's members and customers. (*Id.* at 3–4.)

Kotmair and SAPF moved for a new trial (Doc. 71) and to alter or amend the judgment (Doc. 72), which the District Court denied (Doc. 77).<sup>3</sup> Thereafter, Kotmair and SAPF filed a notice of appeal to this

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<sup>3</sup> Kotmair and SAPF also filed in this Court a request for an “emergency supervisory writ,” which this Court denied on January 9, 2007. *In re: Save-A-Patriot Fellowship et al.* (4th Cir. – No. 06-2314).

Court (Doc. 80) and a motion for a stay of the injunctive order pending appeal (Doc. 78). The District Court granted the motion for a stay pending appeal, stating that the potential immediate impact on Kotmair and SAPF from enforcement of the injunction outweighed the harm to the Government resulting from a brief delay in enforcement. (Doc. 83 at 1–2.) As to the merits of the appeal, the court found “no likelihood of [Kotmair and SAPF] prevailing on the substance of the claims against them. [The Government] is unquestionably entitled to judgment.” (*Id.* at 2.) The court held, however, that issues respecting the precise permissible scope of the injunctive relief were sufficiently serious and substantial as to make them fair ground for litigation. (*Ibid.*)

### **3. Proceedings in this Court**

This Court originally ordered the parties to proceed by informal briefs, with Kotmair’s and SAPF’s brief due to be filed on or before March 26, 2007. SAPF moved for leave to file a separate, formal brief and to amend the briefing schedule. The Court granted the motion, ordering Kotmair and SAPF to file their briefs by April 9, 2007, with

the Government's brief due 14 days after service. SAPF then moved to extend the time within which it may file its brief to April 30, 2007, which the Court granted.

On April 4, 2007, SAPF moved for leave to file an oversized brief of 21,000 words. The Court has ordered the other parties to respond to SAPF's motion.

### DISCUSSION

Under Fed. R. App. P. 32(a)(7)(B), a principal brief filed in an appeal to a federal court of appeals is to contain no more than 14,000 words where the brief uses a proportionally-spaced typeface. A party may file a motion to exceed the type-volume limitations of Rule 32(a). Fourth Cir. R. 32-2. Such a motion "must be supported by a statement of reasons." *Ibid.* Further, "[t]hese motions are not favored and will be granted only for exceptional circumstances." *Ibid.* SAPF has not demonstrated "exceptional circumstances," and its motion to exceed the type-volume limitation for principal briefs should be denied.

SAPF makes no claim of need to rely on an unusually extensive exposition of the facts. Instead, SAPF asserts, in conclusory terms,

that the case presents “serious and substantial legal questions” involving the First Amendment and I.R.C. §§ 6700, 6701, 7402(a), and 7408, including “a serious question . . . as to the elements necessary to be established in order to find violations of §§ 6700 and 6701.” (Mot. 1–2.) It further asserts that the case involves “a higher number of issues than usual” and that the issues are of first impression. (Mot. 2.) SAPF asserts that these legal questions “will require additional space to properly brief.” (Mot. 1.) SAPF’s arguments are without merit.

First, the case involves a limited number of issues: whether Kotmair’s and SAPF’s conduct violates I.R.C. §§ 6700 and 6701; whether that conduct may be enjoined under §§ 7408 and 7402(a); and whether the scope of the injunction order is constitutionally permissible. Moreover, none of these issues is particularly complex, and none is a matter of first impression in the courts of appeals.

As the District Court held on summary judgment, it is “abundantly clear” that Kotmair’s and SAPF’s conduct violated I.R.C. §§ 6700 and 6701 and that injunctive relief under both I.R.C. §§ 7408 and 7402 was “appropriate and necessary.” (Doc. 68 at 7–8.)

Moreover, as the District Court observed, “[c]ourts have universally rejected defendants’ narrow reading of § 6700 and have found tax schemes very similar to Defendants’ to fall within the reach of that statute.” (*Id.* at 10.) *See, e.g., United States v. Bell*, 414 F.3d 474, 475–76 (3d Cir. 2005) (tax-avoidance promotions based on U.S.-sources argument could be enjoined under §§ 7402 and 7408; noting that this argument “has been universally discredited”); *United States v. Schiff*, 379 F.3d 621, 625–26 (9th Cir. 2004) (upholding preliminary injunction under § 7408 against promoters of tax-avoidance schemes purportedly teaching customers how to “legally” stop paying income taxes, as violative of § 6700); *United States v. Raymond*, 228 F.3d 804, 806–11 (7th Cir. 2000) (holding that defendants violated § 6700 in making available for sale forms and instructions to guide taxpayers through process of “withdrawing” from jurisdiction of IRS and Social Security System so that they would, according to their view, no longer be required to pay taxes, defendants’ activities were in violation of § 6700; “the definition of a tax shelter in § 6700 is ‘clearly broad enough to include a tax protester group’” (citation omitted)); *United States v.*

*Kaun*, 827 F.2d 1144, 1147–50 (7th Cir. 1987) (holding that group espousing tax-avoidance schemes constituted abusive tax shelter under § 6700 that could be enjoined under § 7408). In fact, SAPF acknowledged in the District Court that “courts have included all sorts of abusive tax reduction schemes within [§ 6700’s] broad sweep” but argued that “just because courts have followed that course of conduct does not make it valid.” (Doc. 54 at 28 & n.67.)

Further, as the District Court observed, Kotmair’s and SAPF’s constitutional challenges to the scope of the injunction order “have been rejected by courts that have issued or affirmed injunctions against other tax protesters similar to that requested here.” (Doc. 68 at 19.) *See, e.g., Bell*, 414 F.3d at 478–79 (substantially identical injunction against promoter of tax avoidance schemes based on U.S.-sources argument upheld on ground that enjoined activity was unprotected commercial speech and aided and abetted violation of the tax laws); *Schiff*, 379 F.3d at 626–31 (book by promoter of tax-avoidance schemes could be enjoined as fraudulent commercial speech; promoter could also be required to post copy of injunction order on his websites); *Raymond*,

228 F.3d at 815 (holding that injunction prohibiting program promoters from advertising and selling program advising others that income is not taxable did not violate First Amendment); *Kaun*, 827 F.2d at 1150–53 (holding that injunction prohibiting promotion of any plan based on various false and fraudulent claims about income taxation restrained only speech unprotected under First Amendment). As the District Court concluded, the injunction order issued against Kotmair and SAPF “is similar to injunctions issued and upheld by other courts against others touting similar fanciful views of the federal tax laws.” (Doc. 77 at 1.)

In short, there is no merit to the appeal by Kotmair and SAPF, and the arguments that SAPF proposes to present in its opening brief to this Court plainly do not warrant the granting by this Court of a waiver of the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).



CONCLUSION

For the foregoing reasons, SAPF's motion to exceed the type-volume limitation with regard to its opening brief should be denied.

Respectfully submitted,

EILEEN J. O'CONNOR

*Assistant Attorney General*



RICHARD FARBER

(202) 514-2959

CAROL BARTHEL

(202) 514-2921

*Attorneys*

*Tax Division*

*Department of Justice*

*Post Office Box 502*

*Washington, D.C. 20044*

*Of Counsel:*

ROD J. ROSENSTEIN

*United States Attorney*

APRIL 2007

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing response was sent to the Clerk on this 10th day of April, 2007, by FedEx and that service of the response has been made on *pro se* appellant John B. Kotmair, Jr. and on counsel for the appellant Save-A-Patriot Fellowship on this 10th day of April, 2007, by sending each of them a copy by FedEx properly addressed as follows:

Mr. John B. Kotmair, Jr.  
12 Carroll Street  
Westminster, MD 21158

George E. Harp, Esquire  
Suite 619  
610 Marshall Street  
Shreveport, LA 71101



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CAROL BARTHEL  
*Attorney for Appellee*