

Appellate No. 07-1156

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

---

---

UNITED STATES OF AMERICA,  
Plaintiff/Appellee.

v.

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

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MARYLAND**

---

**JOHN BAPTIST KOTMAIR, JR.'S REPLY BRIEF**

---

John B. Kotmair, Jr.  
P.O. Box 91  
Westminster, MD 21158  
(410) 857-4441

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

ARGUMENT ..... 2

A. “John Baptist Kotmair, Jr., d/b/a Save-A-Patriot Fellowship and National Workers Rights Committee” is not a party to this action, and the district court erred in declining to dismiss him. .... 2

B. The government denies in its response that it made any claims relative to Kotmair’s statements about his IRS representative status, and thus manifests the district court’s error in enjoining Kotmair (in any capacity) from representing others. .... 5

C. The jurisdiction invoked under § 7402(a) and § 7408 precludes enjoining Kotmair from representing others, or any consideration of statements made regarding his representative status. .... 7

D. Kotmair’s eligibility to represent SAPF members has not been revoked, since he has never received the due process required under the regulations for Title 31. .... 8

CONCLUSION ..... 10

REQUEST FOR ORAL ARGUMENT ..... 10

CERTIFICATES OF COMPLIANCE & SERVICE ..... 12-13

## INTRODUCTION

As explained in Kotmair's opening brief, the government is collaterally estopped from bringing suit against Kotmair "doing business as" SAPF and National Worker's Rights Committee, and the district court erred in failing to dismiss him on that ground, since FRCP 17(a) requires an action to be prosecuted in the name of the real party in interest.

Because the government's complaint contained *no claims whatsoever* with regard to Kotmair's representation of others before the IRS, the district court also erred in finding that Kotmair's representative status before the IRS had been revoked, that Defendants misrepresent that status, and that Kotmair can be enjoined from representing others.

In attempting to defend the district court's rulings, the government clouds the issues with irrelevant observations and by adopting the pretense that its untimely claims were merely the introduction of more evidence of fraud. When these missteps are avoided, it is clear that the district court's rulings on summary judgment must be reversed on these issues, and judgment granted in favor of Kotmair.

## ARGUMENT

**A. “John Baptist Kotmair, Jr., d/b/a Save-A-Patriot Fellowship and National Workers Rights Committee” is not a party to this action, and the district court erred in declining to dismiss him.**

In its response brief, the government once again side-steps the real issue presented by Kotmair — the issue of *capacity*.<sup>1</sup> Kotmair has not argued that he *can't* be sued in his personal capacity, only that he *hasn't* been sued in that capacity. The complaint names Kotmair as a party in only one capacity — that is, *Kotmair doing business as Save-A-Patriot Fellowship and National Workers Rights Committee*.<sup>2</sup> (Dkt. 1, p.1). However, as previously shown, that capacity simply does not exist, as the district court correctly determined in 1996. In *Save-A-Patriot Fellowship v. U. S.*, 962 F.Supp 695 (1996), the court stated:

The Government contends, at the threshold, that the SAP Fellowship is not an organization at all, but is solely a name used by Kotmair for his own ‘sole proprietorship’ operation. The Court does not agree, even though it is readily apparent that Kotmair is the major figure in the Fellowship. As noted above, the evidence established that there is an organization and not simply an operation by Kotmair personally. The SAP Fellowship, and not Kotmair personally, leased the Office. There are members, other than Kotmair, who engage in Fellowship activities. This Court observes, also, that the I.R.S. itself, quite

---

<sup>1</sup> Instead, the government makes the irrelevant observation that the district court served two summonses and that Defendants filed separate answers to the complaint. (Br. 61).

<sup>2</sup> The government’s assertion that “the complaint ... makes separate allegations that Kotmair ‘organizes and sells tax-fraud schemes’” (Br. 61), attempts to mislead the court by omitting the very first phrase of the complaint’s allegation: “***Doing business as SAPF and NWRC***, Kotmair organizes and sells tax-fraud schemes ...” (Emphasis added) (Dkt. 1, ¶ 4)

appropriately, returned to the Office the operating assets seized from the Office ... In sum, the Court finds as a fact that the SAP Fellowship is an unincorporated association (not just an alter ego or sole proprietorship of Kotmair), has members, and does things through persons in addition to Kotmair. (Emphasis added). (App. 513)

Since the party named in the government's suit does not exist, any decision against such party is meaningless, and the lower court erred in enjoining Kotmair despite FRCP 17(a)'s mandate that "[e]very action shall be prosecuted in the name of the real party in interest."

On the other hand, since the government also did not prosecute this suit against Kotmair in his *personal* or *individual* capacity, there can be no decision against him in such capacity. The government has never alleged that Kotmair, in his personal capacity, did anything to violate any internal revenue law, nor has the government introduced any evidence or argument that Kotmair acted at any time in his personal rather than official capacity as fiduciary of SAPF. Its contention now — that it made "separate allegations" regarding Kotmair and SAPF — is belied by the complaint itself. At ¶ 4, the complaint only alleges that Kotmair "doing business as" SAPF and NWRC<sup>3</sup> "organizes and sells tax fraud schemes." The lower court already determined in 1996 that Kotmair does *not* "do business as" SAPF, and Kotmair introduced an unopposed affidavit showing that this status, and the operation of SAPF, has not changed. (Docket 36, Ex. 1, ¶¶ 6-7). Moreover, the

---

<sup>3</sup> NWRC, the National Worker's Rights Committee, is simply a division of SAPF.

government clarified in its arguments before the lower court that Kotmair was *not* being sued in his personal capacity, but only in his official capacity:

[T]he United States' complaint defines 'doing business as' Kotmair's actions as the 'fiduciary' of SAPF and 'director' of National Workers Rights Committee. (See Docket 42, pp. 8-9).

Thus the government acknowledged that its suit is against SAPF and against Kotmair only in his official capacity as fiduciary of SAPF. All of these factors lead to the conclusion that even if this Court were to decide Kotmair had been sued in his official capacity, the lower court erred in not dismissing him from the suit in his personal capacity as Kotmair DBA.

The distinction between personal and official capacity is so elementary that the Court may take judicial notice of this hornbook law distinction; the government cannot now claim ignorance of the concept. Therefore, all of the government's arguments as to the necessity of enjoining Kotmair separately are irrelevant, because the question is ultimately not whether Kotmair *could* have been sued in his personal capacity, but whether he actually *was* sued in that capacity. That is, did the government actually prosecute a case against him as a separate entity? The answer to that question is unmistakably: NO.

With respect to the government's assertion that Kotmair has waived any objections to the merits of the injunction (Br. 20), it must be noted that all of the arguments raised by Defendant SAPF apply also to Kotmair in his *official* capacity

as fiduciary of SAPF. That is, Kotmair, in his capacity as fiduciary, has no issues separate and distinct from those raised by SAPF. If the injunction is allowed to stand against SAPF, then Kotmair, as fiduciary, is similarly enjoined. If the injunction order against SAPF is vacated, then Kotmair as fiduciary is likewise not enjoined. But, regardless of how the case is ultimately decided, Kotmair in his *personal* capacity should not be affected.

**B. The government denies in its response that it made any claims relative to Kotmair's statements about his IRS representative status, and thus manifests the district court's error in enjoining Kotmair (in *any* capacity) from representing others.**

With respect to the government's claim that Kotmair fraudulently misrepresents his authority to represent SAPF members before the IRS, Kotmair showed this claim was improperly introduced by affidavit and motion for summary judgment, in violation of FRCP 9(b) and FRCP 15(a).<sup>4</sup> The government answers by now asserting that it made no claim at all, it just offered "evidence of [Kotmair's] false statements" that he was authorized<sup>5</sup> as "additional evidence of his ... fraudulent scheme." (Br. 67). There are at least three ways in which this answer manifests the lower court's error in enjoining Kotmair. First, if the government *has*

---

<sup>4</sup> See opening brief, pp. 12-15.

<sup>5</sup> The government has yet to actually identify *any* particular statement made by either Defendant concerning Kotmair's authority to represent members, much less any made within the context of § 6700, that is, with reference to tax benefits to be derived by participation in a plan or arrangement. The only explicit reference the

*never asserted a claim upon which relief can be granted* — and here it maintains it did not — then the government is constrained to agree that the lower court erred in finding Kotmair unauthorized to represent others, and in enjoining Kotmair (or anyone else within SAPF<sup>6</sup>) from representing others before the IRS. No further inquiry need be made, and the injunction regarding representation (App. 474, ¶ e) must be reversed.

Second, the government attempts to distinguish between claiming “Kotmair was unauthorized to practice before the IRS” and claiming that he made “false statements that he was so authorized.” (Br. 67). Of course, to find the latter, one must first find the former: a statement that Kotmair *could* represent an SAPF member is only false if he *could not* represent them. Thus, whether Kotmair is eligible to represent SAPF members must perforce be resolved first, and it is precisely this material fact that is disputed. (Dkt. 64, p. 20, at (3)). To avoid the dispute, the government shows only its own side — a notice from an IRS employee opining that Kotmair is ineligible to represent SAPF members (App. 205-206) — and omits the history of Kotmair’s correspondence contesting the IRS notice. (Dkt. 50, Ex. 2, ¶¶ 16-18, Dkt. 52, Ex. 4).

---

government makes is to a paragraph in Kotmair’s book, *Piercing the Illusion*, (Dkt. 14, Ex. 19), but it does not allege that statement is false.

<sup>6</sup> The government made no claims regarding the representative status of anyone in the complaint. (See Dkt. 1.).



Third, the government asserts that “[Kotmair’s] false statements” regarding representation were part of a “fraudulent scheme.” If true, the statements alleged to be involved in the fraud should have been identified in the complaint with the particularity required by FRCP 9(b). Accordingly, since the government never claimed in its complaint that Kotmair made any such false statement,<sup>7</sup> nor even that he was ineligible to represent members, the entire issue was not properly before the district court, and it erred in finding on the issue and enjoining Kotmair from representation.

**C. The jurisdiction invoked under § 7402(a) and § 7408 precludes enjoining Kotmair from representing others, or any consideration of statements made regarding his representative status.**

Finally, even if such a statement were identified and could be shown to be false, it would still be immaterial to the present injunction suit, in that it would fall outside the scope of the jurisdictional statutes under which the suit was brought. To begin with, it does not come within the scope of either IRC §7402(a) or § 7408 because it does not deal with Title 26 — the “internal revenue” laws — but rather with Title 31, the “money and finance” laws. Second, it has absolutely nothing to do with understatements of liability proscribed by IRC §6701. And third, the ability to represent someone before the IRS is not a “tax benefit” contemplated by

---

<sup>7</sup> The government has yet to actually identify *any* particular statement made by either Defendant concerning Kotmair’s authority to represent members. On page

IRC §6700(a)(2)(A),<sup>8</sup> and so cannot be the basis of a violation of that section. The “tax benefits” referred to in §6700 specifically include “the allowability of any deduction or credit” and “the excludability of any income,” and by operation of the *ejusdem generis* canon of statutory construction, “any other tax benefit” can only refer to such benefits as are of the same general class. Certainly, it cannot be said that an ability to represent someone is in the same class as an exclusion of income or allowance of deductions or credits.

Ultimately, then, *if* Defendants have made false statements regarding Kotmair’s representative status, the only persons with standing to sue at this point in the litigation are those who have been “defrauded” into being represented by Kotmair, and can show damage thereby. Such is not the case here.

**D. Kotmair’s eligibility to represent SAPF members has not been revoked, since he has never received the due process required under the regulations for Title 31.**

The government argues that “[b]ecause Kotmair is not a ‘practitioner,’ as defined in 31 C.F.R. §§ 10.2 *et seq.*, 31 C.F.R. § 10.50 is inapplicable, and his entire argument in this regard necessarily fails.” (Br. 69). From the beginning, Kotmair’s basic argument with respect to his representative status has been that such status cannot be unilaterally revoked, but that he must be afforded

---

63 of its brief, the government acknowledges that the complaint only includes “specific references to ...false statements with respect to the tax laws.”

<sup>8</sup> See SAPF’s Opening Brief, Addendum, page 21.

administrative due process. In his brief, Kotmair cited the regulatory procedures for revocation of a *practitioner's* representative status (31 C.F.R. § 10.50), believing them to be applicable to his situation. The regulations define a “practitioner” as “any individual described in paragraphs (a), (b), (c), or (d) of Sec. 10.3” (entitled “Who may practice”). However, there is *another* category of individuals — established by 31 C.F.R. § 10.3(e) — who, though eligible to practice before the IRS, are not termed “practitioners.” Therefore, Kotmair, whose eligibility is established under the provisions of 31 C.F.R. §10.7(c)(1)(iv), is just such an individual — a non-practitioner who is eligible to practice before the IRS.

Now that the government has pointed out the limited applicability of the procedures established by 31 C.F.R. §10.50, it is clear that the procedures applicable to Kotmair’s situation are those established by 31 C.F.R. §10.7(c)(2)(ii), which states:

(ii) The Director, after notice and opportunity for a conference, may deny eligibility to engage in limited practice before the Internal Revenue Service under paragraph (c)(1) of this section to any individual who has engaged in conduct that would justify censuring, suspending, or disbaring a practitioner from practice before the Internal Revenue Service.

Comparing this provision to that cited earlier by Kotmair shows that the only difference is that where § 10.7 requires “notice and opportunity for a *conference*,” §10.50 requires “notice and opportunity for a *proceeding*.” Kotmair has maintained from the start, and the government has never denied, that he was never given an

opportunity for either a conference or a proceeding, so either way, administrative due process was not followed. Since the provision above is the only means by which the Secretary “may deny eligibility to engage in limited practice before the Internal Revenue Service,” and since the Secretary never followed that procedure in Kotmair’s case, then it must follow that Kotmair’s eligibility to practice has never legally been denied. And if his eligibility to practice has never been legally denied, then any statements made with respect to such eligibility could not be false.

### **CONCLUSION**

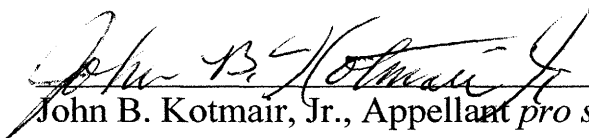
For the reasons stated herein and in his opening brief, Appellant prays that this Court find that the District Court for Maryland erred in refusing to grant summary judgment in favor of Defendant Kotmair, dismiss Kotmair d/b/a SAPF and NWRC from this case, reverse the “PERMANENT INJUNCTION ORDER” insofar as it purports to enjoin the actions of John B. Kotmair, Jr. in his individual personal capacity (and with respect to representation of others in *any* capacity), and provide such other relief as this court deems proper.

### **REQUEST FOR ORAL ARGUMENT**

Appellant requests oral argument. The district court’s injunction against Kotmair is fatally flawed, in that the court ruled on issues never raised in the complaint, and over a subject matter for which no jurisdictional authority was invoked.

In accordance with this Court's practice, Appellant Kotmair is willing to obtain counsel to represent him for the purposes of oral argument.

Dated this 18<sup>th</sup> day of June, 2007.

  
John B. Kotmair, Jr., Appellant *pro se*  
P. O. Box 91  
Westminster, Maryland 21158  
(410) 857-4441

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**  
Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,454 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

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

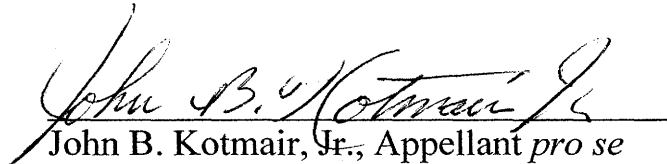
  
John B. Kotmair, Jr., Appellant *pro se*

## CERTIFICATE OF SERVICE

I, John B. Kotmair, Jr., a Citizen of the state of Maryland, am over the age of 21, and do hereby certify that I have sent my INFORMAL REPLY BRIEF with attachments and certificate of service, to the parties indicated hereinafter, via the United States Postal Service, postage having been paid, on June 18, 2007.

Carol A. Barthel, Attorney  
Appellate Section, U.S. Department of Justice  
Post Office Box 502  
Washington, DC 20044

George E. Harp, Esq.  
Attorney for Save-A-Patriot Fellowship  
610 Marshall Street, Suite 619  
Shreveport, LA 71101

  
John B. Kotmair, Jr., Appellant *pro se*