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— MOTION FOR STAY PENDING DETERMINATION BY DISTRICT JUDGE OF OBJECTION TO ORDER OF MAGISTRATE JUDGE

On May 24, 2006, Defendants moved to stay the magistrate judge's order to compel discovery pending the outcome of a motion pursuant to Local Rule 105.10. The United States filed its opposition to the motion to stay on May 30, 2006. Defendants John Baptist Kotmair Jr., *pro se*, and Save-A-Patriot *Fellowship (SAPF), represented by its counsel, George Harp, now reply to Plaintiff's Opposition to* Defendants' Motion for Stay.

**Which rule is invoked in this motion for stay?**

Defendants have invoked Rule 65(a) of the Federal Rules of Civil Procedure in bringing this motion for stay, because the subject of this motion for interlocutory injunctive relief is not a final decision and order. Plaintiff has argued only for Rule 62, which provides for "Stay of Proceedings to

Enforce a Judgment."[1] Since there is no final order or judgment going into appeal, we are dealing with the injunctive relief standard at the district level. Defendants are thus proceeding under FRCP Rule 65.

## ARGUMENT

### Standard for interlocutory injunctive relief

Plaintiff argues that in a Rule 62 motion[2] to stay the district court must consider the four factors reiterated in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (App. 4th Cir. 1977). Defendants addressed these four factors in their own motion. However, in arguing that "Defendants must prove all four factors are met," Plaintiff ignores the actual ruling in *Blackwelder*, which held that the district court is not to stringently apply the four-fold appellate test at the trial level:

> "The district court's reliance on the different standards *of Airport Comm. Of Forsyth Co., N.C. v. CAB*, [296 F.2d 95 (4th Cir. 1961)] was misplaced though understandably so. Even the treatise writers have mistakenly equated the stringent standards of those cases with the more flexible rule of *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42 (4th Cir. 1932)]. See, e.g., Moore's Federal Practice, P. 65.04(1) at 65-39 n. 37 (1975). But there is a difference. The cases relied upon by the district court deal with the question of the issuance vel non of an appellate stay pending review of an administrative order or a trial court decision that dealt with the merits of controversy. Hence they propound an appellate standard and not one for use in the trial courts." *Blackwelder, supra*, p. 193.

The court further stated:

> "Thus in this circuit the trial court standard for interlocutory injunctive relief is the balance-of-hardship test. Whenever a district court has before it a Rule 65(a) motion, although it may properly consider the four general factors enumerated in Airport, see p. 192 supra, it should give them the relative emphasis required by the Sinclair rule: The two more important factors are those of *probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree.* If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and *plaintiff need*

[1] Rule 59 FRCP provides for "New Trials; Amendment of Judgments," clearly not applicable.

[2] Plaintiff tries to characterize Defendants' Rule 65(a) motion for stay as a Rule 62 motion, perhaps to avoid the actual ruling in *Blackwelder*. There, the circuit court stated that the district court "failed to apply the settled principles which govern consideration of a Rule 65(a) motion in this circuit, as set forth in *Sinclair Refining Co. V. Midland Oil Co.*, 55F.2d 42 (4th Cir., 1932) …"

*not show a likelihood of success*." [emphasis added] *Blackwelder, supra*, p. 196.

Thus, the primary concern for interim injunctive relief—which relief we are dealing with here—is not to be confused with injunction relief sought when a district court's final decision or order is appealed. Rather, *Blackwelder* shows that the balance between the likelihood of irreparable harm to Defendants in this case, as opposed to the likely harm to Plaintiff, is the most important factor in whether the stay should issue.

Plaintiff also asserts that "numerous courts have affirmed the denial of a motion that merely presented previously-made legal arguments or those that could have been raised," citing *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 404 (4th Cir. 1988). *Pacific Ins. Co.* is entirely inapplicable here, because it concerns FRCP Rule 59, regarding motions "…**after all** issues … had been considered and decided by the district court." [emphasis added] This rule is inapplicable to interlocutory injunctive relief, since there is no final decision and order upon which reconsideration or review is sought. The other cases cited by Plaintiff in support of this assertion, *Saute Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367 (App. 6th Cir. 1998) and *Zimmerman v. City of Oakland*, 255 F.3d 734 (App. 9th Cir. 2001), also concern Rule 59 motions for reconsideration of final judgments.

**Res judicata: Not a business but a first-amendment association**

Courts uniformly recognize and apply the doctrine of *res judicata*. The Supreme Court has said that the doctrine "is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts ..." *Hart Steel Co. v. Railroad Supply* Co., 244 U.S. 294, 299 (1917).

The standard for *res judicata* is put forth simply in *Black's Law Dictionary*, 7th Edition: "The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties ... ."

Plaintiff states, on page two of its response brief:

> "In support of their argument that they are likely to succeed on appeal, defendants reiterate their belief that they are not a business, and as a result, the information which, although previously disclosed, is now protected by the First Amendment from discovery."

It is not simply "a belief" that Defendants are not a business, it is a verity already recognized by this Court. Nearly ten years ago, in *Save-A-Patriot Fellowship v. U. S.*, 962 F.Supp. 695 (1996) this 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 through 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 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] *Save-A-Patriot Fellowship, supra*, at. pp. 698-699.

At the same time, this Court recognized the First Amendment implications of the identities of SAPF's members, when, during the hearing of that case, the following exchange took place:

> "THE COURT: Mr. Harp, I don't want to be treading on first amendment rights, so I expect you are going to object if I ask this question the wrong way.
>
> Is there a membership list? I am certainly not entitled to ask, and I don't want to ask who the members are. Is there some way of telling who is a member?
>
> MR. HARP: Your Honor, with all due respect to the Court, I would object to that.
>
> THE COURT: I would rather sustain the objection. Is there some question Mr. Harp that we can ask so I can get an idea of whether there is a membership as compared to some kind of feeling that anybody who agrees with us is a member and they know in

there hearts there is a member [sic]. Could you ask the question that is proper please.

MR. HARP: Your Honor, I suppose that there could be a question asked about the membership agreement.

THE COURT: Why don't you ask the question. I don't want to ask the question and be accused of trying to tread on the first amendment - -"[3]

In the same hearing, the Court also stated "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, which is why we have to be scrupulously careful to honor their first amendment rights."[4]

Plaintiff, on the other hand, claims that the Supreme Court, in *Tiffany Fine Arts Inc. v. U. S.*, 469 U.S. 310 (1985), rejected the argument that the First Amendment protects membership information. However, the question before that court was "whether the Internal Revenue Service (IRS) must comply with the 'John Doe' summons procedures of §7609(f) ... when it serves a summons on a named taxpayer for the dual purpose of investigating both the tax liability of that taxpayer and the tax liabilities of other, unnamed parties." *supra* at p. 311. Thus, the issue in that case was the limits of IRS summons authority, which relates solely to the ascertainment and collection of tax liabilities, and not to other types of investigations (even IRS ones), and most certainly not to this instance, where allegations of conduct in violation of §§ 6700 and 6701 are at issue rather than individuals' tax liabilities.[5]

Further, the court in *Tiffany* declared it was not even giving *carte blanche* to the IRS for summonses: "Our conclusion ... should not be read to imply that the IRS can obtain from [the summoned] party, without complying with §7609(f), information that is relevant only to the investigation of unnamed taxpayers." (*supra*, p. 322) Plaintiff in the instant case is attempting to use the

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[3] Exhibit 1, Transcript of hearing on September 20, 1996 (pp. 46-47).

[4] Exhibit 1, Transcript of hearing on September 20, 1996 (p. 73).

[5] Any investigation by the IRS into these matters has presumably been concluded when the referral was brought to the United States Department of Justice.

discovery process to do what the Supreme Court said they could not do even in summons situations.

Plaintiff also cites *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984) to support their position that once Defendants disclosed any information about a member (presumably through its correspondence on their behalf), it no longer enjoyed any First Amendment protection. However, the *S.E.C.* case dealt only with Fourth Amendment objections to the disclosure of information communicated to a third party, and is therefore inapplicable here.

**<u>Defendants will suffer irreparable harm if stay is not granted</u>**

Plaintiff tries to brush aside Defendants' claims that harm would result from ordering them to provide private personal information about Save-A-Patriot members. As noted *supra*, this court has already recognized the First Amendment implications of such an order. Still, Plaintiff contends that no irreparable harm will come to Defendants because "courts are able to fashion effective relief" for those whose records are improperly obtained by the government. Plaintiff cites *Church of Scientology of California v. United States*, 506 U.S. 9 (1992) as support. The government in that case wanted the church's appeal of a summons order dismissed as moot, which would have allowed the government to retain video-taped conversations between church officials and their attorneys, whether or not the videotapes had been obtained via improperly issued or enforced summons. The court recognized that any remedy they might fashion would not be "fully satisfactory" for the "invasion of privacy" (*supra*, p. 13) that had occurred, it would be enough to prevent the appeal from being dismissed as moot:

> "Even though it is now too late to prevent, or to provide a fully satisfactory remedy for, the invasion of privacy that occurred when the IRS obtained the information on the tapes, a court does have power to effectuate a partial remedy by ordering the Government to destroy or return any and all copies it may have in its possession. The availability of this possible remedy is sufficient to prevent this case from being moot." *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992).

Thus, rather than showing that no irreparable harm would result from improperly forcing

Defendants to turn over member information, this case actually acknowledges that the harm in such a situation is indeed irreparable, in that only a "partial remedy" could be effectuated. Moreover, unlike the instant case, *Church of Scientology* dealt with a situation in which it was too late to prevent the harm, and so could only "fashion *some* form of meaningful relief in [such] circumstances." (*supra*, p. 12) Plaintiff, however, wants this court to inflict the harm now, since in theory, it could provide partial relief later.[6]

Apparently, the courts in the unpublished cases *United States v. The Diversified Group, Inc.*, 2002 WL 31812701 (S.D.N.Y.) and *United States v. Telephone and Data Systems, Inc.*, 2002 WL 31367952 (W.D.Wis.) were willing to go that route. In both of these cases, the courts relied on the Supreme Court's statement, in *Church of Scientology, supra,* that it could "fashion *some* form of meaningful relief" (emphasis in original) as justification to deny an injunction of a summons enforcement order, on the basis that the harm would therefore not be irreparable.[7] Again, these cases relate to summons enforcement, as discussed *supra*. Moreover, the ability of the courts to provide a partial, or even a "fully satisfactory remedy" later, should not be the test. It would be an affront to the First Amendment right to free association if only one person failed to join a "politically incorrect" organization such as SAPF because of the knowledge of the government's possession, even if only for an instant, of a membership list.

[6] Of course, even if the court has the power to order a return of the information given at some future date, it cannot withdraw all the information which may be retained by Department of Justice, and it cannot know or meaningfully prohibit the use or abuse of such information.
[7] In the *Diversified Group* case, even though the District Court did not grant the stay pending appeal, it did grant a stay long enough for the Respondent to request a stay from the Circuit court, thereby mitigating its own denial.

## **"Imminent harm" to Defendants**

On page four of its response to Defendants' Motion for Stay, Plaintiff states:

> "Secondly, in cases involving an "injunction, a principle element of which is a finding of irreparable harm that is *imminent,* it is logically inconsistent, and in fact a fatal flaw, to subsequently find no irreparable nor even serious harm to the [p]laintiff" if the stay is granted." [emphasis added]

For support, Plaintiff cites *Rodriguez v. DeBuono*, 175 F.3d 227, 235 (App. 2nd Cir. 1998). However, *Rodriguez* involved a suit for a temporary injunction, pending appeal, of an injunction already issued, and so is not applicable here. The "logically inconsistent" quote[8] refers to the absurdity that would result from an initial finding that an injunction is necessary to prevent imminent harm, and then staying that same injunction. Building upon this unsuited foundation, the United States attempts to equate its *allegations* of irreparable harm to itself with an actual finding that such irreparable harm has occurred. Nonetheless, the finding of harm to the United States has yet to be adjudicated, and is the subject of the suit at hand. It is perhaps worthwhile to note here that the Complaint filed by the United States seeks a list of the SAPF members, both associate and full, as part of the relief prayed for.[9] It now appears that a request for *relief* has metamorphosed into a request for *discovery,* with the United States coming full circle — now claiming that if its request is not *discovered,* the United States will suffer imminent harm.

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[8] The quote continues at *Rodriguez, supra,* p. 235: "For purposes of preliminary injunctions, the irreparability of harm may not be casually suspended pending appeal: the harm must be so imminent as to be irreparable if a court waits until the end of trial to resolve the harm. *See* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* §2948.1, at 144-49 (2d ed. 1995) ("Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief.")(footnote omitted).

[9] Plaintiff's Complaint for Permanent Injunction, p. 12.

Nevertheless, imminence of harm is indeed a factor in deciding the motion to stay. Our own Fourth Circuit has addressed this element in *Scotts Co. v. United Industries Corp.*, 315 F.3d 264 (App. 4th Cir. 2002):

> "As previously discussed, the critical issue in a preliminary injunction case involves the balancing of the harms likely to be suffered by the parties. If the plaintiff has made a strong showing that it will suffer irreparable harm if the injunction is denied, the court must balance the likelihood of that harm against the likelihood of harm that would be suffered by the defendant. The plaintiff must make a clear showing of irreparable harm ···, and the *required irreparable harm must be neither remote nor speculative, but actual and imminent. Direx*, 952 F.2d at 812 (internal quotation marks omitted)." *Scotts Co., supra,* at p. 283. [emphasis added]

The Supreme Court has recognized, and it is well-settled, that harm results from disclosure of membership information of membership organizations:

> "Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of the petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 462, (1958).

This is especially so in this case, where Plaintiff has already admitted in its motion to compel that it wants the membership list to "investigate … the extent to which the members have evaded federal tax, and, once a permanent injunction has been entered, monitoring defendants' compliance with it."[10] This admitted motive has nothing to do with the claims advanced in the pending lawsuit, and is precisely the thing that would justify a member's fear "of exposure of their beliefs shown through their associations and of the consequences of this exposure," as set forth by the Supreme Court above.

**"Imminent harm" to Plaintiff**

Plaintiff first claims that its interests overlap the interests of the public "with regard to tax cases." However, as the cases Plaintiff cites for support show, the type of tax cases where substantial overlap is said to exist are those dealing with the assessment and/or collection of tax liabilities.

> "There is substantial overlap between the injury to the IRS and the harm to the public interest .... 'The public has interests in the correct ascertainment of tax liabilities and the speedy resolution of controversies....' *United States v. Sweet,* No. 79-940, 1980 WL 1507, at *3 (M.D.Fl. Jan. 28, 1980); *see also Bob Jones Univ. v. Simon,* 416 U.S. 725, 736, 94 S.Ct. 2038, 40 L.Ed.2d 496 (1974) (describing the government's "need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference"). The summonses at issue were served over seven months ago. If the Court were to grant an open-ended stay at this point would further protract what is suppose to be a summary proceeding. *See United States v. White, 853 F.2d 107, 111 (2d Cir.1988).* A stay would also subject the petitioner to the risk of "loss of records or the dimming of memories." *United States v. Clark,* No 79-190-G, 1980 WL 1502, at *1 (M.D.N.C. Feb.6, 1980). As such, the Court finds that there is potential harm to the interests of both petitioner and the public if a stay is issued." *Diversified Group*, supra, at *2.

However, the instant case deals neither with the ascertainment nor collection of tax liabilities. Thus, the public's interest in those issues is not present here. Rather, the public's interest more closely aligns with Defendants in this case—that is, an interest in preserving their Constitutional freedoms.

Further, Plaintiff's inference, in citing the *Clark* case, that a stay would subject them to the risk of loss of records or the dimming of memories is disingenuous. The stay requested by Defendants is only while their objection to the magistrate's order is pending. When the decision was made in the Clark case, it had already been two years since the issuance of the IRS summonses at issue, whereas here it has been only a few weeks since the discovery order was issued.

Plaintiff then cites three reasons why it will suffer harm if this court stays the discovery order until resolution of Defendants' objections to it. First, they claim that Defendants' "continued refusal to cooperate in discovery frustrates the preparation of the United States' case which impacts 'the public['s]

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[10] Plaintiff's Motion to Compel Defendants' Discovery Responses, p. 5.

interests in the correct ascertainment of tax liabilities and the speedy resolution of [this] controversy." As already noted above, this case does not impact the public's interest in the ascertainment of tax liabilities. And as also noted above, Plaintiff admitted that it wanted the membership information to conduct investigations of non-parties, and to monitor compliance with an injunction that has not been granted. Defendants' actions with respect to discovery are not the cause of Plaintiff's frustration. Rather, Plaintiff's case-preparation frustration is a result of the overly broad accusations in its complaint, sans factual allegations, or indeed, any evidence whatsoever, to support them, and its expectation of conducting a fishing expedition in an attempt to discover some evidence.

Plaintiff's second reason is that it "alleges an ongoing harm resulting from defendants' activities," and claims that it is "logically inconsistent ... to find no irreparable nor even serious harm" to them. However, as already noted above, that inconsistency only applies in a circumstance where an injunction is requested to stay the effects of an injunction already granted. In this case, Plaintiff has merely requested an injunction, and as noted *supra*, claims of harm have yet to be adjudicated. Therefore, there is no fatal flaw in finding that Plaintiff is not harmed by a short stay now, even if it were to ultimately prevail in obtaining an injunction when the merits of its claims are finally considered.

For its third reason, Plaintiff claims "throughout their motion defendants assert that continued noncompliance with the tax laws maintains the *status quo*." Defendants said no such thing anywhere in their motion. Rather, Defendants pointed out that enforcing compliance with the tax laws has virtually no time constraints and the IRS has all the power Congress deems appropriate to accomplish it. Thus, if the magistrate's order to compel discovery is stayed, or even eventually reversed, imminent or irreparable harm would not be suffered by Plaintiff.

Plaintiff then redefines "*status quo*" to mean *"continued compliance"* in a way that has nothing to do with reality. *Black's Law Dictionary* (6th Edition) see it this way: "*Status quo*. The existing state of things at any given date." Thus, even if Plaintiff were correct in referring to the civil injunction suit at hand as a "tax case," whatever that means, there is no universal "*status quo* in tax cases." *Status quo*, in any type of case, depends wholly on the *actual state* of things at some point in time.

The court in *Blackwelder, supra,* addressed the matter of maintaining the *status quo*, with respect to irreparable harm.

> "The balance-of-hardship test correctly emphasizes that, where serious issues are before the court, it is a sound idea to maintain the *status quo ante litem*, provided that it can be done without imposing too excessive an interim burden upon the defendant, *Munoz v. Porto Rico Light & Power Co.*, 83 F.2d 262, 269 (1st Cir. 1936); *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948); *Pratt v. Stout*, 85 F.2d 172, 177 (8th Cir. 1936); *Sinclair Refining Co. v. Midland Oil Co.*, supra, 55 F.2d at 45 (citing *Blount v. Societe Anonyme Du Filtre*, 53 F. 98, 101 (6th Cir. 1892)), for otherwise effective relief may become impossible.
>
> The controlling reason for the existence of the judicial power to issue a temporary injunction is that *the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated.*" *Blackwelder*, *supra,* p. 194-195. [Emphasis added]

The *status quo ante litem* in the instant case is the state of things at the time the motion for stay was filed. At that time: (1) Plaintiff wanted, but had not yet been provided with, all manner of information and documents spelled out in its discovery requests, and as ordered by Magistrate Bredar; (2) Defendants had filed an objection to Magistrate Bredar's order, and had not yet provided the information and documents sought by Plaintiff. That is the *status quo* that should be preserved until Defendants' objection to the magistrate's order is decided by this court.

Finally, Plaintiff asserts "defendants have not appealed (and cannot at this stage appeal) the order granting the discovery." Of course, Defendants have not appealed this matter to the Fourth Circuit, as

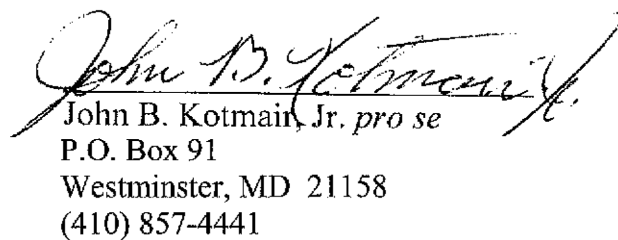
the appropriate path for the objection is here in this court. In that sense, Defendants filed their motion for stay at the same time as they filed their objection to the discovery order.

Plaintiff also asserts that Defendants' motion for stay was only directed to certain of the interrogatories and requests for production, but Defendants' motion clearly requests a stay of the magistrate's entire order. Defendants' objection to the magistrate's order, the resolution of which underlies this request for stay, also clearly addresses all of the interrogatories and requests for production. Therefore, the stay should apply to the entire order.

## CONCLUSION

As the court in *Blackwelder* distinguished, it is the balance between the likelihood of irreparable harm to Defendants in this case, as opposed to the likely harm to Plaintiff, that is the most important factor in whether the stay should issue. For the reasons given herein, and a previous showing that Defendants are likely to suffer irreparable harm, while Plaintiff is likely not to be harmed at all, Defendants pray this court grant the stay of the order compelling compliance with the discovery requests of the Plaintiff, during the pendency of the Defendants' objection of said order.

Respectfully submitted on this 13th day of June, 2006.



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**CERTIFICATE**

The undersigned hereby certifies that a printed copy of the foregoing "Defendants' Reply Brief — Motion for Stay Pending Determination By District Judge of Objection to Order of Magistrate Judge" 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 June, 2006.

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MARYLAND
3 SAVE-A-PATRIOT FELLOWSHIP *
4 Plaintiff *
5 *
6 vs. * MJG 95-935
7 USA *
8 Defendants *
9
10 + + + + + + + +
11 Hearing was held in the above referenced case
12 on September 20, 1996 before the Honorable Marvin J.
13 Garbis.
14
15 A P P E A R A N C E S
16 For the Plaintiffs:
17 George Harp, Esquire
18
19 For the Government:
20 Gregory Hrebiniak, Esquire
21
22 Reported by:
23 Barbara J. Shaulis,
24 Official Court Reporter
25

1 being wrong, and that all the members thought that he
2 was being wrong, what is the nature of what would
3 happen as you understand it?
4 THE WITNESS: The people would probably
5 disassociate themselves from us, and I certainly would
6 too.
7 THE COURT: Well, and what is your
8 understanding of what should happen to the computers
9 or other assets if that occurred? What should happen
10 to this coin collection if the fellowship splintered?
11 THE WITNESS: It would probably kind of be in
12 Limbo unless someone, we don't really have a
13 replacement for Mr. Kotmair. Maybe one would emerge
14 but as of now we don't have anyone, so I really don't
15 know what would happen.
16 THE COURT: Mr. Harp, I don't want to be
17 treading on first amendment rights, so I expect you
18 are going to object if I ask this question the wrong
19 way.
20 Is there a membership list? I am certainly
21 not entitled to ask, and I don't want to ask who the
22 members are. Is there some way of telling who is a
23 member.
24 MR. HARP: Your Honor, with all due respect
25 to the Court, I would object to that.

1 and why it was returned.
2 MR. HARP: Your Honor, I will suggest --
3 THE COURT: No, first of all, as I understand
4 it, now six thousand square feet for this operation,
5 and we have to remember, we are dealing where an
6 organization that has expressed views, views that are
7 unpopular with federal law enforcement and that is the
8 nature of this organization, which is why we have to
9 be scrupulously careful to honor their first amendment
10 rights. Nobody is trying to jump on those, but there
11 is obviously something going on there that is
12 proselytizing the views of Mr. Kotmair and his
13 compatriots, and anybody -- unless they are violating
14 some law, nobody wants to interfere with their rights
15 to sell their ideas, correct, so you can't deny they
16 are actually doing some first amendment activity.
17 MR. HREBINIAK: No, you cannot.
18 THE COURT: And therefore that there has to
19 be in fairness, some assets that are devoted to that.
20 To that because so to speak, now, whether that is Mr.
21 Kotmair himself or this fellowship as an
22 unincorporated association, is in debate.
23 MR. HREBINIAK: Or maybe Your Honor hit the
24 distinction there. That certainly any assets devoted
25 to that, like the computers and whatever, but

1 THE COURT: I would rather sustain the
2 objection. Is there some question Mr. Harp that we
3 can ask so I can get an idea of whether there is a
4 membership as compared to some kind of feeling that
5 anybody who agrees with us is a member and they know
6 in there hearts there is a member. Could you ask the
7 question that is proper please.
8 MR. HARP: Your Honor, I suppose that there
9 could be a question asked about the membership
10 agreement.
11 THE COURT: Why don't you ask the question.
12 I don't want to ask the question and be accused of
13 trying to tread on the first amendment --
14 BY MR. HARP:
15 Q Mr. Erchak, was there a membership agreement with
16 the fellowship that you signed when you joined?
17 A They have membership agreements, that is the
18 purpose of it.
19 THE COURT: Are they available or in
20 evidence? Did we have them described at least.
21 MR. HARP: Your Honor, I don't have one here
22 with me. It may be -- I don't recall whether there is
23 one in evidence in this lawsuit or not.
24 THE COURT: I don't think there is.
25 MR. HARP: It seems like maybe in some other

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7 CERTIFICATE
8
9 I, Barbara J. Shaulis, Official Reporter for
10 the United States District Court for the District of
11 Maryland, appointed pursuant to the provisions of
12 Title 28, United States Code, Section 753, do hereby
13 certify that the foregoing is a true and accurate
14 transcript of the proceedings made in the
15 aforementioned and numbered case on the date
16 hereinbefore set forth, and I do further certify that
17 the foregoing transcript has been prepared by me or
18 under my supervision.
19 Barbara J. Shaulis
20 Barbara J. Shaulis
21 Court Reporter 11-9-96
22
23
24
25