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' MOTION FOR STAY PENDING APPEAL

Defendants Save-A-Patriot Fellowship and John Baptist Kotmair, Jr., for the reasons set forth in the attached memorandum, move this Court to stay its permanent injunction order pending the resolution of Defendants' appeal of that order to the United States Fourth Circuit Court of Appeals.

Respectfully submitted on this 14th day of February, 2007.

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CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Defendants' Motion for Stay Pending Appeal" 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 14th day of February, 2007.

/s/ George E. Harp
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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR STAY PENDING APPEAL

NOW INTO COURT, come Defendants SAVE-A-PATRIOT FELLOWSHIP, through undersigned counsel, and John Baptist Kotmair Jr., *pro se*, and furnish the following in support of their application for a stay of this Court's final decisions and orders filed November 29, 2006 and February 7, 2007.

Defendants intend to appeal this Court's orders of November 29, 2006, and February 7, 2007, and therefore bring this motion pursuant to Federal Rules of Civil Procedure 62(c) and Federal Rules of Appellate Procedure 8(a). FRCP 62(c) states, in relevant part, that "the Court in its discretion may suspend ... an injunction during the pendency of the appeal upon such terms ... as it considers proper for the security of the rights of the adverse party." FRAP 8(a) states that "A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal; ... ." These rules give this Court the authority to stay its injunction order, pending Defendants' appeal.

Standard for stay pending appeal

The issuance of stay pending appeal lies within the discretion of the court. *Connecticut Hosp. Ass'n v. O'Neill*, 863 F.Supp. 59 (D.Conn 1994), at p. 61. See also *Halderman v. Pennhurst State School and Hospital*, 451 F.Supp. 233 (E.D.Pa.,1978), *Philadelphia Council of Neighborhood Organizations v. Adams*, 451 F.Supp. 114 (D.C.Pa.,1978).

The factors regulating a decision to stay a civil order pending appeal are (1) whether applicant has made strong showing that he is likely to succeed on the merits, (2) whether applicant will be irreparably injured absent a stay, (3) whether issuance of stay will substantially injure other parties interested in the proceeding, and (4) where public interest lies. *Hilton v. Braunskill*, 481 U.S. 770 (1987). See also *Long v. Robinson*, 432 F.2d 977 (App. 4th Cir., 1970).

Defendant SAPF substantially meets these four criteria, so as to warrant a stay pending appeal, as shown further hereinafter. Moreover, granting a stay of this court's injunction order pending appeal would serve the appropriate purpose of preserving, not changing, the status quo. See *U. S. v. Michigan*, 505 F.Supp. 467 (W.D.Mich. 1980), at p. 471.

ARGUMENT

Circumstances identical to previous grant of stay

This Court already deemed the issuance of a stay warranted, pending the resolution of Defendants' motions for a new trial and for the modification of the injunction order. Since those motions have now been denied and the stay consequently lifted, circumstances are once again identical to those existing on December 14, 2006, when Defendants' first requested the stay granted by this Court. Therefore, the same issues are involved.

In granting the stay of its injunction order on December 19, 2006, this Court recognized that the immediate harm to Defendants from the force of the injunction was in fact greater than any additional harm caused the government: "In the meantime, it seems prudent to grant Defendants' request for a stay.

While the harm to the government caused by Defendants' activities is not unsubstantial, the additional harm caused by a brief delay in the enforcement of the injunction is less than the potential immediate harm to Defendants once the injunction is in force." Since the circumstances remain the same, a stay is again warranted, pending the appeal of this case to the Fourth Circuit.

Irreparable harm to Defendants

The "potential immediate harm" which this Court recognized would occur once the injunction was in effect is no longer a potential harm, but an actual, imminent harm. Without a stay, this immediate harm will be irreparable on many levels.

First, Defendants are under the steady threat of significant injury from probable inadvertent violations of the vague elements of this Court's order. This threat was identified in Defendants' motion for stay of December 14, 2006.[1] The Court acknowledged this probable injury in its grant of that stay, stating with regard to the motion for modification of the injunction order that "This ... 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."

With its order of February 7, 2007,[2] however, the Court made an about-face and declared that Defendants need no such assistance because their "confusion" is "self-induced,"[3] and that the "injunction issued by the Court is similar to that of injunctions issued and upheld by other Courts."[4] Notwithstanding the Court's opinions that the confusion is "self-induced" on the part of Defendant Kotmair and that the order is "similar" to other injunctions, it is still the sworn testimony of Defendant

[1] Docket 73.
[2] Docket 74.
[3] Docket 74, p. 2.
[4] Docket 74, p. 1.

Kotmair that he does not understand the vague order,[5] and the injunction order, as it stands, is still impermissibly broad and fails the requirements of FRCP 65(d) that an injunction "*shall* set forth the reasons for its issuance; *shall* be specific in terms; *shall* describe in reasonable detail ... the act or acts sought to be restrained." Moreover, nothing in evidence indicates that the members of Save-A-Patriot Fellowship can be expected to understand the injunction order any better than Defendant Kotmair.

As the Supreme Court in *International Longshoremen's Association, Local 1291 v. Philadelphia Marine Trade Association*, 389 U.S. 64, 76 (1967) said:

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid."

Since modification of the order has been denied by this Court, this imminent exposure to prosecution for contempt to Defendant Kotmair and other members of the Fellowship remains. Defendants are in the unenviable position of having to make assumptions as to what is prohibited, and what is not, and they could be subject to criminal contempt if they, even in good faith, guess incorrectly as to what is forbidden.

Irreparable harm from prior restraint on speech

The speech contained in Defendants' materials and publications is protected by the First Amendment, yet this Court enjoined Defendants from selling or distributing any newsletters, books, manuals, videotapes, audiotapes, or other material containing "false commercial speech regarding the internal revenue laws or speech likely to aid or abet others in violating the internal revenue code." This Court stated that "[b]ecause much of the speech ... relates to the sale of SAPF products and services, it

[5] For example, Kotmair testified that "Since I am unable to determine with any certainty what specific acts, speech, and portions of any communication materials are prohibited by the Order, or mandated to be removed by the Order, I do not know what acts, speech, or specific literature or audio/visual materials sold or distributed would place me in danger of contempt." See Docket 72, Exhibit 1, ¶ 10.

is commercial speech."[6] The Court did not (a) elucidate the nature or extent of the relationship necessary between speech and the sale of products or services which turns protected speech into unprotected fraudulent commercial speech, and (b) did not find with particularity *any* of Defendants' speech a proximate cause of "violations" of the Internal Revenue Code, nor did it identify any specific sections of the code it found had been violated.

As a First Amendment organization, Save-A-Patriot has the right to advocate opinions about the tax laws, but the injunction blurs the distinction between political and "commercial" speech by ignoring the Supreme Court's definition of that term in *Valentine v. Chrestensen*,[7] and instead implies that any speech with even a tenuous tie to some commercial activity can be prohibited as "false commercial speech." Further, this Court did not modify its injunction order so that Defendants can understand precisely which speech is enjoined. Together, this leaves Defendants in a precarious and untenable position — having to guess what opinions about the tax laws it can or cannot advocate, which newsletters can be sent to members, or which books, videotapes and audiotapes can be sold. This disability to know which particular statements can or can't be said in books, newsletters, videos, etc., restrains SAPF from advocating politically and communicating its message, both to its members and to potential members. Thus, the injunction prevents SAPF from communicating its political message to nonmembers in order to persuade them to join the Fellowship and its education outreach. This prior restraint on SAPF's ability to persuade others to join the Fellowship affects the rights of both SAPF and the public immediately, and the loss of potential members will be irreparable. Further, it is a denial of the First Amendment rights of the public, in that it forbids them access to dissenting political views, and denies them the opportunity to join a political association, because they are denied the opportunity to

[6] Docket 68, p. 19.
[7] "We are equally clear that the Constitution imposes no such restraint on government as respects *purely* commercial advertising." [emphasis added] *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

hear about it, or even what it advocates.

Immediate harm from prior restraint on "receiving payment"

Again, since modification of the order has been denied by this Court, imminent exposure to prosecution for contempt remains. Since the injunction order still states that Defendants are enjoined from "promoting, marketing, organizing, selling, or receiving payment for any plan or arrangement ... ," there is no certainty that the government may not deem even the solicitation of donations as "promoting" or "receiving payment" with respect to this order. If the order is not stayed, its very vagueness is likely to encourage the government to attack Defendants with such frivolous and unfounded contempt charges, in order to harass Defendants and interfere with their right to due process in pursuing an appeal. This represents an immediate, substantial risk to Defendants.

Immediate harm from prior restraint on the right to petition

As the record shows, correspondence sent to the IRS on behalf of Fellowship members is the result of IRS notices having been sent to those members in the first instance. Surely, all persons have the right to answer IRS-generated notices in whatever way they deem to be in their best interests, and the First Amendment guarantees their right to petition government for redress. The rights of persons to respond to notices or to petition government cannot be diminished merely because they enlist the assistance of the Fellowship in addressing those notices, or because the government doesn't approve of the issues they raise. Yet these rights are immediately infringed upon by the Court's injunction order.

Immediate harm from prior restraint on donating to others

Persons joining Save-A-Patriot Fellowship agree to contribute to other members to help "restore the lives of fellow members who have been hurt when their property is lost or stolen due to *illegal* action by various IRS employees."[8] Members who join the Patriot Defense Fellowship also agree to contribute

[8] Docket 43, Exhibit 1A, Member Handbook, p. 5 (emphasis added).

to each other's legal defense in court. Members themselves make these payments directly to other members.

Naturally, if a person loses property and is in hardship, his family and friends will come to his rescue and charitably contribute, perhaps to keep him from being thrown out of his home, or to provide for the necessities of life. Even in the instance of a convicted felon, no one would suggest that aiding his or her family is not a fundamental right; organizations exist which specifically aid such families when a spouse is in prison.[9] In short, the ability to offer charity and assistance to others in need, or to pledge to do so, is a fundamental right, guaranteed by the Ninth Amendment. The damage to this fundamental right is substantial and sets a dangerous precedent: the injunction order, as it stands, now discriminates between ordinary citizens and citizens who happen to be members of Save-A-Patriot Fellowship. Thus, if a Fellowship member cannot donate to fellow members, who is to say that a church, for example, could not be prohibited from donating to a member family in need?

Immediate harm from surrendering members' personal information

The permanent injunction order requires that Defendants turn over SAPF's membership list, notwithstanding the fact that SAPF is a political organization. However, ordering SAPF to turn over its membership list would, at the very least, permanently and irreparably damage the existence of the Fellowship. As discussed extensively in Defendants' motion to stay of December 14, 2006,[10] courts have long recognized that to order a political organization to turn over its membership list is irreparable injury to the members' rights. See *National Association for Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 459 (1958), *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

The harm resulting from the chilling effect of the government's obtaining this confidential

[9] Prison Fellowship is one such organization; it solicits and gives presents to children of incarcerated parents who sign up for a program called "Angel Tree." See www.angeltree.org/site_hmpg.asp

[10] Docket 73, pp. 3-4.

information, once begun, is non-compensable in terms of money damages, and can never be repaired. People will forever afterwards be leery of associating with the Fellowship, for fear that such association will expose them to increased government scrutiny and harassment.

Any prior restraint, or other deprivation of the rights to political association and free speech protected by the First Amendment, or of any other fundamental right protected by the Ninth Amendment, is injurious to Defendants, to Fellowship members, and to the public generally. With regard to the granting of injunctions in cases involving such alleged deprivations of Constitutional rights, the court stated in *Mitchell v. Cuomo*, 748 F.2d 804 (App. 2nd Cir., 1984), at p. 806:

> "When an alleged deprivation of a constitutional right is involved, most courts hold that *no further showing of irreparable injury* is necessary." 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973). See *Ambrose v. Malcolm,* 414 F.Supp. 485, 493 (S.D.N.Y.1976) (eighth amendment); *Lollis v. New York State Department of Social Services*, 322 F.Supp. 473, 483 (S.D.N.Y.1970)." [emphasis added]

No harm to Plaintiff

As Defendants stated in their motion for stay of December 14, 2006, the alleged harm to the Plaintiff is speculative. To establish standing for injunctive relief, a plaintiff must demonstrate that the threat of injury is in fact real and immediate, *not* merely conjectural or hypothetical. See *Gillespie v. Dimensions Health Corp.*, 369 F.Supp.2d 636 (D.Md.,2005); *Levy v. Mote*, 104 F.Supp.2d 538, (D.Md.,2000); *Shotz v. Cates,* 256 F.3d 1077, (App. 11th Cir., 2001), *Orantes-Hernandez v. Thornburgh,* 919 F.2d 549 (App. 9th Cir, 1990). As Defendants previously noted, Plaintiff established no factual support for any immediate injury to it.

For example, this Court demanded Defendant SAPF provide the government with a list of its members, reasoning that "this information is needed because of the possibility that many do not file tax returns." However, the mere "possibility" that some members do not file is no demonstration of real or immediate injury. Further, such conjecture furnishes no grounds to abrogate the fundamental rights to

free speech, association, and due process of all SAPF members. Indeed, Congress has invested the government with all the powers it deems necessary to accomplish the duty of discovering, assessing, and collecting tax liabilities, even in cases where required returns have not been filed. Said powers are wholly adequate for those purposes, and the government cannot say it is injured when it has such powerful tools in hand, not only to collect taxes, but to add punitive penalties and interest, and to lien, seize and levy property.

The Court also refers to "the matter of unpaid or underpaid income taxes by SAPF adherents" as an element of harm to Plaintiff, yet the record does not support a finding, either that "SAPF adherents" have underpaid any income taxes, or that, even if any have, there is any factual basis that any action by Defendants was the proximate cause of such underpayment.

The Court also asserts that the government is sustaining irreparable harm, in part, "in the form of expenditures of time and money to respond to Defendants' frivolous filings."[11] Since SAPF does not assist anyone in filing returns, the Court is apparently mistakenly referring to the 846 *response letters to IRS notices* — identified by Plaintiff as having been sent by Defendants — as *filings*. Since such letters are primarily responses to IRS assessment and collection notices, the expenditure of time and money to assess and collect has already been spent by the IRS *before* an SAPF member responds to the IRS, and there has been no factual basis shown that any of Defendants' actions were the proximate cause of any expenditure related to "frivolous filings."

Nevertheless, any costs associated with opening and processing some 800 response letters over a year and a half cannot constitute substantial or immediate harm to the government, much less "irreparable" harm. This was confirmed by Gary Metcalfe, the revenue officer in charge of the

[11] Docket 68, p. 18.

investigation. In reply to a question as to whether or not SAPF letters impeded the IRS, Metcalfe said, "No, because they are disregarded."[12]

The costs of corresponding with the public, and of handling calls and letters, is routine for the IRS. Indeed, the IRS sends hundreds of thousands of notices every day. In March of 2000, the GAO informed the Senate Committee on Ways and Means that in the year 1998, the IRS "sent over 80 million notices to individual taxpayers about various enforcement actions, such as audits or demands for payments of past due tax debts." In that same year, the IRS received at least 20 million calls from taxpayers.[13] Compare this immense activity to the 846 response letters identified by Plaintiff as having been opened and "disregarded" over a period of a year and a half, and it will become readily apparent that any costs related to processing letters sent by SAPF are microscopic by comparison.

This lack of evidence of harm — with regard to the claim that the IRS is *possibly* harmed by SAPF members who don't file, and the claim that the IRS is harmed by a miniscule number of response letters — should not only be a decisive factor in granting the brief delay of a stay pending appeal, but is a strong decisive factor in deciding the relative success upon the merits, since a demonstration of such harm is also a necessary element of granting an injunction under IRC § 7402.[14]

Taken together, the balance of irreparable harm to Defendants and the public far outweigh the harm to the Plaintiffs, especially in the short-term incidence of the stay requested herein. This being the case, the other factors generally considered in connection with a request for a stay should be given little weight. Nevertheless, each of those factors will also be addressed in turn.

Harm to the public interest

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[12] Docket 71, Exhibit 1, p. 76:7–8.
[13] GAO/GGD-00-54, *"Tax Administration: Tracking Taxpayer Information About IRS Notices Could Reduce Burden,"* March 2000.
[14] This necessary element was acknowledged by this Court in its memorandum supporting the injunction order, Docket 68, p. 18.

As for the protection of the public's interest, it should be noted that the public has considerable interest in the preservation of their rights and liberties, as guaranteed by the Bill of Rights of the United States Constitution. Every time a court expands an exception to the right of free speech, it is implementing that exact amount of further deprivation thereof. If the freedom to associate with others can be abridged for Save-A-Patriot Fellowship members, on the possibility that someone else in the association *may* have violated some law, that same right of the rest of the public can (and eventually, will) likewise be impaired.

Yet, despite the public's obvious interest in the protection of their rights, the Court acknowledges only the public's interest in "prohibiting the promotion and sale of products that aid some in avoiding lawful income taxes." Weighed in the balance, though, it is clear that their interest in the former outweighs any interest they might have in the latter. In other words, the interests of the public are most closely aligned with Defendants in this case, and so this factor also favors the granting of the stay pending appeal.

Success on the merits

Since "the possibility of irreparable harm favors issuance of the stay and harm to third parties seems minimal, the showing [of success on the merits] which movant must make will not be as rigorous." *Dawecki Berylco Industries, Inc. v. Fansteel, Inc.*, 517 F.Supp. 539, 540 (E.D.Pa. 1981). Further, according to the court in *Hayes v. City University of New York*:

> "In the postjudgment context, the opportunity to influence the court is necessarily more limited; because the judge has ruled, only the side with which he agreed is able to argue persuasively that it is more likely than the other side to succeed on appeal. This difference in contexts suggests that the party seeking a stay pending appeal should be required to show only that its arguments raise a substantial possibility, although less than a likelihood, of success; the greater that possibility, the more justifiable is issuance of a stay. Cf. *Evans v. Buchanan*, 435 F.Supp. 832, 843-44 (D.Del.1977); *Stop H-3 Association v. Volpe*, 353 F.Supp. 14, 16 (D.Haw.1972)." *Hayes v. City University of New York*, 503 F.Supp. 946 (D.C.N.Y., 1980), at p. 963.

There are three factors which lend themselves to the substantial possibility of Defendants' success on the merits of its appeal: (1) the manifest fundamental errors present throughout this Court's findings and orders, (2) the Court's reliance on precedents inapplicable to the instant case, and (3) the serious legal questions raised.

Manifest fundamental error

This Court's finding of fraud in the absence of any evidence (or even any particularized allegations of it, as required by FRCP Rule 9(b)) to support such a finding is error. Further, as Defendants already submitted in their motion for a new trial, [15] improper findings of facts have been made in this case — numerous findings of this court are unsupported, and even contradicted, by the evidence in the record. These unsupported findings are, *inter alia*: a finding of fraud, a finding that statements are false with respect to the prohibition of IRC § 6700, a finding that "much" of Defendants speech is "commercial speech," a finding that SAPF represents that its products and services "will enable members to legally stop paying income taxes on their 'U.S.-source income," a finding that the IRS has "lost revenue from SAPF customers," and a finding that Defendant Kotmair misrepresented his authority to represent others before the IRS. Further, the court enjoined Defendants from activities for which it made no findings at all: from participating in the Member Assistance Program without any evidence that anyone has ever been incited to violate the law by it, and without making a finding that the Membership Assistance Program violates any law; and from assisting anyone to prepare court filings without any evidence of such filings before the Court, and without any finding whatsoever. Findings of fact without evidentiary support is error in and of itself.

This Court also made findings based on inadmissible exhibits, including a finding of irreparable harm to the IRS from "expenditures" to respond to SAPF letters. The Court further allowed Plaintiff to

[15] Docket 71.

improperly raise new allegations by affidavit rather than amend the complaint, and later ruled on these allegations in favor of Plaintiff. This error was severely prejudicial to Defendants, in that Defendants were denied the opportunities to frame responsive pleadings or to conduct discovery regarding these allegations. These improperly introduced allegations involved, *inter alia*: Defendant Kotmair's representative status before the Internal Revenue Service, that SAPF promoted "the § 861 argument" and the "U.S.-Source" "tax-fraud scheme(s)," that "Kotmair claims to be a tax law expert," and that Defendants "market a line of tax evasion products and services."

The Court denied Defendants' motion for new trial on the ground that it merely reargues the same issues already raised in their motion for summary judgment. Although many arguments are related, the basis for the arguments in the summary judgment motion was that evidence sufficient to support the complaint's allegations was lacking, while the basis for the new trial was the Court's error in making findings of fact which ignored that lack of evidence, and the disputed issues of fact raised by Defendants.

Insofar as the motion for modification of the order is concerned, the Court ultimately determined no hearing was necessary because "[i]t is doubtful that being told, yet again, that their view of the tax laws is spurious would have any meaningful impact."[16] This is error as well: the purpose behind moving for modification was that the terms of the injunction were not understood by Defendants,[17] and said motion relied not at all on whether Defendants' agree that their views of the tax laws are spurious. The intent of the motion was to get the Court to specifically identify the proscribed speech and acts, so Defendants would have fair warning as to what would put them in jeopardy of contempt. The failure to do so constitutes a continuing injury to Defendants, subjecting them to the real prospect of contempt, unless they refrain from all speech and all activities. The further error manifested by the Court's reliance

[16] Docket 77, p. 2, FN 1.

on *Bell*, *Schiff*, and *Estate Preservation Services* to justify the failure to be specific (as required by FRCP 65(d)) will be addressed *infra*.

Reliance on inapplicable precedent

> "It is inherently difficult for litigants to convince a judge who has not ruled their favor that they are likely to succeed on appeal. *Hayes*, 503 F.Supp. at 963. Objectivity is best obtained from a review of the precedent on which the court relied. *See United States v. Eastern Air Lines, Inc.*, 923 F.2d 241, 244 (2d Cir.1991) (stating that likelihood of success question depends on whether district court applied proper legal principles)." *Connecticut Hosp. Ass'n v. O'Neill*, 863 F.Supp. 59 (D.Conn.,1994), at p. 62.

In its decision of November 29, 2006, the Court relied extensively on the *Bell*, *Schiff*, and *Estate Preservation Services*[18] cases. In denying Defendants' motion for modification, the Court also cited the similarity between its injunction and the injunctions issued in *Bell*, *Schiff*, and *Estate Preservation Services*. Nevertheless, while all cases dealt with IRC § 6700, there are fundamental differences between those cases and the matter of Save-A-Patriot Fellowship.

For example, regarding the specificity required by FRCP Rule 65(d), the injunctions in the cases cited by the Court were in fact more specific than the injunction in the present case. Bell, for example, was prohibited from promoting "the tax shelter, plan, or arrangement known as 'the U.S. Sources argument' (also known as 'the section 861 argument')." In that case, then, the actual tax shelter, plan or arrangement was specifically identified. In *Estate Preservation Services*, the Court also identified the specific shelter, plan or arrangement—"Asset Preservation Trusts" and "Estate Management Trusts"—as well specific statements found to be false and fraudulent.[19] Similarly, in *Schiff*, the order prohibits him from promoting:

> "the positions that (1) persons can legally stop paying taxes or become tax free by using the plan or arrangement; (2) federal income tax is voluntary; (3) there is no law requiring

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[17] See Docket 72, Exhibit 1, Kotmair Declaration.
[18] *United States v. Bell*, 414 F.3d 474 (App. 3rd Cir. 2005); *United States v. Schiff*, 379 F.3d 621 (App. 9th Cir. 2004); and *United States v. Estate Preservation Services*, 202 F.3d 1093 (App. 9th Cir. 2000).
[19] See *U.S. v. Estate Preservation Services*, 38 F.Supp.2d 846, 860 (E.D.Cal., 1998).

> anyone to pay income tax; (4) there is no income tax, only a profits tax; (5) it is legal to report zero income regardless of what you may have earned, or to use false withholding forms; (6) Schiff's personal services as witness or brief writer will be materially helpful in defending criminal prosecution."[20]

There again, unlike here, Schiff is at least given an indication of the positions he is proscribed from advocating. In the present case, no such identification of the exact shelter, plan or arrangement, nor the specific statements determined to be prohibited, is ever made, leaving Defendants to guess at what is being proscribed. It is clear, then, that at least in this respect, the Court did not actually rely upon the precedent set by the injunction orders in those cases, and an appeal regarding the motion for modification of the order is likely to succeed on this ground alone.

As another example, in its memorandum supporting the injunction order of November 29, 2006, the Court relied heavily on the decision in *Estate Preservation Services, infra,* as part of its determination that SAPF has engaged in "commercial speech" that is fraudulent, yet this case involves activities utterly different from those in the instant case, and the principle concerning fraudulent commercial speech set therein is clearly inapplicable here. Estate Preservation Services sold trusts and made various misrepresentations regarding the tax benefits to be obtained through those trusts. The Ninth Circuit, in making its determination, said:

> "The Fifth Circuit has declared: [W]here it has been determined that [a promoter's] *statements regarding the tax benefits of his trust, which constitute commercial speech*, are misleading in the context contemplated by Congress in enacting the statute, and the injunction prohibiting such statements is adequately tailored and construed *to enjoin only such commercial speech* which has been shown to be both misleading and likely to promote illegal activity, such representations are not protected by the First Amendment ... *Buttorff*, 761 F.2d at 1066." *U.S. v. Estate Preservation Services*, 202 F.3d 1093 (App. 9th Cir., 2000), at p. 1106. [emphasis added]

Thus, the determinations turned on the finding that "statements regarding tax benefits of [the] trust" were "commercial speech," and subsequently determined to be misleading. In other words, *Estate*

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[20] See *United States v. Schiff*, 269 F.Supp.2d 1262 (D.Nev. 2003), at p. 1284.

Preservation Services fits squarely into the true scope of IRC § 6700, dealing with actual tax arrangements, the tax benefits of which were misrepresented by its promoters.

Serious legal questions

This is a case of first impression in certain respects, making the argument for a stay pending appeal all the more compelling. For example, there is no case law to support this Court's finding that IRC § 6700 applies to any statements made by Defendants, false or otherwise, since no such statements were identified by the Court which were made in connection with tax benefits claimed to be *derived from participation* in any tax shelter, plan or arrangement. On the other hand, controlling case law dealing with free speech, political speech, and unprotected commercial speech greatly favors Defendants' position, thereby greatly enhancing the likelihood of success on the merits on appeal.

That this case presents serious legal questions cannot be doubted. The First Amendment rights of Defendants Kotmair and SAPF, as well as SAPF members, are under serious attack. Their right to privacy in their associations would be violated by this Court by requiring Defendants to provide a membership list. The justification given is that "this information is needed because of the possibility that many do not file tax returns." And yet, the mere "possibility" of violations of filing requirements cannot justify violation of the rights of ALL members, even if "many" members failed to file. Indeed, the Court's use of the term "many" is an acknowledgment that the right of association of at least *some* members of Save-A-Patriot Fellowship will be violated without reason, other than their membership.

Likewise, there is a serious legal question involved where Defendants' right to freely speak their ideas is curtailed. The Court erred in following the tendency of the lower courts to expand the "false commercial speech" exception to the right of free speech, carved out by the Supreme Court's allowance for the regulation of false advertising. Once the concept of advertisement is removed, all speech eventually becomes fair game for restriction under this exception. The Court further erred in finding that

"Defendants' representations about the tax laws"[21] could possibly constitute "commercial speech." Clearly, any such representations about the tax laws is purely political speech, and not commercial speech.

Another serious legal question in this case is whether activities can be prohibited which do not fall within the jurisdiction under which the present injunction was requested. For example, this Court prohibits Defendants from "preparing or assisting in the preparation of court filings related to the assessment or collection of income taxes on behalf of any other person," yet no law is cited which makes such preparation illegal. The injunction then, purports to prevent Defendants from doing something which the laws of this country allow. Likewise, SAPF members have the right, just like all other persons, to distribute their own property in the form of financial assistance to those in need, regardless of the reason why they are in need. And yet, this Court purports to prevent SAPF members from exercising that right, by claiming that this assistance aids "others to violate the internal revenue laws." Thus, the legality of financial assistance, according to this Court, depends on the reason why the recipient is in need of it. The error is clear when you consider that by that qualification, government-sponsored welfare to families of incarcerated criminals is also illegal.

Defendants are entitled to have each of these serious legal questions decided by the Court of Appeals, and justice requires that this Court maintain the *status quo ante litem* until such time as that appeal can be decided. As the court in *Sweeney v. Bond*, 519 F.Supp. 124 (E.D.Mo.1981), at p. 132, noted:

> "The District of Columbia, the Second and the Ninth Circuits have adopted the approach that an injunction pending appeal is appropriate where serious legal questions are presented and the balance of hardships tips sharply toward the moving party. *Holiday Tours* at 844; *Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973); *Costandi v. Aamco Automatic Transmissions, Inc.*, 456 F.2d 941, 943 (9th Cir. 1972); see *Evans v. Buchanan,* 435 F.Supp. 832, 843-44 (D.Del.1977). These courts have

[21] Docket 68, page 19.

recognized that under Rule 62(c), courts may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained. *Holiday Tours* at 844-45."

Maintaining the status quo

Of course, it is a matter of human nature that any trial judge is reluctant to find that a substantial likelihood exists that he or she will be reversed. As a result, trial courts have issued or stayed injunctions pending appeal where such action was necessary to preserve the *status quo* or where the legal questions were substantial and matters of first impression. See *Mesabi Iron Co. v. Reserve Mining Co.*, 268 F.2d 782, 783 (8th Cir. 1959); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.Cir.1977); *Parks v. "Mr. Ford"*, 386 F.Supp. 1251, 1270 (E.D.Pa.1975).

Naturally, the issuance of the stay requested by Defendants will maintain the *status quo* at the time just prior to the entry of the injunction order. Given the balance of harm discussed herein, and the likelihood of success on the merits, justice demands that such injury to Defendants be postponed at least until Defendants have opportunity to pursue an appeal in the Fourth Circuit.

WHEREFORE, for the reasons stated herein, Defendants prays this Court grant the Stay of its Permanent Injunction order, during the pendency of the Defendants' appeal.

Respectfully submitted on this 14th day of February, 2007.

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CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Memorandum in Support of Defendants' Motion For Stay Pending Appeal" 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 14th day of February, 2007.

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