IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No.: WMN 05 CV 1297**
	)	
JOHN BAPTIST KOTMAIR, et al.,	)	
	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR STAY PENDING APPEAL

On February 14, 2007, Defendants filed another Motion for Stay of the Court's Permanent Injunction Order Pending Appeal[1] and have requested—without citing legal authority—that the Court stay the injunction pending resolution of their appeal to maintain the "*status quo*." This request should be denied because: (1) Defendants have no likelihood of success on the merits; (2) the United States and the public would be irreparably harmed if a stay is granted; and (3) Defendants are not harmed by the injunction because it merely prevents them from breaking the law.

ARGUMENT

Fed. R. Civ. P. 62(c) permits motions to stay proceedings to enforce a judgment or order. In deciding whether to grant a motion for a stay pending appeal, a district court must consider four factors: (1) whether claimant has demonstrated that they are likely to succeed on the merits; (2) whether Defendants will be irreparably injured absent a stay; (3) whether issuance of the stay

[1] Defendants have filed this most recent motion, which is nearly identical to the first motion requesting a stay of the Permanent Injunction Order, only seven days after the previous motion was denied.

will substantially injure the United States; and (4) where the public interest lies.[2] Defendants must prove all four factors are met.[3] Moreover, numerous courts have affirmed the denial of a motion that merely presented previously-made legal arguments or those that could have been raised.[4]

None of Defendants' arguments establish a likelihood that they will succeed on appeal. Defendants first contend that the Court's Permanent Injunction Order is "vague," making them unable to comply. There is nothing vague about the Order or the evidence upon which it is based. The injunction Order explains in detail the proscribed conduct engaged in by Defendants and how that conduct violates various Internal Revenue Code statutes (*e.g.*, §§ 6700 and 6701). The Order states why an injunction is necessary. The Order explains the standards for granting summary judgment and how those standards apply to this case. The Order specifically states what evidence supports the Court's findings, and explains the Court's evidentiary rulings. The specificity requirements set forth in Fed. R. Civ. P. 65(d) are satisfied.

Furthermore, the Order sets forth the terms of the injunction–*i.e.,* what Defendants must do to comply with the injunction and what they are barred from doing. Foremost, Defendants must get out of the fraudulent tax program business. Defendants' conduct in this regard is

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[2] *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977); *Family Foundation, Inc. v. Brown*, 9 F.3d 1075, 1076 (4th Cir. 1993); *United States v. Various Articles of Drug*, 1996 U.S. Dist. LEXIS 22868, at *3-4 (D. Md. Sept. 6, 1996)(noting that the Fourth Circuit requires a "*strong showing*" that the movant will succeed.)

[3] *Blackwelder Furniture Co.*, 550 F.2d 189, 193; *United States v. Tel. & Data Sys., Inc.*, 2002 U.S. Dist. LEXIS 19072, at *3 (W.D. Wis. Aug. 21, 2002).

[4] *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 404 (4th Cir. 1998); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *see also Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001).

described in the Order. They must stop aiding or assisting in the preparation of false or fraudulent documents (such as frivolous letters sent to the IRS on behalf of customers, Statements of Citizenship, or Affidavits of Revocation and Rescission). Defendants must disclose to the United States the identities of those individuals who have purchased their programs and notify those persons of the injunction Order. These mandates are not vague.

The injunction Order also requires Defendants to remove from their website all advertisements for their fraudulent tax programs, and to post a copy of the injunction Order. In addition, Defendants must stop making false statements that encourage people to violate the tax laws (and buy their products), including such statements as: payment of federal income taxes is voluntary; wages, salaries, and commissions on U.S.-source income is not taxable; that the Internal Revenue Code applies only to federal enclaves; and that individuals who revoke their Social Security numbers are not required to file income tax returns.

Also, Defendants must stop engaging in conduct that interferes with the administration and enforcement of the internal revenue laws, and stop instructing others to violate the tax laws, including offering "insurance-like" coverage to customers to violate the income tax laws. They must cease encouraging and assisting persons in disrupting or delaying IRS examinations by providing their IRS protest letters. The injunction Order is not vague and Defendants cannot feign ignorance of its edicts.

The injunction entered in this case is similar to those entered and upheld by other courts in recent years. *E.g.*, *United States v. Gleason*, 432 F.3d 678 (6th Cir. 2005); *United States v. Bell*, 414 F.3d 474 (3rd Cir. 2005); *United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004) (preliminary injunction); *United States v. Raymond*, 228 F.3d 804 (7th Cir. 2000); *United States*

v. Estate Preservation Services, 202 F.3d 1093 (9th Cir. 2000) (preliminary injunction). No grounds exist to clarify the Order. To the extent that they are requesting a stay of the Order on these grounds, Defendants' request should be denied.

Defendants' vagueness argument may be more aptly described as a transparent effort to assert error in the Order when they fail to comply. Those assertions are legally insufficient as a defense to compliance, and have been characterized by the Supreme Court as an "experimentation with disobedience." *United States v. Rylander*, 460 U.S. 752, 756-57 (1983) (*quoting Maggio v. Zeitz*, 333 U.S. 56, 69 (1948)). This would be especially true for SAPF — a represented party — which cannot genuinely claim ignorance of this Court's Order as a defense to compliance.

Defendants also argue that their customer list is protected from disclosure by the First Amendment. Numerous courts have considered whether the customer list of an individual's tax-fraud scheme is protected by the First Amendment. *See e.g.*, *United States v. Bell,* 414 F.3d 474, 475 (3d Cir. 2005).[5] None of the cases presenting these arguments have been successful. *Id.* The injunction Order does not violate Defendants' First Amendment rights, it only proscribes certain limited fraudulent conduct on their part. *See, e.g., Kahn v. United States*, 753 F.2d 1208, 1217 (3d Cir. 1985) ("What is subject to sanctions is not the expression of views, but the conduct of furnishing inaccurate information.")

Moreover, Defendants are not banned from promoting any political views. For that reason, and the fact that Defendants political-based argument is irrelevant, the questions they

[5] The Third Circuit specifically noted that "freedom of association does not extend to . . . unlawful activity" because "'[t]he First Amendment does not make a social club a sanctuary for crime.'" *Id.* at 343.

"demand" that the Court answer — which they caption as "serious legal questions"— are nonsensical and baseless. The Court's Order is clear. The permanent injunction does not infringe on Defendants' purported political activities, nor does it prevent Defendants' adherents from voicing their grievances in court or with the IRS — the Order only prevents Defendants from assisting others in advancing their rather perverse claims about the income tax laws.[6]

Next, Defendants cannot make any showing that they will suffer any harm absent a stay. The injunction only prevents them from engaging in illegal conduct, nothing more. Injunctions to stop violations of the law are typically permitted "because [they] merely require the enjoined party to obey the law." *United States v. Campbell*, 897 F.2d 1317, 1324 (5th Cir. 1990). Defendants have no right to peddle fraudulent tax schemes and any supposed harm to their reputation, which they claim, is derived solely from their sale of a tax-fraud scheme.

The remaining two factors—harm to the United States and to the public—are related because "there is substantial overlap between the harm to the IRS and the harm to the public" with regard to tax cases.[7] For these factors, Defendants' argument that, absent a stay, the public is harmed, and the United States is not, lacks merit for at least three reasons. First, in cases involving an "injunction, a principal element of which is a finding of irreparable harm that is

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[6] All of these arguments have already been ruled on by this Court more than once, and Kotmair has had every opportunity to contest the issues he now raises. Kotmair failed to contest any of the factual or legal arguments made by the United States, and cannot do so on appeal. On the other extreme, SAPF has unsuccessfully raised these same arguments in its reply to the United States' motion to compel, motion for summary judgment, and request for stay — which were all rejected. For that reason, Defendants have demonstrated no chance of success on these claims.

[7] *Diversified Group*, 2002 U.S. Dist. LEXIS 23920, at *6; *See also United States v. Sweet*, 1980 U.S. Dist. LEXIS 10541, at *3 (M.D. Fl. Jan. 28, 1980); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)(describing the government's "need to assess and collect taxes as expeditiously as possible.")

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 a stay is granted.[8]

Second, as the Court has already noted Defendants' customers will actually benefit from their compliance. Providing a copy of the injunction will inform Defendants' customers that they could be subject to potential penalties or criminal sanctions for purchasing these defective products. (Docket No. 68 p. 22). In this regard, compliance with the Order would further curtail Defendants from misleading customers, or potential customers, into purchasing products and services that Defendants have acknowledged are worthless and ignored by the IRS. *Id.*

Third, Defendants misconstrue the term *status quo* and assume that it means the situation that existed immediately before the permanent injunction was granted—i.e., Defendants conducting business as usual, selling their tax-fraud scheme. Instead, the *status quo ante litem* is "the last uncontested status which preceded the pending controversy." *Goto.com v. Walt Disney Company*, 202 F.3d 1199, 1210 (9th Cir. 2000). Kotmair and Defendants' customers have gone to jail and have incurred civil penalties for implementing this scheme. The Government hardly left Defendants' pre-lawsuit assertions and actions uncontested. The last uncontested status existed immediately before Defendants sold their first tax-evasion product. Moreover, the *status quo* in tax cases is *continued compliance,* and any delay in collecting taxes or continuing illegal

[8] *Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2nd Cir. 1998). Defendants apparently contend that the harm to the United States is speculative. To the contrary, Defendants' adherent's non-compliance with the income tax laws is well documented: *Damron v. Yellow Freight Sys.*, 18 F. Supp. 2d 812 (E.D. TN 1998)(the Court noted that the SAPF customer "adopted this misguided philosophy and misinterpretation of the law from a tax protest organization known as the Save-A-Patriot Fellowship" in addressing the Affidavit of Revocation); *Alaska Computer Brokers v. Morton,* 1995 WL 653260 (D. Ak. Sept. 6, 1995)(SAPF customer's "Statement of Citizenship" is "frivolous"); *Narramore v. Commissioner*, T.C. Memo. 1996-11 (SAPF customer sanctioned $7,500 after attaching an "Affidavit of Revocation" to his motion.)

activity only alters the *status quo*.[9] Simply put, maintaining the *status quo*, as Defendants' request, would require that their present motion be denied.

CONCLUSION

Defendants have offered no compelling reason that a stay should be granted. Instead, they have demonstrated a desire to continue their scheme to mislead customers into purchasing their worthless products. Their motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing OPPOSITION TO MOTION FOR STAY PENDING APPEAL has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 16th day of February, 2007.

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[9] *Barringer v. Griffes*, 810 F. Supp. 119 (D. VT., November 30, 1992). Moreover, "any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." *See also Tiffany Fine Arts, Inc.*, 469 U.S. 310, 321.