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

On February 14, 2007, Defendants moved this Court for a stay of the its injunction order pending appeal. Defendants filed a notice of appeal on February 16, 2007. On that same day, Plaintiff filed an opposition to Defendants motion to stay pending appeal. 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.

ARGUMENT

Plaintiff erroneously claims on page one of its opposition that "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." Certainly, Defendants' Motion for Stay Pending Appeal is similar in some respects to their earlier request for stay pending the resolution of their

motions for new trial and for modification of the injunction order.[1] Since the current circumstances are identical to those of the previous motion for stay, it is only natural that the two motions be similar. However, Defendants' prior motion for stay was not denied, as Plaintiff asserts, but was granted by this Court on December 19, 2006. The stay was lifted on February 7, 2007, when the Court denied Defendants' other two motions, precipitating the need to request the current stay pending appeal of the final orders of this Court. Given this Court's previous recognition of the jeopardy to their rights that will result from the injunction, Defendants are confident that this Court will again grant their motion for a stay of the injunction until the Court of Appeals can review the decision.

Vagueness of injunction

Plaintiff argues that the injunction order is not vague at all. In explaining how the order is specific, Plaintiff makes all sorts of proclamations as to what the injunction prohibits, but none are from the actual injunction order. Indeed, perhaps if the order had been as specific as Plaintiff's proclamations, there would be less to object to on that score. Unfortunately, that is not the case; Defendants are left to guess at the specific acts and speech to be prohibited, with the concomitant danger of contempt from guessing wrong.

Furthermore, as has been repeatedly pointed out by Defendants, none of the statements Plaintiff refers to on page three of its opposition even fall within the scope of IRC § 6700, in that they are not statements with respect to tax benefits as a consequence of participation in any plan or arrangement. Indeed, Plaintiff now ignores the fact that participation is even a required element of § 6700 — rather, the statements Plaintiff complains of are "false statements that encourage people to violate the tax laws

[1] Docket 71 and Docket 72.

(and buy their products)."[2] Neither are the statements listed on page three of Plaintiff's motion in opposition "commercial speech." Such statements, therefore, are outside the proper scope of an injunction — another sign that Defendants are likely to succeed on the merits of their case.

Even so, Defendants have never asserted that payment of income tax liabilities is "voluntary"; nor that the Internal Revenue Code applied only in federal enclaves; nor that wages, salaries and commissions on U.S.-source income are not taxable; nor even that those who revoke Social Security numbers are not required to file income tax returns.[3] In short, Plaintiff is now fabricating or attributing statements made by others to Defendants. This exemplifies Defendants' predicament — just as the government is now claiming that the statements referred to on page three of its motion in opposition have been prohibited by the order, Defendants can never be sure that any statement will not, at some later time, likewise be claimed to have been prohibited, even though never specifically identified in the order. And so, with the broad brush of the injunction order — since just about any statement made by the Defendants, whether pertaining to taxation or otherwise, might later be deemed forbidden speech punishable by contempt — the only way to be sure of avoiding punishment is to steer wide of all speech. And this fear is well founded; this Court has already deemed "much" of Defendants' political speech to be prohibited, even going so far as to prohibit distribution of books, videos, publications and newsletters never introduced into evidence.

As for the mistaken characterization of Defendants' objections to the vagueness of the injunction

[2] Docket 79, page 3.
[3] The closest Plaintiff has been able to get to this claim is Defendants' warning that filing a return would invalidate one's Affidavit of Revocation and Rescission. See Docket 62, p. 8 and Docket 64, pp. 15–16.

as attempts at "experimentation with disobedience," it seems Plaintiff misreads *Rylander* and *Maggio*.[4] Those cases discuss such experimentation as being fostered by inconclusive procedures to enforce court orders, and if read in light of injunctions, seem to support Defendants' objections. In that light, the quote serves as an observation that uncertainty in the mandates of the injunction will cause experimentation with disobedience, since there will be no other way to determine the actual limits of prohibition.

Similarity to other injunctions

Plaintiff also continues to assert that "[t]he injunction entered in this case is similar to those entered and upheld by other courts in recent years," apparently contending this sufficient to deny any likelihood that Defendants will succeed on the merits of their appeal with respect to modification of the injunction order. Plaintiff cites *United States v. Gleason*, 432 F.3d 678 (App 6th Cir., 2005), *United States v. Bell*, 414 F.3d 474 (App. 3rd Cir., 2005), *United States v. Schiff*, 379 F.3d 621(App. 9th Cir., 2004), *United States v. Raymond*, 228 F.3d 804 (App. 7th Cir., 2000), and *United States v. Estate Preservation Services*, 202 F.3d 1093 (App. 9th Cir., 2000), yet none of those cases involved a fellowship or a political organization.[5] Insofar as *Bell*, *Schiff*, and *Estate Preservation Services* are concerned, Defendants have already shown[6] that there are fundamental differences between these cases and the matter of SAPF and Defendant Kotmair.

This fundamental difference also exists between *United States v. Gleason*, *supra*, and the instant case. That court stated:

> "For over fifteen years, Mr. Gleason has provided tax preparation and representation services individually and through Tax Toolbox, Inc., and My Tax Man, Inc. In 2000, Mr.

[4] *United States v. Rylander*, 460 U.S. 752 (1983), at p. 756-757, *Maggio v. Zeitz*, 333 U.S. 56 (1948), at p. 69.
[5] This is especially material with respect to the government's demand for a membership list.
[6] See memorandum, Docket 78, pages 14-16.

> Gleason, the President and CEO of My Tax Man, Inc., created the Tax Toolbox that, in the charitable words of the District Court, "aggressively promoted tax saving through home-based businesses. … In "no more than a couple of minutes a day," Mr. Gleason's materials asserted, "you transform your non-deductible personal expenses into legal and audit-proof business deductions" by following his tax strategies." *Gleason, supra*, at p. 680.

Clearly, *Gleason* also fits squarely into the true scope of IRC § 6700, dealing with an actual tax arrangement, the benefits of which were misrepresented by its promoter. It is obvious from the record that Defendants neither engaged in tax preparation nor provided services purporting to create tax benefits of any sort. They never have, and nothing in the record indicates otherwise.

Moreover, whether the present injunction order is "similar" in any respect to any other injunction order is of little consequence. There is likely no shortage of injunction orders in IRC § 6700 cases; yet in our courts, there are no one-size-fits-all injunctions, nor do courts draw injunction orders from other cases, but rather look to the pleadings and the record of the case before them. Thus, the likelihood of success with regard to the motion for modification rests on the objections raised by Defendants that the injunction order is not specifically drawn with respect to FRCP Rule 65(d), that it is unsupported by the factual record and the law in this case, and that it is improperly issued as the result of errors made by this Court. The court in *Gleason, supra*, at page 681, elucidated this issue:

> "The district court abuses its discretion if it 'applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.' " *Szoka*, 260 F.3d at 521 (quoting *Waste Mgmt., Inc. of Tennessee v. Metro. Gov't of Nashville & Davidson County*, 130 F.3d 731, 735 (6th Cir.1997))."

Further, it appears from the opinions cited by the government that the issue of lack of specificity pursuant to Rule 65(d) was neither raised by the appellants in those cases[7] nor addressed by those courts.

[7] That is, *Gleason, Schiff, Raymond, Bell*, and *Estate Preservation Services*. See Docket 79, page 3.

Thus, they do not lend any support whatsoever to the government's contention that, because those cases are "similar," "[n]o grounds exist to clarify the Order."

In three of those cases, however — *Raymond*, *Schiff*, and *Bell* — objections related to the infringement of First Amendment rights were raised, and the courts did address that issue in each case's context. In *Raymond*, the court noted that the injunction order was indeed crafted too broadly with respect to the First Amendment, and devoted some time to the importance of narrowly tailoring injunctions:

> "However, we caution district courts, wherever possible, to craft injunctions that are not in need of narrowing constructions by this Court. Although we did not strike down the injunction in *Kaun*, we expressed our serious concerns regarding the potential breadth with which the language used by that district court could be read. *Kaun*, 827 F.2d at 1150, 1151. Rather than simply repeating that language and depending on this Court's restrictive reading to avoid constitutional complications, the district court *should have drafted in the first instance an injunction that was narrowly tailored to prohibit only those activities that can be restrained consistent with the First Amendment*." *United States V. Raymond*, 228 F.3d. 804 (App. 7th Cir., 2000), at p. 816. [emphasis added][8]

Thus, *United States v. Raymond*, *supra*, is likewise fundamentally different from the matter of SAPF in this respect: when one compares and contrasts the permanent injunction order of this Court with the *Raymond* court, we see that the latter court was more careful to delineate prohibited conduct than this Court in the instant case. Consequently, the chances of success on the merits are high for this reason alone.

Prohibition of lawful activities

The government's assertion, on page four of its opposition, that Defendants are not banned by

[8] See also *Bell*, *supra*, at p. 484. ("Bell's case is not the first where the breadth of an injunctive order against a tax protester has skirted constitutional limits. *See Kaun*, 827 F.2d at 1150. In *Kaun*, the Court of Appeals for the Seventh Circuit construed an injunctive order narrowly rather than remand to the district court to write a new order. We will do the same here.")

the injunction order from promoting any political views is patently untrue. It is Defendants' political views — and especially, its political stance on the proper application of the tax laws — that are the direct casualty of the injunction order issued by this Court, particularly with respect to the selling or distributing of books, newsletters, and videotapes. With the expediency of merely declaring that such publications contain "fraudulent commercial speech regarding the income tax laws,"[9] this Court has *de facto* banned the very political speech the government dislikes.

Plaintiff further asserts that the order "does [not] 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." Certainly, members of Save-A-Patriot Fellowship, just like all members of the public, have the right to voice their grievances with the IRS, even so far as to advance whatever claims about the tax laws they deem proper — including those the government deems "perverse." However, an injunction is not proper to prevent activity that is lawful. And if it is lawful for the public at large to advance such claims on their own behalf, then it can only be lawful to assist them in doing so.

Thus, in light of the harm demonstrated on pages 3–8 in Defendants' Memorandum in Support of Motion for Stay Pending Appeal, Plaintiff's assertion, on page 5 of its opposition, that "Defendants cannot make any showing that they will suffer any harm absent a stay" is clearly false.

Moreover, the issue of harm to Defendants from being forced to provide a list of Fellowship members has been thoroughly discussed, and this is especially true with respect to associate members, who have no access to any letter-writing services of the Fellowship. This limited membership exists especially for those who want to support the Fellowship's efforts as a political outreach association. In

[9] Docket 70, ¶ 1(k).

demanding that names, addresses, phone numbers, e-mail addresses, etc. of such associate members be given to the government, the injunction order goes well beyond matters regulated by the Internal Revenue Code, and is thus outside the limit of injunctions under § 7402 and § 7408.

Clearly, associate members are no more involved in "fraudulent tax programs" than any American citizen belonging to any other political organization. Yet the government demands their confidential information anyway. If not to investigate them, then to what purpose? No intellectually honest person can deny that this is the very kind of "chilling effect" on free speech that the U. S. Supreme Court has condemned repeatedly and consistently over the years, and those who support unpopular speech are no exception — case law protects even such politically disfavored groups such as the Ku Klux Klan. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Indeed, these members will suffer harm as the result of increased scrutiny (real or perceived) by the government, be it in the form of tax audits, inquiries of friends, family members, employers, etc. by officials of the Internal Revenue Service, likely resulting in unwarranted embarrassment or stigmatization, etc. Since no amount of money can compensate this kind of damage, such damage is irreparable. Likewise, prospective members will fear joining SAPF lest their identity be revealed to the government as an unapproved political dissident — this is exactly what is meant by the "chilling" effect on political speech.

Serious legal questions

Ignoring this imminent infringement of the rights of Defendants and SAPF's members, on page five of its response, Plaintiff makes light of Defendants' assertion that "serious legal questions" exist so as to warrant a stay. Defendants do not raise this point, as Plaintiff contends, for the purpose of making any "demands" of this Court with respect to the serious questions involved; such matters are now in the

hands of the Fourth Circuit. It is, however, the seriousness of these legal questions that warrants a stay *pending appeal*, as discussed on pages 16 through 18 of Plaintiff's Memorandum in Support of Motion for Stay Pending Appeal. There is nothing "nonsensical" about protecting one's constitutional rights, and, in granting the earlier stay, this Court recognized the real potential for irreparable harm to the rights of Defendants. Thus, these legal questions for which Defendants seek review are not baseless, as Plaintiff claims.

Plaintiff goes on to cite the logical inconsistency of granting a stay of an injunction, apparently trying to ignore this Court's earlier stay of its injunction.[10] The simple fact is that this logical inconsistency already exists, and it is equally illogical to refuse to grant a stay of an injunction that has already once been stayed, as has happened here. The same conditions necessarily found by this Court in granting the December 19, 2006 stay continue to exist. Therefore, Plaintiff's assertions notwithstanding, denying this stay would be illogical under the circumstances of this case.

Status quo

According to Plaintiff, the state of being which should be preserved is a state that has not existed for some 23 years.[11] Of course, this is preposterous; before the instigation of the present suit for injunction, there was no actual controversy between Defendants and Plaintiff. That is, Defendants had never been accused of violating IRC §§ 6700 or 6701, nor of committing fraud, nor of imminently inciting the commission of crimes. That accusation, by way of Plaintiff's complaint, was the beginning of the controversy between the parties. It is disingenuous for Plaintiff to claim that it has contested "Defendants' pre-lawsuit assertions and actions." Even if it could be said that the government *disagreed*

[10] Docket 74.

with such assertions and actions, certainly such disagreement never rose to the level of trying to prohibit Defendants from making such assertions or taking such actions. Now, however, Plaintiff is doing just that. It is plain to see that Plaintiff's current suit is the first attempt by Plaintiff to *change* the *status quo* — that is, to force Defendants to discontinue doing and saying the things they have been doing and saying for decades. It is this change in the *status quo* that Defendants seek to postpone until such time as the Fourth Circuit can hear their challenges to this Court's decision.

Further, Plaintiff's statement that "Kotmair and Defendants' customers have gone to jail and have incurred civil penalties for implementing this scheme"[12] is completely untrue, and serves to illustrate the likelihood of Defendants' success on the merits. Apart from the fact that no "scheme" or "arrangement," nor how such actually operate, has ever yet been articulated by Plaintiff in the whole of its pleadings before this court,[13] which *activity conducted by the Save-A-Patriot Fellowship* is a jailable or penalizable offense? Nothing in the record shows that Defendant Kotmair, nor any SAPF members, have been jailed or penalized because they participated in the member assistance program, for example, or because they assisted someone in writing a letter to the IRS, or stated their opinion of what the internal revenue code says, or sold any books, or wrote newsletters. If none of these activities, by itself, is a jailable or penalizable offense, it is evident that participating in any one of these activities — or even in all of them together — cannot be a jailable or penalizable offense. Only Plaintiff's sleight-of-hand turns these activities into jailable offenses: by labeling a mere collection of otherwise legal activities a "tax-fraud scheme" to order to invoke jurisdiction under IRC §7402, Plaintiff abuses the civil injunction

[11] See page 6 of Docket 79: "The last uncontested status existed immediately before Defendants sold their first tax-evasion product."
[12] Docket 79, page 6.

remedy to turn these otherwise perfectly legal activities into criminal offenses — but only *if they are engaged in by SAPF*.

Finally, just as it did earlier in this case,[14] Plaintiff attempts to redefine "*status quo*" in a way that defies reality. *Black's Law Dictionary* (6th Edition) defines it as "The existing state of things at any given date." Thus, even if Plaintiff were correct in referring to this civil injunction suit as a "tax case," there is no universal "*status quo* in tax cases." *Status quo* in such cases, just like in any other, depends wholly on the actual state of things at some point in time.

Public interest

Plaintiff claims, as it has before,[15] that its interests overlap the interests of the public "with regard to tax cases."[16] However, as the cases Plaintiff cites for support show, the type of cases where substantial overlap is said to exist are those dealing with the assessment and/or collection of tax liabilities. *United States v. The Diversified Group, Inc.*, 2002 WL 31812701 (S.D.N.Y.) specifically relates to a stay of "summonses" where the stay might subject petitioner "to the risk of 'loss of records or the dimming of memories.' "(quoting *United States v. Clark*, No 79-190-G, 1980 WL 1502, at *1 (M.D.N.C. Feb.6, 1980)).

Nothing within the injunction order affects the IRS' ability to assess or collect specific tax liabilities.[17] Rather, the injunction forbids many activities, as previously addressed, for which the

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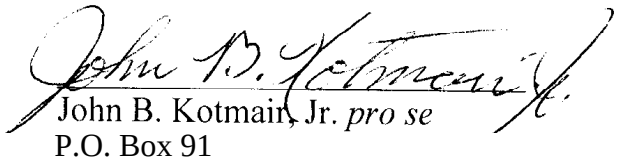
[13] Even a prosecutor must have a credible theory of how a plan or conspiracy operated to effect a crime, for example, if he or she expects to convince a jury.
[14] Defendants first pointed this out in their "Reply — Motion for Stay Pending Determination by District Judge of Objection to Order of Magistrate Judge", Docket 41, page 12.
[15] See Docket 41, p. 10.
[16] Docket 79, p. 5.
[17] The only paragraph which might be construed so is ¶ 1(g), which forbids "obstructing or advising or assisting anyone to obstruct IRS examination, collections, or other IRS proceedings." However, as

public's interest in preserving their constitutionally protected liberties is more closely aligned with Defendants.

WHEREFORE, Defendants pray that this Court grant their motion for stay of injunction pending appeal.

Respectfully submitted on this 20th day of February, 2007.



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Defendants showed previously, there is nothing in the record which supports a finding that obstruction of IRS activities has actually occurred.

CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Defendants' Reply To United States' Opposition To 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 21st day of February, 2007.

/s/ George E. Harp
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