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 RESOLUTION OF MOTION FOR MODIFICATION OF PERMANENT INJUNCTION ORDER AND MOTION FOR NEW TRIAL

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' Motion for New Trial and Motion for Modification of Permanent Injunction Order.

Respectfully submitted on this 14th day of December, 2006.

P.O. Box 91
Westminster, MD 21158
(410) 857-4441

/s/ George Harp
GEORGE HARP Bar number 22429
Attorney for Save-A-Patriot Fellowship
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

CERTIFICATE

The undersigned hereby certifies that a printed copy of the foregoing "Defendants' Motion for Stay" 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 15th day of December, 2006.

/s/ George Harp
GEORGE HARP Bar number 22429
Attorney for Save-A-Patriot Fellowship
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

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UNITED STATES OF AMERICA,	)	
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Plaintiff,	)	
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v.	)	Civil No. **WMN05CV1297**
	)	
JOHN BAPTIST KOTMAIR, JR.,	)	
and SAVE-A-PATRIOT FELLOWSHIP,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR STAY PENDING RESOLUTION OF MOTION FOR MODIFICATION OF PERMANENT INJUNCTION ORDER AND MOTION FOR NEW TRIAL

COME NOW, Defendants John Baptist Kotmair Jr., *pro se*, and Save-A-Patriot Fellowship (SAPF), represented by its counsel, George E. Harp, who, in support of their application for a stay of this Court's final decision and order filed November 29, 2006, furnish the following memorandum:

Rule 62. Stay of Proceedings to Enforce a Judgment

This Court has the authority to grant a stay of its permanent injunction order. Federal Rule of Civil Procedure ("FRCP") Rule 62 states in relevant part:

> "Rule 62 (b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b)."

Balance of harm

Standard:

In deciding whether to grant injunctive relief pending appeal of the final order of a district court, four factors are typically to be considered where a stay is at issue: (1) irreparable harm; (2) harm to the public interest; (3) maintaining the status quo; and (4) and the chance of success on the merits, with two of the factors being more important: probable irreparable injury to plaintiff without a decree and likely harm to the defendant with a decree. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (App. 4th Cir. 1977)

Like the Rule 65(a) motion discussed in *Blackwelder*, the balance between the likelihood of irreparable harm to Defendants in this case if the stay is not granted and to Plaintiff if it is granted is the primary factor in deciding whether a stay should issue in the present case. This balancing act of potential injury favors Defendants here.

Harm to the Defendants:

First and foremost is the real and appreciable potential of significant injury to Defendants from possible (indeed, probable, considering the vagueness) inadvertent violations of this Court's order, which is drawn in language so broad that it is impossible for them to know with any certainty whether a particular anticipated action on their part has been prohibited. Since the order does not identify the precise conduct enjoined, Defendants are left to speculate to some degree at its meaning. This lack of specificity is proscribed by Rule 65(d), as explained by the Supreme Court in *International Longshoremen's Association, Local 1291 v. Philadelphia Marine Trade Association*, 389 U.S. 64, 76 (1967):

> "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."

This issue is addressed more fully in "Defendants' Motion for Modification of the Permanent Injunction Order," which is incorporated herewith by reference thereto.

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. The courts have long recognized that to order a political organization to turn over its membership list is irreparable injury to the members' rights. Similarly, the right of SAPF members to freely associate with others, invoke remedies at law, and to freely communicate their opinions on matters of prime importance to all citizens—federal taxes being one such matter—is irreparably damaged by turning over its membership list.

In *National Association for Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 459 (1958), the Supreme Court recognized that damage to a membership association is reasonably likely to result from the production of its membership list, and the right of the organization to complain on behalf of those members:

> "The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members."

The harm resulting from that chilling effect, once begun, can never be repaired. People will forever afterwards be more leery of associating with the Fellowship, for fear that such association will expose them to increased government scrutiny and harassment.

Of course, the defendants in this matter are concerned about their Fellowship being ruined. But the harm here goes well beyond the interests of the Defendants. If SAPF members are dispossessed of

their right to freely associate and engage in political speech without being red-flagged (or worse) by government officials, any political organization will be at risk. This is particularly true where the organization espouses unpopular political sentiments.

This same form of injury was addressed by the Supreme Court in *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960):

> "Freedoms such as these [freedom of speech and a free press, the right of peaceable assembly, and the freedom of association for the purpose of advancing ideas and airing grievances] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925; *N.A.A.C.P. v. State of Alabama*, supra; *Smith v. People of State of California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205. ,'it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute (an) effective * * * restraint on freedom of association. * * * ***This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'*** *N.A.A.C.P. v State of Alabama*, 357 U.S. at page 462, 78 S.Ct. at page 1171." (Emphasis added)

Any prior restraint, or other infringement of the rights to political association and free speech protected by the First Amendment, is injurious to Defendants, to Fellowship members, and to the public generally. Together, these injuries to the rights of the Defendants, their members, and the public at large are quite substantial.

"Injunctive relief is historically designed to deter, not to punish." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). See also *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Yet, in the present case, the government wants to punish not only Petitioners, by infringing their right to freely associate and speak, but also SAPF members individually, by subjecting them to increased scrutiny of their financial affairs, not because the government has information that they have violated any law, but merely because they have chosen to associate with the Save-A-Patriot Fellowship.

Prospective harm to Plaintiff:

On the other hand, the alleged harm to the Plaintiff is speculative and negligible. The district court cited the reasons for its demand that Petitioners provide the government with a list of its members as being that "this information is needed because of the possibility that many do not file tax returns." However, a "possibility" that some do not file is no reason to abrogate the rights to free speech, association, and due process of all SAPF members. Indeed, in the Internal Revenue Code, Congress has invested the government with all the powers it deemed necessary to accomplish their duty of discovering, assessing, and collecting tax liabilities, even in cases where required returns have not been filed. Said powers are wholly adequate to those purposes, and can be exercised in the precise manner intended by Congress, even without access to the names of Petitioner's members.

Correspondence sent to the IRS on behalf of Fellowship members, as already noted, is the result of the IRS already having sent notices to those members in the first place. Surely, such persons have the right to answer such notices in whatever way they deem to be in their best interests, even if the "best interests" of the government are not served thereby. The rights of such persons to respond cannot be diminished merely because they enlist the assistance of the Fellowship in addressing those IRS notices, or because the government doesn't approve of the issues they raise.

With regard to the financial harm alleged to result from correspondence to Plaintiff, the Court refers to 800 letters sent to the IRS during the pendency of this suit. However, Gary Metcalfe, the revenue officer in charge of this investigation, replying in his deposition to a question regarding whether or not SAPF letters were any impediment to the IRS, said, "No, because they are disregarded." Metcalfe deposition, p. 76:7–8. (Exhibit 1, Motion for New Trial). This is hardly irreparable harm, especially in light of the fact that each letter was precipitated by some notice from the IRS.

The Court also refers to "the matter of unpaid or underpaid income taxes by SAPF adherents" as an element of harm to Plaintiff, yet no proper evidence exists in the record to 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.

Taken together, the balance of irreparable harm to Defendants and the public[1] 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.

Success on the merits

Defendants are requesting a stay of the injunction order until their motions for new trial and for modification of the order can be decided. Those motions are incorporated herewith by reference.[2]

The motion for a new trial is based on the fact that the case was not ripe for summary judgment. As pointed out in the motion, there were numerous instances of *c*ontested issues of material fact which were used as a basis for the summary judgment order. If the Court were to order a hearing to resolve the contested issues of material fact, it would likely be necessary to modify its permanent injunction order.

Likewise, the motion for modification is based on the overbreadth and lack of specificity in the prohibitions established by the injunction order. FRCP Rule 65(d) requires an injunctive order to ". . . be specific in terms . . ." and to ". . .describe in reasonable detail . . . ." The Fourth Circuit addressed this provision:

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[1] Since the government has ample means at its disposal to discover, assess, and collect any taxes determined to be owed, the public's interest in such assessment and collection is not affected by the issuance of the requested stay. In fact, the public's interest is more closely aligned with that of Defendants in this case, in that they have a great interest in the preservation of their Constitutional rights.

[2] The three motions currently before this Court are Defendant's Motion for New Trial, Motion for Modification of Permanent Injunction Order, and this Motion for Stay.

> "'The specificity provisions of Rule 65(d) are no mere technical requirements.' *CPC Int'l, Inc. v. Skippy Inc.*, 214 F.3d 456, 459 (4th Cir.2000) (internal alterations and quotation marks omitted). Rather, Rule 65(d) 'was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. *Id.* Moreover, without specificity, appellate review of an injunctive order is greatly complicated, if not made impossible. Rule 65(d) thus serves the twin purposes of providing fair notice of what an injunction requires and of facilitating appellate review.'" *Scardelletti v. Debarr*, 265 F.3d 195, 211 (App. 4th cir. 2001).

Since the permanent injunction order involves prior restraint, with a concomitant prospect of criminal contempt charges being brought, it is all the more important that said order specify with complete particularity what is prohibited. For example, the injunction prohibits "selling or distributing any newsletter, book, manual, videotape, audiotape, 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." How can Defendants know if the book, *Piercing the Illusion*, can be distributed? The order prohibits the distribution of any book "containing false commercial speech regarding the internal revenue laws or speech likely to aid or abet others in violating the internal revenue code." There was no specific finding that *Piercing the Illusion* contains either type of speech that has been enjoined; if it does contain such speech, it was not designated. Yet only one page of the book was included in the Plaintiff's summary judgment evidence. Defendants must be given fair notice of exactly what is covered by the injunction. If Kotmair wanted to revise and republish the book, he could not do so without risk of running afoul of the broad language of the injunction. Likewise, the Fellowship publishes a video series, *Just The Facts*. Although this 12-hour video was never introduced into evidence, Defendant could not risk that a broad interpretation of the injunctive order would purport to prohibit its distribution as well. Again, it would not be possible for Defendant to revise the video without risk. To require Defendants to make an independent determination as to what part of the video, if any, has been prohibited would be a due process violation.

The injunction is overbroad in another aspect. The order prohibits Defendants from "engaging in similar conduct that substantially interferes with the administration and enforcement of the internal revenue laws." The conduct is unspecified that interfered with the enforcement of tax laws, which were also unspecified. 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.

As a First Amendment organization, Save-A-Patriot has the right to advocate its opinions about the tax laws; but the injunction blurs the distinction between political speech and "commercial speech," by ignoring the Supreme Court's definition of that term in *Valentine v. Chrestensen*,[3] and instead implying that any speech with even a tenuous tie to some commercial activity can be prohibited under the "false commercial speech" doctrine. This again causes uncertainty in the order, such that Defendants are unable to determine with certainty what speech is enjoined.

Maintaining the status quo

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, justice demands that such injury to Defendants be postponed at least until a final decision on the current motions for new trial and for modification of the injunction.

WHEREFORE, for the reasons stated herein, Defendants prays this Court grant the Stay of its Permanent Injunction order, during the pendency of the Defendants' Motion for New Trial and Motion for Modification of this Court's Permanent Injunction Order.

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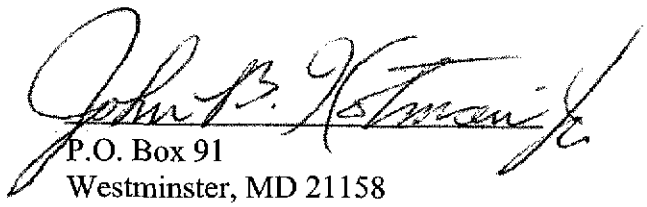
[3] "We are equally clear that the Constitution imposes no such restraint on government as respects *purely* commercial advertising." [emphasis added] *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

Respectfully submitted on this 14th day of December, 2006.



P.O. Box 91
Westminster, MD 21158
(410) 857-4441

/s/ George Harp
GEORGE HARP Bar number 22429
Attorney for Save-A-Patriot Fellowship
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003

CERTIFICATE

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/s/ George Harp
GEORGE HARP Bar number 22429
Attorney for Save-A-Patriot Fellowship
610 Marshall St., Ste. 619
Shreveport, LA 71101
(318) 424-2003