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CLERK, U.S. DISTRICT COURT
NORFOLK, VIRGINIA

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No.
	)	
ANTHONY McBRYDE, d/b/a ANTHONY McBRYDE & ASSOCIATES,	)	
	)	
Defendant.	)	

UNITED STATES' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Defendant Anthony McBryde, who sometimes does business as Anthony McBryde & Associates, is preparing fraudulent federal tax returns claiming bogus deductions. The Court should enjoin him now to prevent further harm while this case is litigated.

I. Facts

McBryde, a Norfolk resident employed with the City of Nofolk as a code inspector, prepares fraudulent federal tax returns for customers in Hampton Roads purporting to eliminate or substantially reduce their federal income tax liability and claiming refunds. Thus far, McBryde's return preparation has cost the United States more than $190,000 in erroneous refunds and lost revenue.[1]

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[1] Declaration of Gaynelle D. Britt (submitted herewith) ¶¶ 72-73 (stating that the IRS has issued $102,299.74 in erroneous refunds based on McBryde's "claim of right" amended returns (Forms 1040X) and that his "claim of right" returns (Forms 1040) understate his customers' tax liabilities by an estimated $87,128). This amount, which is exclusive of penalties and interest, is based only on McBryde's "claim of right" returns and does not include revenue loss caused by his other frivolous returns. *Id.*

A. McBryde's "Claim of Right" Returns

In at least 187 returns—thirty-seven Forms 1040 (U.S. Individual Income Tax Returns) and 150 Forms 1040X (Amended U.S. Individual Income Tax Returns)—that he has prepared and filed for customers since August 2003, McBryde has claimed huge deductions for what he calls the "claim of right."[2] As he explained to the IRS, McBryde calculates the "claim of right" deduction by subtracting the customer's other deductions and exemptions from his or her taxable income and claiming the resulting amount as a deduction on line 27 of Schedule A, thus eliminating or, in some cases, substantially reducing the customer's taxable income.[3]

On the "claim of right" amended returns the IRS has identified, McBryde "corrected" his customers' previously filed returns to report hugely inflated itemized deductions that equaled the customers' adjusted gross income.[4] He explained these deductions by either citing Internal Revenue Code (I.R.C.) (26 U.S.C.) § 1341 or stating "claim of right,"[5] and attached a Schedule A (Itemized Deductions) showing the "claim of right" deduction on line 27, in the space provided for "Other Miscellaneous Deductions."[6] For example, on the amended return McBryde prepared

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[2] *Id.* ¶ 71.

[3] *Id.* ¶ 19.

[4] *See, e.g.*, Exs. 10A, 11A, 12A-12B, 13A, 14B, 15B-15D, 17A, 18A-18B, 20A, 21A-21B, 22B, 23A-23C, 25B. In one amended return, Ex. 14A, the itemized deductions, $47,185, are less than the adjusted gross income, $51,946, but when added to the exemptions, $5,600, they eliminate all taxable income. All exhibits cited in this brief are attached to the Declaration of Gaynelle D. Britt.

[5] *See, e.g.,* Exs. 10A, 12A-12B, 13A, 14A, 15B-15D, 17A, 18A-18B, 20A, 21A-21B, 22A-22B, 23A-23C.

[6] *See, e.g.,* Exs. 10A, 11A, 12A-12B, 13A, 14A-14B, 15B-15D, 17A, 18A-18B, 20A, 21A-21B, 23A-23C, 25B.

and filed for Henry and Hedy Stevenson "correcting" their 2002 return, McBryde reported itemized deductions totaling $83,550, neatly wiping out the Mayfields' $83,550 adjusted gross income and requesting a $6,214 refund.[7] Line 27 of the Schedule A he attached showed that the $83,550 in itemized deductions was largely attributable to a "deduction under section 1341 IRC" in the amount of $54,401.[8]

On the "claim of right" Forms 1040 the IRS has identified, McBryde also made the "claim of right" deduction on Schedule A, line 27.[9] The 2003 return he prepared for Larry and Diane Jordan is typical.[10] On Schedule A, line 27, he made a $65,000 "claim of right" deduction, citing I.R.C. § 1341.[11] Along with their other itemized deductions (including an improper $315 deduction for utilities, discussed below), and their exemptions, McBryde's "claim of right" deduction whittled the Jordans' $105,680 adjusted gross income to a mere $18,860, resulting in a refund claim of $10,782.[12]

Needless to say, I.R.C. § 1341 does not permit McBryde's "claim of right" deductions. It applies only to activities not engaged in for profit, and only to "situations in which the claimant is compelled to return the taxed item, or its equivalent, because of a mistaken presumption that the right [to the item] was unrestricted and, therefore, the item was previously reported,

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[7] Ex. 18A.

[8] *Id.*

[9] *See, e.g.*, Exs. 10B, 12D, 15A, 16A, 24A.

[10] Ex. 16A.

[11] *Id.*

[12] *Id.*

erroneously, as taxable income."[13] The income McBryde deducts is from his customers' employment (an activity clearly engaged in for profit), was never included in income before, and the customer's right to the income was never restricted. When the IRS confronted McBryde about his "claim of right" deductions, he argued that his customers' rights to their income was restricted because the income was subject to withholding taxes.[14] A person's right to their income is not considered "restricted" merely because the income is subject to tax; under that specious reasoning, all rights to income would be "restricted."[15]

B. McBryde's Other Frivolous Returns

McBryde does not limit his frivolous return preparation to improper deductions under I.R.C. § 1341. On several of his returns, McBryde has also claimed deductions ranging from $215 to $385 on Schedule A, line 8 for non-deductible household utilities such as gas, telephone, electricity, and water.[16] On two returns, Marvin T. Evans's 2000 and 2001 Forms 1040, both filed in February 2005, McBryde falsely reported Evans's wages as a negative amount labeled

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[13] *Sumter v. United States*, 61 Fed. Cl. 517, 523 (2004) (discussing the frivolous "claim of right" argument and holding that "I.R.C. § 1341 is inapplicable to [the taxpayer's] claim because she has a continuing, unrestricted claim of right to her salary income and has not been compelled to repay that earned income in a later tax year. Section 1341 allows deductions relating to activities not engaged in for profit, which does not cover salary and earnings from employment.").

[14] Britt Decl. ¶ 17.

[15] *See Sumter*, 61 Fed. Cl. at 523 (rejecting a similar fraudulent "claim of right" deduction).

[16] *See* Exs. 11A, 13A, 14B, 15A-15D, 16A, 17A, 18B, 19A, 21A-21B, 24B, 25A-25C. Of course, in some circumstances, utilities can qualify as deductible business expenses under I.R.C. § 162, provided that the taxpayer meets the requirements of that statute and shows that the expenses were different from, or in excess of, what the taxpayer would have spent for personal purposes. *See* I.R.C. § 262; *Sutter v. Commissioner*, 21 T.C. 170, 173 (1953).

"NON TAXABLE INCOME - LABOR ONLY."[17] On his own 2000 return, McBryde reported his income as $0, while at the same time attaching an IRS Form W-2 (Wage and Tax Statement) that showed he had earned $24,690.35.[18]

In addition, McBryde prepares and files returns for customers claiming improper deductions under I.R.C. §§ 162 (Trade or Business Expenses), 183 (Activities Not Engaged in for Profit) or 212 (Expenses for Production of Income).[19] These deductions, substantially the same as his "claim of right" deductions, also appear on Schedule A, line 27 of his returns. For example, on Ruth Morrow's 2003 Form 1040, McBryde claimed itemized deductions totaling $30,564, leaving Morrow with only $2,997 in taxable income.[20] The bulk of these itemized deductions, $18,550, was for "deduction under sec [sic] 183 and 212."[21] As with the "claim of right" deductions, there is no valid basis for McBryde to assert these deductions for Morrow, who does not own a business but is an employed wage-earner.[22]

Apart from the numerous and diverse fraudulent claims he has made on his own and his customers' returns, McBryde has demonstrated his unfitness to prepare any federal tax returns by

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[17] Exs. 23D, 23E.

[18] Ex. 26.

[19] *See* Exs. 19A, 24A-24B, 25C.

[20] Exs. 1 (IRS letter to McBryde dated June 8, 2004); 24 (Morrow Aff.) (stating that McBryde prepared her return after June 16, 2004); 24B (return).

[21] Ex. 24B.

[22] *See Sumter*, 61 Fed. Cl. at 523 (rejecting a tax protestor's attempt to deduct a portion of her income under I.R.C. § 212 because "[e]arnings from employment . . . cannot qualify as expenses incurred in the 'production or collection' of that same income."). *See also* Ex. 24 (Morrow Aff.) (explaining that McBryde did not consult her on these deductions).

submitting to his employer, the City of Norfolk, several IRS Forms W-4 (Employee's Withholding Allowance Certificates), most recently on February 2, 2005, in which he claims that he is exempt from federal taxation.[23] He also sent the IRS, as an attachment to his own 2000 return, a three-page screed laying out his beliefs that no one is liable for taxes, no one is required to file income tax returns, the wages he receives are not income, and the IRS cannot assess penalties against him.[24] Such tax-protestor views are fundamentally inconsistent with return preparation.

C. McBryde's Conduct as a Return Preparer

While the fraudulent claims McBryde asserts in returns warrants an injunction barring him from return preparation, his conduct in preparing those returns also violates several laws. He files the returns without even showing them to his customers, let alone obtaining their signatures or giving them copies.[25] Tony Bazemore's experience in this regard was typical of McBryde's customers. Bazemore explained to the IRS that:

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[23] Ex. 27.

[24] Ex. 26.

[25] *See* Exs. 11 (Fagan Aff.) ("I never saw the 1040X returns and I never signed [them]."); 13 (Griffin Affs.) ("I did not see any of the amended 1040X returns and I did not sign them."); 25 (Bagby Affs.) (testifying that McBryde prepared and filed their 2000 and 2001 amended returns without their signatures and without even showing them these returns); 14 (Jones Affs.) ("I did not sign the returns."); 15 (Johnson Aff.) ("I never saw the 1040X returns and never signed the returns."); 16 (Jordan Affs.) ("I did not see these returns and did not sign these returns."); 17 (Mayfield Affs.) ("These returns were . . . signed by him. I did not see [them] before they were filed. . . . I did not give him any authorization to sign my name on these returns."); 18 (Stevenson Aff.) ("I did not sign the 1040X and neither did my wife."); 20 (Flyth Aff.) ("I did not sign the 1040X's nor did I give him permission to do so.").

> I have never seen a copy of these returns, nor did I sign them. . . . I thought Mr. McBryde was going to prepare [the returns] and call me. I had no idea he had already sent them off to the IRS.[26]

A comparison of the signatures on several of McBryde's returns reveals that McBryde signs his customers' names to their returns himself.[27] He also fails to identify himself on the returns as the return preparer, by either signing his own name or providing his identifying number,[28] and even goes so far on some of his returns as to state that the return was "self-prepared."[29] Several of his customers testified that he never explained the "claim of right" deduction to them, and that they did not know how he calculated it.[30]

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[26] Ex. 10 (Bazemore Aff.). *See also* Ex. 17 (Mayfield Affs.) ("I was told to think about it and he could file an amended return. After I decided to go ahead with it he was called. Mac had already filed the 1040X."); 20 (Flyth Aff.) ("I was still not sure and I wanted to think about it some more. When I got to his home . . . he told me he already sent them to the IRS.").

[27] *See, e.g.,* Exs. 10A-10B, 11A, 12A-12B, 13A, 14A-14B, 15B-15D, 17A, 18A-18B, 20A, 21A-21B, 23A-23C, 25B.

[28] *See, e.g.,* 10A-10B, 11A, 12A-12C, 13A, 14A-14B, 15B-15D, 17A, 18A-18B, 20A, 21A-21B, 22A-22B, 23A-23C, 25B.

[29] *See, e.g.,* Exs. 10A-10B, 11A, 12A-12C, 15C, 18A-18B, 20A, 22A-22B, 23A-23C.

[30] *See* Exs. 10 (Bazemore Aff.) ("I don't remember him explaining the 'claim of right' deduction."); 11 (Fagan Aff.) ("nor did he explain to me what the 'claim of right' deduction was."); 13 (Grifin Affs.) ("I was never told what the 'claim of right' deduction was and I do not know how it was calculated."); 14 (Jones Affs.) ("I have no knowledge of how the deduction was computed on the 1040X."); 15 (Johnson Aff.) ("I do not know how the deduction was determined."); 16 (Jordan Affs.) ("The Claim of Right deduction was never explained to me. I never saw anything in writing about the deduction. . . . How it was calculated is unknown."); 17 (Mayfield Affs.) ("The deduction was not explained to me."); 20 (Flyth Aff.) ("He did not explain to me how the deduction for 'claim of right' was computed."); 25 (Bagby Affs.) (testifying that McBryde told them that they could "get additional money back. . . . He said there was a glitch in some book that allowed this. He never showed [them] the book or any literature on the claim of right deduction. He never explained . . . how the deduction worked . . . [or] how . . . [the deduction] amounts were calculated.").

In addition to a flat rate of between $60 and $130 per return,[31] McBryde charges his customers a contingent fee of up to one-third of any tax refund received.[32] IRS regulations prohibit contingent fees for the preparation of original returns, and allow them for amended returns only if the preparer reasonably anticipates that the IRS will substantively review the amended returns.[33] Clearly, McBryde was not intending his returns to receive substantive review because he would have known they would be rejected.

D. IRS's Investigation of McBryde

On June 8, 2004, Revenue Agent Gaynelle D. Britt wrote McBryde requesting an interview and informing him that she was investigating his preparation of federal tax returns that asserted a "claim of right" deduction under I.R.C. § 1341.[34] She enclosed with this letter a copy of IRS Revenue Ruling 2004-29, which explains that the "claim of right" deduction is frivolous,

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[31] *See* Exs. 20 (Flyth Aff.) ("I paid him $60.00 for the preparation of these returns."); 19 (Mem. of Interview of R. Jones) (noting that Jones stated he paid McBryde $130 for return preparation).

[32] *See* Exs. 12 (Fulwood Aff.) ("I was told that if I got the refunds, then he would tell me what amount I owed him."); 13 (Griffin Affs.) ("I received a refund for tax year 2000 of $4,087.11. I paid Mr. McBryde 1/3 of the refund[,] around $1,000."); 15 (Johnson Aff.) ("I was to pay Mr. McBryde 1/3 of my refund."); 17 (Mayfield Affs.) ("payment to him would be 1/3 of the refund received."); 18 (Stevenson Affs.) ("He [McBryde] did not receive a fee because no refund was received."); 20 (Flyth Aff.) ("I paid him $60.00 for the preparation of these returns. . . . I told him I received the refund for 2001. He said at that time I owed him 33%. I already paid him $60.00. I was angry and I refused to pay it."); 21 (Jackson Aff.) ("I was told that unless I received a refund I would not have to pay him. . . . If I received the refunds then I would pay him somewhere between 10-20%."); 25 (Bagby Affs.) (testifying McBryde charged them 30% of the $3,034 refund the IRS erroneously issued them).

[33] 31 C.F.R. § 10.27(b).

[34] Ex. 1. *See also* Ex. 3 (June 16, 2004 letter from Britt to McBryde with enclosed copy of Internal Revenue Bulletin 2004-12, stating that "claim of right" position is frivolous).

and a list of requested documents, including copies of the returns he prepared and a customer list.[35] McBryde refused to meet with her or provide any documents.[36]

Having failed to secure McBryde's cooperation informally, Britt issued an IRS summons on June 24, 2004, demanding that he meet with her to answer questions and produce a customer list, copies of returns, and other documents.[37] McBryde again refused, and questioned her authority to issue summonses.[38]

The United States then turned to this Court for enforcement of the IRS summons.[39] Only when the Court ordered him to do so did McBryde finally meet with Britt and answer questions, though even then he refused to produce documents, claiming that he had none.[40] He was also cagey with some of his responses to Britt's questions, on the one hand insisting that he was not a paid return-preparer while at the same time refusing to answer when Britt asked him pointedly whether he received payment for preparing returns.[41] His claim that he is not a paid return-preparer was a lie. Copies of three checks McBryde received for return preparation are

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[35] Ex. 1.

[36] Ex. 2.

[37] Britt Decl. ¶ 6, Ex. 4.

[38] *Id.* ¶¶ 7-8, 11, Exs. 5-6, 8.

[39] *Id.* ¶¶ 10-12.

[40] *Id.* ¶¶ 13-14.

[41] *Id.* ¶ 22.

attached,[42] and several of his customers have sworn that they paid him amounts ranging from $60 to to $1,000 for return preparation.[43]

Because McBryde refused to produce the summoned documents, the Court issued a second order compelling his compliance with the summons.[44] This time, despite his earlier representations that they did not exist, McBryde gave the IRS copies of some of his returns, though clearly not all: the returns he produced included only some of the thirty-seven "claim of right" returns (Forms 1040) the IRS has identified and none of the 150 "claim of right" amended returns (Forms 1040X).[45] Lest there be any doubt that he would not have produced any documents absent a court order, McBryde gave the IRS a "Statement for the Record" stressing that the copies of returns had "not been provided voluntarily, but pursuant to a Federal Court Order."[46]

E. McBryde's Continued Fraudulent Return Preparation

Despite the IRS's investigation into his return preparation, which McBryde knew of as early as June 8, 2004, McBryde has persisted in filing frivolous returns.[47] In March 2005, the IRS received two Forms 1040 for Marvin Evans, both prepared by McBryde and both reporting

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[42] Ex. 13B (three checks, all endorsed by McBryde, from Velma and Carlton C. Griffin, Jr.: one dated April 16, 2000 for $68 for "1999 tax paper;" a second dated March 12, 2003 for $80 for "2003 taxes [sic] papers;" and a third dated March 29, 2004 for $85 for "taxes 2003.").

[43] *See supra* notes 31-32.

[44] Britt Decl. ¶ 15.

[45] *Id.* ¶ 25.

[46] *Id.* ¶ 24, Ex. 9.

[47] *Id.* ¶ 3, Ex. 1.

Evans's wages as a negative amount labeled "NON TAXABLE INCOME - LABOR ONLY."[48] Rather than attach Forms W-2 from Evans's employer, Virginia International Terminals, Inc., to these returns, McBryde submitted Forms 4852, Substitutes for Form W-2, that he prepared to show Evans's wages as a negative amount "FROM A NON-TAXABLE SOURCE (LABOR ONLY)."[49]

For Ruth L. Morrow, McBryde prepared her 2002 and 2003 returns in mid-June 2004, *after* receiving Britt's June 8, 2004 letter.[50] Knowing that the IRS was investigating him, McBryde changed tactics ever so slightly by citing I.R.C. §§ 183 and 212 in addition to § 1341 in support of the $21,214 deduction he claimed on Morrow's 2002 Schedule A, thus reducing her taxable income from $33,788 to $2,071 and claiming a $4,535 refund.[51] On Morrow's 2003 Schedule A, McBryde dropped I.R.C. § 1341 altogether and relied entirely on I.R.C. §§ 182 and 212 in support of an $18,550 deduction.[52] He also calimed $215 on the 2003 Schedule A for "phone, electric, water, gas, ect [sic]."[53] Thanks to McBryde's creative deductions, Morrow's

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[48] Exs. 23 (reporting that Evans admitted that McBryde prepared his 2000 and 2001 Forms 1040), 23D (2000 Form 1040), and 23E (2001 Form 1040). In addition to Evans's admission that McBryde prepared these returns, McBryde's role is apparent from a review of the envelopes the returns were mailed in: the handwriting matches that on the other envelopes he sent the IRS. *Compare* Exs. 23D, 23E (envelopes) *with* 10A, 11A, 12A, 12B, 14B, 15D, 18A, 20A, 21A, 21B (envelopes).

[49] Exs. 23D-23E.

[50] Ex. 24 (Morrow Aff.) (stating that McBryde prepared her 2002 and 2003 Forms 1040 after June 16, 2004).

[51] Ex. 24A.

[52] Ex. 24B.

[53] *Id.*

2003 taxable income was reduced to $2,997, and he claimed a $5,561 refund on her behalf.[54] On both these returns, McBryde failed to identify himself and stated that the returns were "self-prepared."[55]

In addition, McBryde filed Randolph Jones, Jr.'s 2004 return, claiming a $6,770 deduction on Schedule A, line 27 for "Section 162 and 212 I.R.C.," and a $355 deduction on Schedule A, line 8 for "gas, water, elec [sic], phone, ect [sic]."[56] As usual, McBryde failed to identify himself on Jones's return and represented that it was "self-prepared."[57]

F. Harm Caused by McBryde's Fraudulent Federal Tax Returns

As a direct result of McBryde's fraudulent returns, his customers fail to report or pay the correct amount of tax and in some instances have obtained refunds to which they were not entitled. The IRS estimates that thus far McBryde's "claim of right" returns and amended returns, not including his other fraudulent returns, have resulted in lost revenue to the United States of approximately $190,000.[58] The IRS is forced to devote its limited resources to identifying and recovering this lost revenue, tasks made more difficult by McBryde's failure to keep complete records, his failure to identify himself on his returns, and his obstinate refusal to cooperate with the IRS absent a court order. Aside from the harm to the United States, McBryde

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[54] *Id.*

[55] *Id.*

[56] Ex. 19A.

[57] *Id.*

[58] Britt Decl. ¶¶ 72-73.

harms his customers by exposing them to civil and criminal penalties and interest on the tax they fail to pay timely due to his fraudulent returns.[59]

II. Argument

A. Standards for a Preliminary Injunction

Due to the urgent need to halt irreparable harm, "a preliminary injunction is customarily granted on . . . procedures that are less formal and on evidence that is less complete than a trial on the merits. A party thus is not required to prove his case in full" at the preliminary injunction stage.[60] In a statutory-injunction action such as this, the moving party must demonstrate that the

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[59] Several of McBryde's customers testified that they received notice from the IRS that they would be penalized for their frivolous returns unless they signed the IRS's claim disallowance forms. *See, e.g.,* Exs. 10 (Bazemore Aff.) ("I agreed to sign and return [the IRS waivers] to avoid the $500 frivolous penalty); 11 (Fagan Aff.) ("I received letters from the IRS asking me to sign and return claim disallowance forms or pay the $500 penalty for each year. I gave these forms to Mr. McBryde and he stated he would take care of them. They were never sent to the Service and I am currently paying back frivolous return penalties."); 13 (Griffin Affs.) ("I received letters from the [IRS] Service Center regarding the frivolous returns."); 16 (Jordan Affs.) ("I received forms [regarding the penalty] . . . . I signed them and returned them . . . and was not assesed the frivolous return penalty."); 17 (Mayfield Affs.) ("I received information from the [IRS] and signed and returned the forms to avoid the $500 penalty."); 20 (Flyth Aff.) ("I received letters from the IRS about the deduction. . . . I sent the waiver forms to the IRS . . . . I am still paying back the taxes to the IRS on the 2001 tax year" due to McBryde's fraudulent return for that year.); 21 (Jackson Aff.) ("When I received . . . letters from the [IRS] . . . about the returns I called [McBryde] and he told me to sign them and send them back or I would have to pay a penalty."); 22 (Stip. of Anticipated Test., *Sonko v. Commissioner*, No. 20359-03S (U.S. Tax Court)) (relating to an I.R.C. § 6662 penalty); 25 (Bagby Affs.) ("I received correspondence from the Service to sign forms 2297 and 3363. I signed them and sent them in.").

[60] *University of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981). *See Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986) ("Affidavits and other hearsay materials are often received in preliminary injunction proceedings.").

statute has been violated[61] and that "there is a reasonable likelihood of future violations."[62] Because I.R.C. §§ 7407, 7408, and 7402(a) set forth the criteria for injunctive relief, the United States need only meet those criteria, without reference to the traditional equitable factors, for an injunction to issue.[63] Nonetheless, because the "balance of hardship" tips in the United States' favor, the United States is also entitled to injunctive relief under the Fourth Circuit's equitable test.[64]

The evidence submitted with this motion clearly establishes that a preliminary injunction under §§ 7407, 7408, and 7402(a) should issue to stop McBryde from preparing federal tax returns for others and interfering with the administration of the internal revenue laws.

B. McBryde Should Be Enjoined Under I.R.C. § 7407 From Preparing Any Federal Tax Returns.

Section 7407 authorizes the Court to enjoin an income tax preparer from engaging in conduct subject to penalty under I.R.C. §§ 6694 or 6695 if the Court finds that injunctive relief is appropriate.[65] Where a return preparer's violations of I.R.C. §§ 6694 or 6695 have been

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[61] *S.E.C. v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982).

[62] *United States v. Raymond*, 228 F.3d 804, 813 (7th Cir. 2000); *Abdo v. United States*, 234 F. Supp. 2d 553, 565 (M.D.N.C. 2002), *aff'd mem.*, 63 Fed. Appx. 163 (4th Cir. 2003).

[63] *See United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000) ("The traditional requirements for equitable relief need not be satisfied since Section 7408 expressly authorizes the issuance of an injunction."); *Abdo*, 234 F. Supp. 2d at 564 ("[b]ecause both Section 7407 and 7408 authorize injunctions, injunctive relief under these sections does not have to be established by resort to traditional equitable factors. Instead, courts rely on the factors identified in each individual section.").

[64] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985).

[65] I.R.C. § 7407(b).

continuous or repeated, the court may enjoin the return preparer from preparing any returns if the Court finds that a more narrow injunction prohibiting only specific misconduct would be insufficient to prevent further interference with the administration of the internal revenue laws.[66] McBryde is violating both I.R.C. §§ 6694 and 6695, and so should be enjoined under I.R.C. § 7407.

Under I.R.C. § 6694(a), return preparers are prohibited from understating a customer's liability based on an unrealistic position. McBryde's returns grossly understate his customers' liabilities based on patently frivolous positions, such as his "claim of right" deductions, his deductions under I.R.C. §§ 162, 183, and 212, his deduction of household utilities, and his reporting a customer's wages as a negative amount. Having prepared and filed more than 187 such returns, McBryde has repeatedly and continuously violated I.R.C. § 6694(a).[67]

Section 6695 penalizes a return preparer who fails to, *inter alia*, furnish a copy of the return to the taxpayer, sign the return, furnish the return preparer's own identifying number on the return, or maintain, for production to the IRS upon request, either copies of the returns he prepares or a list of his customers' names and taxpayer identification numbers.[68] McBryde has committed numerous infractions of I.R.C. § 6695. He frequently fails to give customers copies of their returns.[69] Not only does he fail to identify himself on the returns by signing them and furnishing his identifying number, he actively attempts to conceal his authorship of these returns

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[66] *Id.*

[67] Britt Decl. ¶ 71.

[68] I.R.C. § 6695(a)-(d); 6107.

[69] *See supra* note 25.

by omitting his name altogether and claiming the returns are "self-prepared."[70] Finally, McBryde does not keep records of his customers' names and taxpayer identification numbers or copies of their returns, and what few copies he does keep he refused to share with the IRS until this Court ordered him to do so.[71]

There can be no question that absent an injunction backed by the Court's contempt powers McBryde will continue to prepare fraudulent federal tax returns. The IRS notified him on June 8, 2004 that he was under investigation for preparing returns asserting the frivolous "claim of right" deduction.[72] McBryde's response was to switch tactics. He began citing I.R.C. §§ 162, 183, and 212 rather than § 1341 in support of the substantial deductions he continued to claim on behalf of his customers, and on two returns he reported the customer's income as a negative "non-taxable" number.[73] Since the IRS notified him of its investigation, he has filed at least five fraudulent returns.[74]

Because his fraudulent claims have been so varied, a narrow injunction would not stop McBryde's abuses. Rather than limiting his fraudulent returns to misuse of a single IRS form, a single illegal deduction, or a single factual misrepresentation,[75] McBryde has falsified Forms

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[70] *See supra* notes 28-29.

[71] *See supra* notes 36-46 and accompanying text.

[72] Ex. 1.

[73] *See supra* notes 48-57 and accompanying text.

[74] Exs. 19A, 23D-23E, 24A-24B.

[75] *Cf. United States v. Foster*, No. Civ. 3:02CV133, 2002 WL 31689537 (E.D. Va. Oct. 18, 2002) (enjoining defendant from preparing returns asserting "fabricated tax credits for slavery reparations" because that was the only illegal claim he made).

1040, Forms 1040X, and Schedules A, and has made numerous illegal deductions. The Forms W-4 he submitted to his own employer, claiming that he is exempt from federal taxation, and his three-page attachment to his 2000 return, expounding on his warped views of the tax laws, prove that he cannot be trusted to file proper returns.[76] Were the Court to enter a narrow injunction, prohibiting only the specific illegal deductions and claims that the IRS has identified thus far, McBryde would be free to continue filing fraudulent tax returns with only slight variations on his past abuses or with new improper claims. The Court should enjoin him from preparing federal tax returns altogether.

C. Injunctive Relief Is Warranted Under I.R.C. § 7408 Because McBryde's Preparation of Frivolous Tax-Related Documents Violates I.R.C. § 6701.

Section 7408 authorizes a court to enjoin persons who have engaged in any conduct subject to penalty under I.R.C. §§ 6700, 6701, 6707, or 6708 if the court finds that injunctive relief is appropriate to prevent the recurrence of such conduct.[77] Section 6701 is violated when a person prepares or assists in the preparation of "any portion of a return, affidavit, claim, or other document" that he "knows (or has reason to believe) will be used in connection with any material matter" under the internal revenue laws and that he knows "(if so used) would result in an understatement of the liability for tax."[78] There is overwhelming evidence that McBryde is violating I.R.C. § 6701.

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[76] Exs. 26-27.

[77] I.R.C. § 7408(b)-(c).

[78] I.R.C. § 6701.

McBryde prepares federal tax returns that he knows or has reason to know will be used in connection with a material matter arising under the internal revenue laws—the determination of his customers' tax liabilities—and that result in a gross understatement of those liabilities. Unless enjoined, McBryde is likely to continue to engage in such conduct. Therefore, injunctive relief is appropriate under I.R.C. § 7408.

D. McBryde Should Be Enjoined Under I.R.C. § 7402(a) from Interfering with the Enforcement of the Internal Revenue Laws

I.R.C. § 7402(a) grants federal district courts broad authority to issue injunctions and other orders enforcing the internal revenue laws, even where the United States has other remedies available. To obtain a preliminary injunction under I.R.C. § 7402(a), the United States need only show that an injunction is necessary or appropriate for the enforcement of the internal revenue laws.[79] Because I.R.C. § 7402(a) explicitly provides that the injunction remedy is "in addition to and not exclusive of" other remedies for enforcing the internal revenue laws, the United States need not establish that it has no adequate remedy at law for an injunction under I.R.C. § 7402(a). Rather, I.R.C. § 7402(a) manifests "a Congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws,"[80] and "has been used to enjoin interference with tax enforcement even when such interference does not violate

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[79] *See* I.R.C. § 7402(a). *See also Duke v. Uniroyal, Inc.*, 777 F. Supp. 428, 433 (E.D.N.C. 1991) (finding that where an injunction is expressly authorized by statute, and the statutory conditions have been satisfied, the moving party is not required to establish irreparable injury before obtaining injunctive relief).

[80] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957). *See United States v. First Nat'l City Bank*, 568 F.2d 853 (2d Cir. 1977).

any particular tax statute."[81] Here, McBryde is violating I.R.C. §§ 6694, 6695, and 6701,[82] and interfering with the administration of the internal revenue laws. The Court should preliminarily enjoin him from his continued abuse of the law.

McBryde interferes with the administration of the internal revenue laws by preparing and filing returns that illegally reduce his customers' reported federal income tax liabilities and claim refunds to which his customers are not entitled. He refused IRS requests for information and refused to obey an IRS summons, forcing the United States to seek a court order simply to acquire records that he was required by I.R.C. § 6695 to produce upon request. Even then, the IRS discovered that his records were incomplete. McBryde impedes the IRS from identifying his returns not only by his failure to keep and produce records, but also by his refusal to identify himself on the returns. His failure to discuss his returns with his customers hinders them from making informed decisions about his frivolous claims. Because he does not show his customers the returns before filing, and in some cases even files the returns before the customers have given him permission to do so, they have no opportunity to object to the frivolous positions he asserts

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[81] *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984). *See United States v. Kaun*, 633 F. Supp. 406, 409 (E.D. Wis. 1986) ("federal courts have routinely relied on [§ 7402(a)] . . . to preclude individuals . . . from disseminating their rather perverse notions about compliance with the Internal Revenue laws or from promoting certain tax avoidance schemes"), *aff'd* ,827 F.2d 1144 (7th Cir. 1987). *See generally United States v. Lee*, 455 U.S. 252, 253 (1982) (noting that "the broad public interest in maintaining a sound tax system is of . . . a high order."); *United States v. Ekblad*, 732 F.2d 562, 563 (7th Cir. 1984) (finding in a case brought under I.R.C. § 7402 that "[t]he United States has standing to seek relief from actual or threatened interference with the performance of its proper governmental functions.").

[82] *See supra* text accompanying notes 65-78.

on their behalf.[83] McBryde also interferes with the administration of the internal revenue laws by charging a contingent fee for his return preparation, notwithstanding that IRS regulations prohibit contingent fees in all but a few circumstances.[84]

An injunction is both necessary and appropriate to prevent McBryde from further interfering with the enforcement of the internal revenue laws.

E. McBryde Is Likely To Continue To Prepare Fraudulent Returns and Interfere with the IRS Unless He Is Enjoined.

After the statutory requirements for injunctive relief have been met, the Court should consider whether there is a "reasonable likelihood of future violations" before issuing injunctive relief.[85] Relevant factors for determining the likelihood of future violations are: (1) the gravity of the harm caused by the offense, (2) the extent of the defendant's participation and his degree of scienter, (3) the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions, (4) the defendant's recognition of his own culpability, and (5) the sincerity of the defendant's assurances against future violations.[86] Because these factors all point to McBryde continuing to prepare fraudulent returns and to interfere with the IRS, injunctive relief is appropriate.

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[83] *See, e.g.,* Exs. 10 (Bazemore Aff.) ("I thought Mr. McBryde was going to prepare [the returns] and call me. I had no idea he had already sent them off to the IRS."); 17 (Mayfield Affs.) ("I was told to think about it and he could file an amended return. After I decided to go ahead with it he was called. Mac had already filed the 1040X."); 20 (Flyth Aff.) ("I was still not sure and I wanted to think about it some more. When I got to his home . . . he told me he already sent them to the IRS.").

[84] *See* 31 C.F.R. § 10.27(b).

[85] *United States v. Raymond*, 228 F.3d 804, 813 (7th Cir. 2000).

[86] *Id.*; *Abdo*, 234 F. Supp. 2d at 565.

McBryde has caused serious harm to the United States. His fraudulent returns have cost the United States Treasury more than $190,000 in lost revenue thus far.[87] Having prepared these returns himself, McBryde was well aware that they asserted unsupported positions. As a paid return preparer with ninety-four customers,[88] McBryde is likely to continue to prepare fraudulent returns. Far from recognizing his culpability, or making any offer of assurance against future violations, McBryde has continued his fraudulent return preparation unabated since learning of the IRS investigation.

Accordingly, there is a high likelihood that absent an injunction McBryde will continue to prepare fraudulent returns and interfere with the IRS. He should be enjoined under I.R.C. §§ 7407, 7408, and 7402(a).

F. Equitable Factors Weigh in Favor of Enjoining McBryde

Under the Court's traditional equitable powers, the Court may issue an injunction after evaluating "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest."[89] The relative likelihood of harm to the parties is the most important consideration, and determines the degree to which the plaintiff must demonstrate a likelihood of success on the merits.[90]

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[87] Britt Decl. ¶¶ 72-73.

[88] *Id.* ¶ 70.

[89] *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

[90] *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997); *Direx Israel*, 952 F.2d at 812 (finding that if the balance of harms "tips decidedly in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious,

If McBryde is not enjoined, the United States will be irreparably harmed because he will continue to prepare fraudulent returns misstating his customers' liabilities. His fraudulent returns necessitate the IRS expending its limited resources in examining customers' true liabilities and attempting to collect the unpaid taxes—tasks made more difficult by McBryde's failure to keep complete records and failure to identify himself on his returns. Already, the United States has lost more than $190,000 due to McBryde's returns.[91] While the United States will suffer irreparable harm if McBryde is not enjoined, McBryde has no protected interest in his return-preparation service.[92] The United States is likely to prevail on the merits in this case because McBryde is violating the law and interfering with the administration of the internal revenue laws. The public interest will be advanced by enjoining McBryde because he will stop his illegal conduct and the harm to the United States and his customers that it is causing.

G. The United States Is Entitled to the Affirmative Relief it Seeks.

In addition to barring McBryde from preparing federal tax returns and interfering with the IRS, this Court should order in its preliminary injunction that he produce to the United States information identifying his customers and copies of his returns,[93] provide his customers with a

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substantial, difficult, and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.") (internal quotations omitted).

[91] Britt Decl. ¶¶ 72-73.

[92] *See Dunlop v. Davis*, 524 F.2d 1278, 1281 (5th Cir. 1975) (finding that an injunction requiring people to obey the law does not cause hardship). Indeed, return-preparation is not even McBryde's primary source of income: he is employed as a code inspector with the City of Norfolk.

[93] McBryde has continued to prepare and file returns since this Court last ordered him to produce customer records and copies of returns in December 2004.

copy of the preliminary injunction, and notify them that the returns he prepared for them were fraudulent. The Court should also allow the United States to conduct discovery to monitor McBryde's compliance with the preliminary injunction. This requested affirmative relief is authorized by I.R.C. § 7402(a), which grants the Court broad authority to fashion relief to prevent interference with the internal revenue laws. As the Supreme Court found in *United States v. First National City Bank*, because the public interest is at stake in cases brought under I.R.C. § 7402(a), courts may grant relief in § 7402(a) injunctions that they would not grant to private litigants.[94]

The customer list and copies of returns will enable the IRS to examine McBryde's clients, thus beginning the process of recovering lost revenue, as well as monitor whether McBryde prepares additional returns on behalf of these customers. Unless McBryde is required to send the preliminary injunction to his customers, they may be unaware that this Court has found his tax return service to be illegal and may continue to go to him for return preparation or file similar returns themselves. In addition, notifying the customers of this Court's findings will encourage them to correct the fraudulent returns McBryde has filed on their behalf. Allowing discovery at this time will enable the United States to monitor McBryde's compliance with the preliminary injunction.

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[94] 379 U.S. 378, 383-84 (1965) ("our review of the [temporary] injunction as an exercise of the equity power granted by 26 U.S.C. § 7402(a) must be in light of the public interest involved: 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'") (quoting *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 552 (1937)).

Other courts have granted the United States similar affirmative relief in both preliminary and permanent injunctions. Numerous decisions require abusive tax scheme promoters and return preparers to produce customer information to the United States,[95] and I.R.C. § 6107(b) mandates that return-preparers furnish such lists and copies of returns to the United States upon demand.[96] Courts have ordered abusive tax scheme promoters and return preparers to provide

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[95] *See, e.g.,United States v. Fuselier*, No. 04-cv-2435 (W.D. La. Feb. 24, 2005) (http://www.usdoj.gov/tax/fuse.pdf) (ordering that promoters of "claim of right" tax scheme produce customer list to United States and notify customers of preliminary injunction); *United States v. Kahn*, No. 5:03-CV-436-OC-10GRJ, 2003 WL 23309466 (M.D. Fla. Dec. 29, 2003) (http://www.usdoj.gov/tax/Kahn.pdf) (ordering, in a preliminary injunction, that abusive tax scheme promoters produce customer list to United States); *United States v. Rivera*, No. CV03-2520GHK(JWJX), 2003 WL 22429482 (C.D. Cal. Jul. 18, 2003) (http://www.usdoj.gov/tax/RiveraDefjPrelimInj.pdf) (ordering that abusive tax scheme promoter mail copies of the permanent injunction to customers and produce a customer list to the United States); *United States v. Mosher*, No. 1:03-CV-208, 2003 WL 21153355 (W.D. Mich. Apr. 7, 2003) (http://www.usdoj.gov/tax/PI.pdf) (ordering, in preliminary injunction, that tax return preparer produce customer list to United States); *United States v. Mayer*, No. CIV8:03CV415T26TGW, 2003 WL 1950079 (M.D. Fla. Feb. 20, 2003) (granting temporary restraining order requiring immediate disclosure of return preparer's customer list and allowing United States expedited discovery); *United States v. Farnell*, No. 8:02-CV-1742-T-26TBM, 2003 WL 690888 (M.D. Fla. Jan. 21, 2003), *modified at*, 2003 WL 1870502 (ordering, in a preliminary injunction, that abusive tax scheme promoter provide customer information to United States); *United States v. Prater*, No. 8:02-CV-2052-T-23MSS, 2002 WL 32107640 (M.D. Fla. Dec 19, 2002) (ordering, in a preliminary injunction, that abusive tax scheme promoter produce customer list to United States); *United States v. Joy Found.*, No. Civ. 02-1069, 2002 WL 31689477 (C.D. Ill. Oct. 18, 2002) (ordering that abusive tax scheme promoters produce their customer list to the United States and mail copies of the permanent injunction to their customers; also allowing the United States to conduct discovery to monitor compliance); *United States v. Rosile*, No. 8:02-CV-466-T-17MSS, 2002 WL 1760861 (M.D. Fla. June 10, 2002) (http://www.usdoj.gov/tax/preliminjorderRos352.pdf) (ordering, in a preliminary injunction, that return-preparer produce a customer list or copies of the returns he had prepared); *United States v. Sweet*, No. 8:01-CV-331-T-23TGW, 2002 WL 963398 (M.D. Fla., Feb. 20, 2002) (http://www.usdoj.gov/tax/sweetinjuctionjudgment.pdf) (ordering that abusive tax scheme promoter provide copies of the permanent injunction to customers and produce a customer list to the United States).

[96] I.R.C. § 6107(b) ("Any person who is an income tax return preparer . . . shall . . . retain a completed copy of such return or claim, or retain, on a list, the name and taxpayer identification

their customers with copies of the injunction[97] and to notify them of the falsity of their positions.[98] Additionally, courts have permitted the United States to conduct discovery to monitor compliance with injunctions.[99]

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number of the taxpayer for whom such return or claim was prepared, and . . . make such copy or list available for inspection upon request by the Secretary."); *see also* I.R.C. § 6695(d) (penalizing failure to comply with I.R.C. § 6107(b)).

[97] *See, e.g., United States v. Bell*, 238 F. Supp. 2d 696, 706 (M.D. Pa. 2003) (ordering, in a preliminary injunction, that abusive tax scheme promoter notify his customers of the injunction); *Abdo*, 234 F. Supp. 2d 553 (ordering abusive tax scheme promoter, in a permanent injunction, to send copies of the injunction to his return-preparation customers); *United States v. Molen*, No. CIV 03-1531 (E.D. Ca. Dec. 12, 2003) (http://www.usdoj.gov/tax/MolenPrelimInj.pdf) (ordering defendants to distribute copies of preliminary injunction); *United States v. Thompson*, No. CIV 03-1532, 2003 WL 23309468 (E.D. Ca. Sept. 12, 2003) (http://www.usdoj.gov/tax/ThompsonPrelimInj.pdf) (ordering defendant to distribute copies of preliminary injunction); *Rivera*, 2003 WL 22429482; *United States v. Bosset*, No. 8:01-CV-2154-T-17TBM, 2003 WL 1735481 (M.D. Fla. Feb. 27, 2003) (http://www.usdoj.gov/tax/bossettinjunction.pdf) (ordering, in a permanent injunction, that abusive tax scheme promoter provide customers with copies of the injunction and inform them of the falsity of his positions, that the IRS may impose penalties against them due to the fraudulent returns he prepared for them, and that the United States may seek to recover erroneous refunds issued to them); *Joy Found.*, 2002 WL 31689477; *Sweet*, 2002 WL 963398.

[98] *See, e.g., United States v. Bell*, 414 F.3d 474, 485 (3d Cir. 2005) (affirming a permanent injunction ordering abusive tax scheme promoter to post the injunction on his website); *United States v. Schiff*, 379 F.3d 621, 631 (9th Cir. 2004) (affirming preliminary injunction requiring abusive tax scheme promoter to post injunction on his website); *Fuselier*, No. 04-cv-2435 (W.D. La. Feb. 24, 2005) (http://www.usdoj.gov/tax/fuse.pdf) (preliminary injunction ordering promoter of "claim of right" scheme to notify customers of the injunction).

[99] *See, e.g., Mayer*, 2003 WL 1950079; *Joy Foundation*, 2002 WL 31689477.

III. Conclusion

The Court should enjoin McBryde now to prevent further harm while this case is litigated.

Respectfully submitted,

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