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U.S. DISTRICT COURT
DISTRICT OF COLORADO

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-B-1127 (PAC)

UNITED STATES OF AMERICA,

Plaintiff,

v.

AUSTIN GARY COOPER, individually and as founder of Taking Back America;
MARTHA E. COOPER, individually and as founder of Taking Back America;
TAKING BACK AMERICA, an unincorporated organization.

Defendants.

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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TAKING BACK AMERICA, an unincorporated organization.

Defendants.

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Introduction

The Government's complaint seeks to enjoin the defendants under §§ 7402 and 7408 of the Internal Revenue Code (IRC) (26 U.S.C.) from further promoting an abusive tax scheme. The Government has moved for a preliminary injunction, and requests an expedited hearing to stop the defendants' illicit conduct before any more damage is done.

The evidence submitted with the Government's motion establishes that the defendants are marketing a discredited scheme referred to as the "expatriation/repatriation program." The proposed preliminary injunction sought at this time would prevent the defendants from:

(1) Organizing, promoting, marketing, or selling any abusive tax shelter, plan or

arrangement that advises or encourages customers to attempt to violate the internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities, including the expatriation/repatriation program;

(2) Making false statements about the securing of any tax benefit by the reason of participating in their program, including the false statement that American citizens are not required to pay federal income tax;

(3) Encouraging, instructing, advising and assisting others to violate the tax laws, including to evade the payment of taxes;

(4) Engaging in conduct subject to penalty under IRC § 6700, *i.e.*, by making or furnishing, in connection with the organization or sale of an abusive shelter, plan, or arrangement, a statement the defendants know or have reason to know to be false or fraudulent as to any material matter;

(5) Engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws by the Internal Revenue Service.

In short, the Government seeks a preliminary injunction preventing the defendants from committing future violations of the Internal Revenue Code. Injunctions to stop violations of the law are typically permitted "because [they] merely require the enjoined party to obey the law." *United States v. Campbell*, 897 F.2d 1317, 1324 (5th Cir. 1990).

Statement of the Evidence

Austin Gary Cooper and Martha E. Cooper, husband and wife, and their organization, Taking Back America, market and promote a tax shelter in which their customers cease filing federal income tax returns and stop paying federal income taxes.[1] Mrs. Cooper cofounded TBA with her husband.

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[1] *See* Declaration of Dennis Montgomery ¶¶ 1 and 9.

She is the trustee, financial officer and seminar coordinator for TBA.[2]

According to the defendants, through use of the expatriation/repatriation program, a person can give up his United States citizenship, but retain or reclaim his American citizenship. According to the defendants, U.S. citizens, but not American citizens, are obligated to pay federal income tax. Thus, by use of the expatriation/repatriation device, a person purportedly becomes exempt from federal taxation.[3]

Participation in the defendants' abusive tax program begins with an "Expatriation/Repatriation Application and Services Agreement,"[4] which customers complete and forward to TBA. Afterwards, the defendants send the customer an expatriation/repatriation document package that includes numerous forms that purport to remove the purchaser from the federal income tax system and the social security system. Paperwork sent to customers includes various declarations for the customer to sign and forward to the IRS, the Supreme Court, the Social Security Administration and other government departments and agencies, notifying those entities that the signer is no longer a United States citizen and no longer subject to their jurisdiction or laws.[5]

The expatriation/repatriation material includes a form letter to be sent by the purchaser addressed to the Commissioner of Internal Revenue. The letter notifies the IRS that the person is no

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[2] Montgomery Decl., Exh. C, p. 27.

[3] Montgomery Decl. ¶ 4.

[4] Montgomery Decl., Exh. C pp. 31-32.

[5] Montgomery Decl., Exh. A, Exh. B, p. 6.

longer a citizen of the corporate United States and is no longer subject to the internal revenue laws. The letter requests a return of all funds previously paid by the purchaser for federal taxes and social security. The letter states that "This document shall establish a debt owed to me by you [the IRS] and your principal [the Federal Reserve]."[6]

The defendants also send purchasers a form letter apparently to be used if the IRS levies on social security payments. The document is meant to hinder any such levy.[7]

In the expatriation/repatriation package, the defendants incite and assist their customers to file false IRS W-4 Forms (Employee's Withholding Allowance Certificate) and W-8 Forms (Certificate of Foreign Status) so that the employer will stop withholding taxes from the customer's paychecks.[8] TBA tells its potential customers that "[o]nce you are aboard, TBA will provide you with all necessary documentation for getting your employer to stop withholding from your paycheck."[9]

Defendants use a distributorship system to promote and sell their abusive tax program. Distributors are participants in the expatriation/repatriation program who have executed distributor agreements with TBA. Potential customers are referred to their nearest distributor, who makes a commission from the program sales.[10]

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[6] Montgomery Decl., Exh. A, pp. 17-18.

[7] Montgomery Decl., Exh. A, pp. 27-29.

[8] Montgomery Decl. ¶ 8, Exh. A, pp. 5, 15 and 34, Exh. B, pp. 2 and 5.

[9] Montgomery Decl., Exh. C, p. 11.

[10] Montgomery Decl. ¶ 5, Exh. C, pp. 34-35

The price charged by the defendants for the expatriation/repatriation program starts at $1,595. The customers are advised to make the check payable to the distributor who referred them.[11]

As part of their promotion, the defendants also market and offer the use of Unincorporated Business Trust Organizations (UBTOs), which defendants claim give a person the privileges of ownership of assets without the liabilities. UBTOs are nothing more than sham trusts designed by the defendants for the sole purpose of sheltering or hiding income and assets. Customers are also advised to use fictional names on their trusts to make them further judgment proof.[12]

Defendants also sell to TBA members a product called the Barrister Course. This course, which was designed and implemented by the Coopers, purports to educate the purchaser on the Coopers and TBA's philosophy and interpretation of the law. According to the defendants, a Law Barrister degree is bestowed upon successful completion of the course The course costs $2,400.[13]

The defendants market their abusive tax program nationwide through seminars, regularly scheduled telephone conference calls, and the Internet, including live Internet shows. The most comprehensive version of their promotional materials and a description of the abusive program is at the defendants' website, www.tbafoundation.com.[14]

In promoting and explaining their program, defendants have made the following false or

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[11] Montgomery Decl., Exh. C, p. 32.

[12] Montgomery Decl. ¶ 11.

[13] Montgomery Decl. ¶ 12, Exh. C, p. 33

[14] Montgomery Decl. ¶ 13.

fraudulent statements[15]:

- If you are not a U.S. citizen, you are not obligated to pay income taxes.[16]
- The expatriated/repatriated individual is no longer under the jurisdiction of the IRS.[17]
- By expatriation/repatriation you are only giving up your U.S. citizenship, not your American Citizenship.[18]
- The United States boundary is solely within the confines of Washington, D.C., and the United States government has power to legislate only within those confines.[19]
- The expatriation/repatriation program allows persons to terminate all so-called contracts with the Federal Government, thereby relieving them of their income tax obligations.[20]
- The IRS has no authority to examine a person's tax liabilities if the person has entered the expatriation/repatriation program.[21]
- Cooper has the only documented case where the government admitted the contracts that bind us to a voluntary income tax system. TBA has successfully proven these contracts to be fraudulent with the concurrence of the President of the U.S., Chief Justice Rehnquist of the U.S. Supreme Court, many of the State Chief Justices, many of

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[15] These statements and similar ones are disseminated on the defendants' website.

[16] Montgomery Decl., Exh. C, p. 4.

[17] Montgomery Decl., Exh. A, pp. 17-18 and 33, Exh. C, p. 13.

[18] Montgomery Decl., Exh. C, p. 6.

[19] Montgomery Decl., Exh. C, pp. 3 and 8.

[20] Montgomery Decl., Exh. C, pp. 6, 10, 11 and 13.

[21] Montgomery Decl., Exh. A, pp. 17-18.

the Governors of each States and the Commissioner of Internal Revenue.[22]

The defendants' promotional materials provide "testimonials" in order to induce customers to purchase the defendants' tax evasion schemes. Statements in the testimonials include:

- By renouncing the inferior US citizenship and reclaiming American Citizenship, we set ourselves free again. A side benefit is that we are removed from the jurisdiction of the fraudulent IRS. – Janis G, Missouri

- In 2001 I learned of TBA, joined right away, filed my paper work and served this to the IRS. The tax lien was removed and the last letter from the IRS was, "Sorry for any inconvenience this office may have caused you." – Dale R, Florida

- After 25 years of pursuing Tax Freedom, I finally found the solution. – Ken H, North Carolina

- Taking Back America is a wonderful opportunity to free yourself from a "voluntary" tax system known as Income Tax. By getting involved you can help others do the same and help your country as the same time. I am so thankful to TBA for the positive impact they have made in my life, thanks TBA. – Michael N, Virginia

- I have briefly studied the Federal Reserve and the fraudulent collection of federal and state income tax on and off for the past five years. Quite frankly, I was too afraid to exercise my rights to withdraw from the system with the methods available – too confrontational. With TBA, we can educate ourselves and by working together, eradicate that fear. TBA has an easy-to-understand, proven method of Expatriation/Repatriation that does work. Many thanks to Gary Cooper for making this program available to us. – Dick L, Georgia[23]

Participation in the defendants' abusive program results in customers' failing to file federal income tax returns, have the proper amount of federal income taxes withheld from wages, and pay their

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[22] Montgomery Decl., Exh. C, p. 26.

[23] Montgomery Decl., Exh. B, pp. 8-11.

federal tax liabilities.[24]

To assuage customers who may feel unpatriotic about not participating in the federal income tax system, the defendants falsely assure them that paying income taxes is voluntary, and that, any case, income taxes are not used for the nation's roads, operations or military anyway.[25]

Defendants also assert that their program permits customers to continue using their social security number. TBA's website states, "TBA takes a revolutionary, non-confrontational approach by delivering a proven method of eliminating income tax permanently and removing yourself completely from the system without sacrificing the use of your social security number."[26]

Although Mr. Cooper holds himself out as a "Law Barrister and Lawyer" who gives "legal advice and advice in the law."[27] There is no evidence that he is a lawyer. He was convicted in 1990 under IRC § 7201 for willfully attempting to evade or defeat the payment of federal income taxes by failing to file income tax returns, failing to pay income tax and by filing false employee's withholding allowance certificates. (*United States v. Cooper*, Case No. 89-109-CR-WMH, S.D. Fla.) Cooper's position in the criminal case was similar to the one the defendants espouse in their abusive tax program—chiefly, that an individual can renounce his citizenship and become exempt from federal

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[24] Montgomery Decl. ¶ 9.

[25] Montgomery Decl., Exh. C, pp. 10 and 12.

[26] Montgomery Decl., Exh. C, pp. 13 and 25.

[27] Montgomery Decl., Exh. C, pp. 19 and 25.

taxes.[28]

Argument

A. A Preliminary Injunction Should Issue under IRC § 7408 Before Defendants Engage in Further Conduct Subject to Penalty under § 6700

This Court has authority to grant the requested preliminary injunction under IRC § 7408 if the Government proves that the defendants engaged in conduct subject to penalty under IRC § 6700 and injunctive relief is appropriate to prevent the recurrence of such conduct. The record submitted with this motion makes that showing.

Although the legislative history shows that §§ 6700 and 7408 were enacted to give the IRS more effective tools to deal with "the growing phenomenon of abusive tax shelters," S. Rep. No. 97-494, at 266 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1014, these statutes do not apply only to typical investment tax shelters, but also to "other abusive tax avoidance schemes." S. Rep. No. 97-494, *supra* at 266. *See United States v. White*, 769 F.2d 511, 515 (8th Cir. 1985); *United States v. Buttorff*, 761 F.2d 1056, 1063 (5th Cir. 1985). The Senate Report indicates the following rationale for enacting this injunctive relief provision (S. Rep. No. 97-494, 1982 U.S.C.C.A.N. at 1016):

> The committee believes that the most effective way in which this new penalty [§ 6700] can be enforced is through injunctions against violators to prevent recurrence of the offense. The ability to seek injunctive relief will insure that the . . . [IRS] can attack tax shelter schemes years before such challenges would prove possible if the . . [IRS] were required to await the filing and examination of tax returns by investors. Thus, injunctive relief will better enable the . . . [IRS] to protect the integrity of the tax laws and to protect potentially innocent investors against wide-spread marketing of such tax

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[28] Montgomery Decl. ¶ 20.

schemes.

Five elements must be shown to obtain an injunction under IRC §§ 6700 and 7408:

> (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct.

United States v. Estate Pres. Servs., 202 F.3d 1093, 1098 (9th Cir. 2000).[29]

(1) Defendants organized and sold a plan or arrangement.

There is no question that the defendants organized and sold a plan or arrangement. The expatriation/repatriation program was organized and marketed by the defendants within the meaning of § 6700. The defendants charge $1,595 for participation in the program. They market their program in seminars, regular phone conference calls, and through the Internet. They use a network of distributors, which they recruited, to assist in the marketing and sales. The Coopers are the founders and operators of TBA, which is the vehicle used for the abusive program.

(2) Defendants made false or fraudulent statements regarding the tax benefits associated with their program.

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[29] Because § 7408 expressly provides for an injunction, the traditional guidelines for equitable relief do not have to be established for an injunction to issue. *Id.*; *White*, 769 F.2d at 515; *Buttorff*, 761 F.2d at 1059 ("When an injunction is explicitly authorized by statute, proper discretion usually requires its issuance if the prerequisites for the remedy have been demonstrated and the injunction would fulfill the legislative purpose.") *See United States v. H & L Schwartz, Inc.*, 60 A.F.T.R.2d 87-6031, 87-6036 (C.D. Cal. 1987) ("Traditional equity grounds need not be proven in order for an injunction that is authorized by statute is issued.").

The defendants make numerous false or fraudulent statements regarding the tax benefits of the expatriation/repatriation program. The defendants' materials assure customers that the Federal Government is without authority to tax them and that by following the instructions in the expatriation/repatriation packet they can legally refuse to pay federal income taxes and file income tax returns. The defendants' erroneous statements generally fall into the following categories:

- Americans hold dual citizenship–United States and American; and only U.S. citizens, and not American citizens, are subject to federal income taxation;
- The payment of federal income taxes is voluntary;
- The Federal Government (IRS) has no authority outside the District of Columbia;
- Citizens can "contract out" of the federal taxation system by not availing themselves of such services as social security and the Post Office.

These statements are no different than the usual shopworn tax protestor arguments that have been rejected by every court that has considered them.

The defendants' claim that American citizenship and U.S. citizenship bestow different rights and obligations is unfounded. The claim is similar to that made by tax protestors who claim that they are State citizens and not United States citizens, and thus not subject to federal taxation. There are numerous court cases in which individuals have attempted to reject United States citizenship in order to relieve themselves of their federal income tax requirements. None of them has been successful. Claims that individuals are not citizens of the United States but solely citizens of some nonforeign entity, and not subject to federal taxation have been uniformly rejected. *E.g.*, *United States v. Gerads*, 999 F.2d 1255 (8th Cir. 1993); *United States v. Sileven*, 985 F.2d 962,970 (8th Cir. 1993); *United States v.*

Steiner, 963 F.2d 381 (9th Cir. 1992); *United States v. Masat*, 948 F.2d 923, 934 (5th Cir. 1991); *United States v. Sloan*, 939 F.2d 499 (7th Cir. 1991); *United States v. Kurger*, 923 F. 2d 587, 588 (8th Cir. 1991); *United States v. Price*, 798 F.2d 111,113 (5th Cir. 1986).

Here, the defendants maintain that American citizenship differs from United States citizenship, and only the latter is subject to the federal income tax laws. There is absolutely no support for this claim. The IRC imposes an income tax upon United States citizens. *Sloan*, 939 F.2d at 501. As one court made clear, "[a]s a United States citizen, plaintiff is required to pay federal income tax. Section 1(c) of the I.R.C. provides that a tax shall be 'imposed on the taxable income of every individual.'" *Betz v. United States*, 40 Fed.Cl. 286, 296 (1998). The IRC applies to "citizens or residents of the United States." *Id.*

The United States Constitution delineates the powers delegated to Congress by the states. The power of Congress to impose a federal income tax system on citizens and residents of the United States derives from the Sixteenth Amendment. *Lonsdale v. Commissioner*, 661 F.2d 71, 72 (5th Cir. 1981); *United States v. Updegrave*, 97-1 U.S. Tax Cas. (CCH) ¶ 50,465 (E.D. Pa. 1997). The Fourteenth Amendment controls the definition of citizenship. The Amendment states that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."

The defendants' statement that federal income taxes apply only to U.S. citizens is frivolous. Federal income tax law applies not only to all citizens of this country, but also to residents of this country. IRC § 7701(a)(14) defines "taxpayer" as any person subject to any internal revenue tax. As

courts have stated, "All individuals, natural or unnatural, must pay federal income tax on their wages," *Lovell v. United States*, 755 F.2d 517, 519 (7th Cir. 1984); *Coleman v. Commissioner*, 791 F.2d 68 (7th Cir. 1986). *See also* IRC § 7701(a)(30); *United States v. Ward*, 833 F.2d 1538, 1539 (11th Cir. 1987); *In re Becraft/United States v. Nelson*, 885 F.2d 547, 548 n.2 (9th. Cir. 1989). The Internal Revenue Code imposes a duty on individuals to file tax returns and pay the appropriate amount of tax. IRC § 6012 states that an individual shall file a tax return if taxable income exceeds a given amount. *United States v. Drefke*, 707 F.2d 978, 981 (8th Cir. 1983).

For federal income tax purposes, there is simply no distinction between being an American citizen and a United States citizen. The different nomenclature merely gives the defendants and their ilk an irrational excuse to break the law.

Also, contrary to the defendants' statements, it is clear that the filing of tax returns or the payment of federal income taxes is not voluntary, but mandatory. *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990); *Wilcox v. Commissioner*, 848 F.2d 1007, 1008 (9th Cir. 1988). The requirement to file an income tax return is plainly set forth in IRC §6011(a), 6012(a), *et seq.*, and 6072(a). *See also* Treas. Reg. §1.6011-1(a). The requirement to pay tax is contained in IRC §6151. Any taxpayer who has received more than the statutory amount of gross income is obligated to file a return and pay the appropriate tax. *See United States v. Raymond*, 228 F.3d 804, 812 (7th Cir. 2000) (paying taxes is not a voluntary activity); *Gerads*, 999 F.2d 1255 (the claim that payment of federal income tax is voluntary clearly lacks substance); *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir. 1990) (this position is "completely lacking in legal merit and patently frivolous');

United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986).

As this Circuit has stated in an unpublished opinion, "The federal income tax is not voluntary and a person may not elect to opt out of the federal income tax laws by a unilateral act of revocation and recission." *Lesoon v. Comm'r*, 141 F.3d 1185, 1998 WL 166114 (10th Cir. 1998). In fact, failure to file and pay taxes could cause the noncomplying individual to be subject to civil and criminal penalties, including fines and imprisonment. The defendants' position that the federal income tax laws are voluntary is a discredited, false concept.

The defendants' representation that the Federal Government has no authority or jurisdiction outside the District of Columbia is also wrong. As the Supreme Court stated long ago, "The people of the United States resident within any State are subject to two governments: one State, and the other National. . . ." *United States v. Cruikshank*, 92 U.S. 542, 550 (1876). In fact, the Internal Revenue Code's definition of "United States" includes "the States and the District of Columbia." IRC § 7701(a)(9); *Betz*, 40 Fed.Cl. at 295. *See also Lonsdale*, 919 F.2d at 1448 (the argument that the federal government has jurisdiction only over the District of Columbia is "completely lacking in legal merit and patently frivolous").

The Internal Revenue Code was enacted by Congress pursuant to the Sixteenth Amendment and imposes an income tax on citizens and residents of the 50 states and the District of Columbia. Taxation is not limited to just the District of Columbia, but extends to "'United States citizens throughout the nation, not just in federal enclaves,' such as post offices and Indian reservations." *Sloan*, 939 F.2d at 501 (quoting *United States v. Collins*, 920 F.2d 619, 629 (10th Cir. 1990); *Betz*,

40 Fed.Cl. at 295. *See also In re Becraft*, 885 F.2d at 549-50 ("no semblance of merit" to claim that federal laws only apply to territories and District of Columbia); *Ward*, 833 F.2d at 1539 (contention that United States has jurisdiction only over D.C. and other federal enclaves is rejected as a "twisted conclusion")

Equally meritless is the idea that taxation is somehow contractual. It is well settled that individuals must pay federal income taxes on their wages, regardless of whether they avail themselves of government benefits or privileges. All individuals must pay federal income tax on their wages "regardless of whether they requested, obtained or exercised any privilege from the federal government." *Sloan*, 939 F.2d at 501. "The notion that the federal income tax is contractual or otherwise consensual in nature is utterly without foundation [and] . . .has been repeatedly rejected by the courts." *McLaughlin v. United States*, 832 F.2d 986, 987 (7th Cir. 1987); *Coleman*, 791 F.2d at 70 (this is a "tired argument"); *Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir. 1985) (rejecting argument that a person is liable for tax only if he benefits from a governmental privilege); *Lovell*, 755 F.2d at 519.

In *Drefke*, the defendant trotted out the same arguments promoted by the defendants here--that taxes are debts that can only be incurred voluntarily when persons contract with the government for services and that those who choose to enter such contracts do so by signing tax returns and other tax forms, such as W-4 forms. The defendant argued that by refusing to sign those forms, he was a "nontaxpayer" "immune" from the IRS's jurisdiction. The court deemed the defendant's argument "totally without merit." *Drefke*, 707 F.2d at 981. In the present case, the defendants' statements that

persons can exempt themselves from income tax obligations by terminating so-called contracts with the Federal Government, such as with the postal service or with the Social Security Administration, are likewise without merit.

(3) Defendants knew or had reason to know that their tax statements were false or fraudulent.

Each of the defendants knew or had reason to know that their statements regarding the tax consequences of purchasing the expatriation/repatriation program were false or fraudulent. The United States is not required to establish that the defendants acted with subjective bad faith, *i.e.*, to show that defendants actually knew, at the time they sold their program, that they were espousing false and fraudulent statements. Rather, it is sufficient (for the purpose of establishing defendants' violation of § 6700) for the Government to show that, as a result of the uniform rejection by the courts of the same or similar statements, the defendants should have known that their representations regarding the tax benefits of their program were false or fraudulent.[30] *White*, 769 F.2d at 515 (person knew or had reason to know of false or fraudulent statements because such statements had been consistently rejected by courts); *Buttorff*, 761 F.2d at 1062.

The "knew or had reason to know" standard includes "what a reasonable person in the [defendant's] . . . subjective position would have discovered." *Estate Pres. Servs.*, 202 F.3d at 1103. As shown above, the law is well settled that the tax statements made by the defendants are false or

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[30] Of course, if it is clear beyond any doubt that a scheme is illegal under established principles of tax law, then the participants have fair notice of its illegality even if no court has so ruled. *See United States v. Ingredient Technology Corp.*, 698 F.2d 88 (2d Cir. 1983).

fraudulent. "The average citizen knows that the payment of income taxes is legally required." *Schiff*, 919 F.2d at 834. A modicum of research by the defendants would reveal that the program is simply a rehash of the outdated and discredited rhetoric espoused by the tax protest community.

The Coopers are not ignorant persons. According to TBA's website, Mrs. Cooper has been running successful businesses for 20 years. Mr. Cooper has had some college and was formerly an electrician by trade. Mr. Cooper advertises that he is a "Law Barrister and Lawyer" who gives "legal advice and advice in the law." The defendants even promote and run a quasi-law school through their Barrister Course. They either know or ought to know what the law is.

Furthermore, Mr. Cooper's conviction under IRC § 7201 shows he has experience with serious tax matters. Unfortunately, what he learned from the experience has not been put to legitimate use. The defendants are aware of the falsity and fraudulence of their program, they simply choose to ignore it.[31]

(4) Defendants' false or fraudulent statements were material.

In proving materiality, the Government need not demonstrate that a purchaser has relied on the promoter's misrepresentations. Rather, "a matter is considered material to the arrangement 'if it would have a substantial impact on the decision making process of a reasonably prudent investor.'" *United States v. Smith*, 657 F. Supp. 646, 655 (W.D. La. 1986) (quoting *Buttorff*, 761 F.2d at 1062, and

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[31] The defendants' trust program, which they promote as a vehicle to make their customers' assets judgment proof, is evidence that the defendants are aware that the IRS will someday come to collect.

S. Rep. No. 97-494, *supra* at 267). The false representations contained in the defendants' promotion are "material" because, as explained in *White*, 769 F.2d at 515, "[t]he taxpayers who have been or are now being audited by the IRS or are involved in litigation because they relied upon [the promoters' representations] should certainly have been informed about their complete lack of merit." The representations made by the defendants concerning the requirements of the federal income tax law obviously would affect the decision making process of a purchaser of the program. *See also United States v. Estate Pres. Servs.*, 38 F. Supp.2d 846, 855 (E.D. Cal. 1998) (finding that statements pertaining to the "availability of tax deductions, credits, or to other mechanisms for reducing tax liability . . . clearly qualify as 'material'" under § 6700), *aff'd* 202 F.3d 1093.

(5) An injunction is appropriate and necessary to prevent future violations of § 6700.

The need for injunctive relief in order to prevent future violations of IRC § 6700 in the present case is palpable. The defendants are canvassing the country encouraging persons to put into practice discredited theories that have been rejected by numerous courts. Factors that may be relevant in determining the likelihood of future violations of § 6700, and thus the need for an injunction under § 7408, include:

> (1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's recognition (or non-recognition) of his own culpability; and (6) the likelihood that defendant's occupation would place him in a position where future violations would be anticipated.

Estate Pres. Servs., 202 F.3d at 1105.

These factors are all satisfied here. First, the harm caused is grave. There may be as many as 2,000 persons who have purchased the expatriation/repatriation program.[32] That means 2,000 persons who have taken themselves out of the federal tax system, and have failed to file returns or pay income taxes. Second, the extent of the defendants' participation is broad. The Coopers are the founders and driving force behind TBA, which is the vehicle used for the abusive promotion. Third, the defendants promote themselves as knowledgeable about the law, when they are actually attempting to wrench tax provisions out of context to promote a willful misreading of the law. Their conduct is recurrent. The defendants are not expected to concede any culpability on their part; indeed, incarceration for tax crimes was not sufficient to make Mr. Cooper acknowledge the error of his ways. Lastly, given that the defendants remain in business and are collecting large fees for their program and services, future violations are anticipated.[33]

The defendants' conduct in promoting their abusive tax program thus warrants an injunction under IRC § 7408.

B. A Preliminary Injunction Should Issue Based Upon IRC § 7402 to Prevent Defendants from Engaging in Activities that Interfere with the Enforcement of the Internal Revenue Laws

This Court is authorized by IRC § 7402 to issue an injunction "as may be necessary or

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[33] Nine times a week the defendants conduct a nationwide phone-in conference call. Seminars are also planned, one is scheduled for June 26. (Montgomery Decl. ¶ 18, and Exh. C, pp. 15 and 22.) Their Internet website, of course, gives them access to anyone with a computer.

appropriate for the enforcement of the internal revenue laws." That statute manifests "a Congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws,"[34] and "has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute."[35] The legislative history accompanying § 7408 explicitly states that "the court will continue to have full authority under [§ 7402] and will continue to possess the great latitude inherent in equity jurisdiction to fashion appropriate relief." S. Rep. No. 97-494, *supra* at 269.

Here, injunctive relief under § 7402 is appropriate to prevent the Coopers and TBA from continuing to interfere with tax enforcement. Their false tax advice to customers and abusive program interfere with the enforcement of the internal revenue laws by delaying examination and collection and by discouraging their customers from complying with the internal revenue laws. Their activities cause the Government irreparable harm and the Government's remedies at law are inadequate.[36]

Customers who follow the defendants' advice do not file tax returns, file false withholding

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[34] *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).

[35] *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).

[36] Other remedies available to the Government involve actions against each individual taxpayer who purchases the defendants' program. Because these individuals do not file tax returns (as advised by the defendants), even identifying these persons would be a challenge for the IRS.

certificates with their employers, and do not pay their proper federal income taxes. The expatriation/repatriation program clearly interferes with the enforcement of the internal revenue laws. Injunctive relief under § 7402 is therefore necessary and appropriate to prevent the defendants from continuing to disrupt the federal tax system.

Conclusion

The defendants have organized and are promoting an abusive tax shelter that is blatantly false or fraudulent in every respect. Their activities have caused and are causing substantial harm—to their clients, to the Government, and to law-abiding taxpayers who pay their proper tax liabilities. The Court should preliminarily enjoin Austin Gary Cooper, Martha E. Cooper and Taking Back America now to prevent further harm while this case is litigated.

Respectfully submitted,

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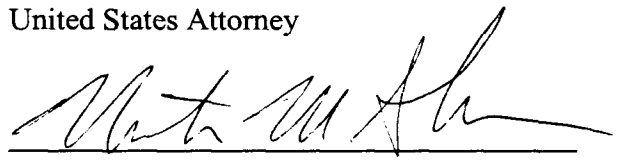

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