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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO.
v.	)	8-02-CV-466-T-17-MSS
	)	
	)	
DOUGLAS P. ROSILE, SR.,	)	
	)	
	)	
Defendant.	)	

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

Question Presented

Douglas Rosile has helped at least 174 clients attempt to evade an estimated $29 million in federal income taxes. He does this by preparing tax returns using the "IRC § 861 Argument," which this court has recognized as frivolous.[1] Despite several warnings, Rosile—who has a history of previous professional misconduct—refuses to stop preparing frivolous tax returns. Rosile even prepared and signed a frivolous tax return on April 16, 2002, four weeks after the Government filed its complaint against Rosile. Should the Court preliminarily enjoin Rosile from preparing tax returns and promoting the § 861 Argument during the pendency of this lawsuit?

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[1] *United States v. David Bosset*, Case No. 8:01-CV-2154-T-17TBM (March 26, 2002). We are providing Rosile with a copy of the Government's brief in *Bosset*. Accordingly, we will not in this brief discuss in detail the merits of the § 861 Argument.

Rosile's harmful and illegal conduct has continued unabated even after Government filed its complaint, so the United States requests an expedited hearing.

Facts

A. Rosile's professional background: sanctioned by Ohio, Florida, the SEC, and IRS.

Douglas Rosile was previously licensed as a certified public accountant in Florida and Ohio. Rosile's Florida accounting license was first placed on a one-year probation in 1989, because Rosile issued "accountants reports and related financial statements which did not comply with the applicable generally accepted auditing standards. . . ."[2] The Florida Board of Accountancy further found that Rosile "failed to exercise professional competence and due professional care. . . ." The Board noted that Rosile had operated an unlicensed accounting firm in conjunction with a non-accountant in contravention of Florida accounting rules.

The Florida Board of Accountancy then suspended Rosile's accounting license in 1992 for failing to complete sufficient continuing education.[3] In 1997 the Board revoked Rosile's Florida CPA license based—in part—on Rosile's actions that resulted in the SEC disciplinary action, explained below. The Florida license revocation also was based on Rosile's submission of an affidavit that apparently contained false information.[4]

In 1996 the Ohio Board of Accountancy revoked Rosile's Ohio CPA license, based on the

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[2] Exhibit 1, Florida Dep't of Professional Regulation Board of Accountancy Case No. 0094039.

[3] *See* Exhibit 2.

[4] *See* Exhibit 3.

Florida Board of Accountancy's earlier orders of probation and suspension.[5] The IRS Director of Practice suspended Rosile from practice before the IRS indefinitely, effective May 29, 1996.[6]

In 1995 the Securities and Exchange Commission permanently barred Rosile from appearing or practicing before the SEC.[7] This decision was based on a determination—to which Rosile consented—that Rosile had prepared and signed a financial statement overstating his client's assets by more than 300 percent. The financial statement also overstated the client's income and understated the client's liabilities. Further, the statement omitted reference to $600,000 of cash reserves, because the client believed that disclosure of these reserves would "discourage further investment from the general public." In the order, the SEC found that Rosile "failed to maintain any attitude of professional skepticism, frequently substituting management's judgment for his own." The SEC further found that Rosile failed to comply with numerous other accounting standards.

B. Rosile's preparation of tax returns based on the § 861 Argument.

1. Rosile's relationship to ARL and harm to the Government and his clients.

Rosile has been preparing federal income tax returns based on the IRC § 861 Argument since at least 2000.[8] Rosile obtains some or all of his clients through his association with a group called American Rights Litigators (ARL), which promotes the § 861 Argument. ARL advertises

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[5] Declaration of Kathleen Arth at ¶ 9.

[6] *Id.*

[7] *See* Exhibit 4.

[8] *See* Arth Dec. at ¶ 13.

on its website (americanrightslitigators.org) that it provides tax-preparation and advocacy services, including acting as power of attorney for taxpayers and writing letters to the IRS on their behalf. An ARL letter sent to its customers encouraged them to consider filing tax returns based on the § 861 Argument. ARL's letter noted that "[t]he amended or current returns are not done by ARL staff, but rather by the accountant, Doug Rosile."[9] The ARL letter further advised customers that "if you have any questions regarding any of the returns please call and ask for Mr. Rosile."[10] ARL charged its customers $100 per return, plus 20 percent of all IRS refunds resulting from filing § 861 returns.[11] ARL in turn paid Rosile at least $50 per return for preparing the returns.[12]

Rosile has prepared § 861-based amended and current-year federal income tax returns for at least 174 taxpayers in 34 states.[13] The known amount of erroneous refunds made to taxpayers based on these Rosile-prepared claims is $79,247.[14] The actual harm may be substantially greater. Because Rosile has refused to turn over copies of his clients' returns or supply a client list, the Government is not able to determine with certainty the full scope of the harm caused by

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[9] *See* Arth Dec. at ¶ 16 and attached Exhibit G; Lutz Dec., attached Exhibit A .

[10] *Id.*

[11] *Id.*

[12] *See* Arth Dec. at ¶ 17 (and attached Exhibit I, copy of canceled check from ARL to Rosile for $350, with notation "7 returns").

[13] *See* Arth Dec. at ¶ 14.

[14] *Id.*

Rosile's misconduct. The potential loss to the United States (*i.e.*, total estimated taxpayer refund claims and underpayment of taxes) for § 861-Argument-returns prepared by Rosile is estimated to be at least $29 million.[15] This estimate does not include returns Rosile is known or believed to have prepared but that the IRS has not yet had an opportunity to review. Nor does it include tax year 2001 returns.[16]

Some Rosile clients have simply stopped filing income tax returns, based presumably on Rosile's promotion of the § 861 Argument.[17] Although the IRS has attempted to estimate revenue loss from the identified non-filers among Rosile's clients, the total revenue loss from that can be ascertained only after obtaining Rosile's complete client list and auditing all clients who failed to file returns after asserting the § 861 Argument.

Rosile has prepared § 861 returns for clients without informing them that the § 861 Argument has been rejected by the courts, or warning them of the consequences of filing frivolous returns. This is shown by the testimony of a Rosile client, David C. Lutz, who retained ARL to represent him in an IRS audit of his 1995 business tax return.[18] ARL asked Lutz to

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[15] *Id.* The potential loss figure includes estimated tax loss for some Rosile clients who previously filed returns and paid taxes but failed to file or pay for 1999 or 2000. The estimate assumes that the clients' decision to stop paying or filing stems from Rosile's assertion of the § 861 Argument on their behalf.

[16] *Id.*

[17] See Arth Dec. at ¶ 14.

[18] *See* Declaration of David C. Lutz, ¶¶ 9-17.

submit copies of his 1997, 1998, and 1999 personal income tax returns.[19] ARL advised that it would review the returns to see if filing amended returns claiming refunds was appropriate.

After sending the requested copies to ARL, Lutz received from ARL amended returns for the three years prepared and signed by Rosile.[20] Because Lutz had sent his original returns to ARL—not Rosile—it is apparent that ARL forwarded Lutz's returns to Rosile.[21] Rosile never spoke to Lutz about the amended returns, and did not explain to him that the amended returns were based on the § 861 Argument. Lutz, relying on Rosile's purported expertise, filed the Rosile-prepared amended returns with the IRS.[22]

The IRS subsequently notified Lutz that his amended returns were frivolous and that a frivolous-return penalty could be imposed.[23] Lutz then retained an attorney not affiliated with ARL and learned that the § 861 Argument asserted on the returns is legally unsupportable.[24] Lutz withdrew the amended returns filed with the IRS.[25] Lutz is now working to ascertain his correct

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[19] *Id.*, ¶ 18.

[20] *Id.*, ¶ 19; Exhibit 5, copies of Lutz's 1997 and 1999 amended income tax returns. (For privacy reasons we have redacted social security and other taxpayer identification numbers from copies of these and all other tax returns submitted with the Government's motion. If the Court requests, we can provide unredacted copies.)

[21] *Id.*, ¶ 20.

[22] *Id.*, ¶¶ 2, 21.

[23] *Id.*, ¶ 24.

[24] *Id.*, ¶ 26.

[25] *Id.*

federal tax liabilities and pay them, together with any applicable interest and penalties.[26]

Despite Rosile's claim that the § 861 Argument is legally supportable, he has refused to turn over to the IRS his client list for the past three years, in violation of IRC § 6107.[27] Because Rosile has refused to give the IRS his client list or copies of all returns he has filed, the IRS is currently unable to establish with certainty how many frivolous § 861-based returns Rosile has prepared.

2. Examples: returns prepared for Snipes, Shahinian, Spiers, and McCandless.

The largest Rosile-prepared bogus refund claim that the IRS has detected is an amended 1997 income tax return—containing an altered jurat—prepared for Wesley Snipes. The amended return—signed by Rosile as preparer and dated April 14, 2001—requested a $7,360,755 refund of 1997 income taxes, based on reducing Snipes's adjusted gross income from $19,238,192 to zero.[28] Attached to Snipes's amended return was a document stating "amounts previously reported not from a taxable source per 26 CFR 1.861-8(f)(1)."

Other large Rosile-prepared claims were filed on behalf of James Shahinian of San Pedro, California. These amended returns, signed by Rosile as preparer, claimed refunds totaling $407,399 for three tax years based on reducing Shahinian's adjusted gross income for these three

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[26] *Id.*

[27] Decl. of Arth, ¶ 3-7.

[28] Exhibit 6. The printed jurat above Snipes's signature on the amended 1997 return is altered from the standard "Under penalties of perjury" to "Under no penalties of perjury."

years from $1,932,552 to zero.[29]

Rosile continued to prepare § 861-based returns even after the IRS informed him that he was under investigation and even after the Government filed and served on him a copy of its complaint. In February of 2002, Rosile prepared a return for Robert A. Spiers of Elmhurst, Illinois. Spiers signed the return—which has an altered jurat—and filed it with the IRS in March, 2002.[30] The return requested a refund of all 2001 income taxes withheld or paid—$3,603—by reducing Spiers's adjusted gross income from $44,182 to zero based on the § 861 Argument. On April 16, 2002, four weeks after the Government filed its complaint, Rosile prepared a return for Peter H. McCandless of Kansas City, Missouri. McCandless signed the return and filed it with the IRS in late April of 2002.[31] The return requested a refund of all 1999 income taxes withheld or paid—$4,192—by reducing McCandless's adjusted gross income from $36,367 to zero based on the § 861 Argument.

3. Rosile prepared § 861-based tax returns for himself and his company.

Rosile has also asserted the § 861 argument on his own tax returns.[32] Rosile's 1996 federal income tax return, filed on March 26, 2000, reports adjusted gross income of zero based on a handwritten notation stating "Per section 1.861-8(f) income not from taxable sources." Because Rosile had made estimated tax payments of $1,000 for that year, the IRS—failing to

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[29] Exhibit 7.

[30] *See* Arth Dec. at ¶ 13; Spiers return, Exhibit 9.

[31] Exhibit 10.

[32] Exhibit 8.

detect the bogus nature of Rosile's claim—erroneously sent him a refund check in that amount.

In addition to using the § 861 Argument on his individual income tax returns, Rosile filed six § 861-based refund claims on behalf of his dissolved corporate tax-preparation business, Affordable Tax/Accounting Service, seeking refunds of federal employment taxes paid. The self-professed inventor of the § 861 Argument, Thurston Bell, lists Affordable Tax/Accounting Service on his website, (www.nite.org), as client that "successfully" obtained a $14,256.65 refund of federal employment taxes based on the § 861 Argument.[33] In *United States v. Bell*, No. 1:CV:01-2159 (U.S.D.C. M.D. Pa.), the United States has sued to enjoin Bell and his National Institute for Taxation Education from promoting abusive tax schemes, including the § 861 Argument.

4. Rosile refused to cooperate with the IRS investigation and continues to prepare frivolous returns.

The IRS advised Rosile in August, 2001, that he was under investigation for possible violations of IRC § 6700 and an injunction under IRC § 7408 for promoting an abusive tax scheme.[34] A few weeks later the IRS issued a summons to Rosile, requiring him to produce documents that identify "names, addresses and social security numbers of any purchasers or clients of any plans, operations, or arrangements offered by you . . . that . . . employ the "IRC 861

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[33] Arth Dec. at ¶ 10.

[34] *See* Arth Dec. at ¶ 3.

position" on any Federal or State tax returns."[35] The IRS also requested that Rosile provide a list "of all federal and state tax returns and amended returns prepared by you . . . including, but not limited to 1040s, corporate returns, trust returns and payroll returns, with a detailed schedule of the names of the entities, addresses, and taxpayer's identification numbers."[36]

Rosile refused to turn over his client list, in violation of IRC § 6107. Rosile's lawyer—Milton H. Baxley, II—sent letters to the IRS falsely stating that it had no authority to conduct an investigation and falsely accusing the IRS agent handling the investigation of harassment and intimidation, violating the Fair Debt Collection Act, and issuing a "fraudulent document" to Rosile—an IRS summons. One of Baxley's letters also asserted the frivolous position that congressional authorization for IRS summonses is limited to cases involving taxes on cotton.[37]

The § 861 Argument has been rejected summarily by every judge that has considered it, beginning as early as 1993, with many taxpayers being sanctioned for raising the frivolous

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[35] *See* Arth Dec. at ¶ 4.

[36] *Id.*

[37] *See* Arth Dec. ¶¶ 3 and 5, and Exhibits B and D.

argument.[38] Courts have also enjoined § 861-Argument promoters and return preparers.[39]

Despite this clear legal precedent and IRS warnings to the public and to Rosile, he persists in preparing returns based on the § 861 position, including preparing and signing Spiers's tax return after the IRS informed Rosile that he was under investigation for possible § 6700 penalties. Rosile appears undaunted by the prospect of an injunction, since he prepared and signed a § 861-based tax return for McCandless four weeks after being sued to enjoin his return-preparation activities.

Argument

A. Standards for Granting a Preliminary Injunction.

An injunction may issue without resort to the traditional equitable prerequisites (*i.e.*, balancing of harms, public interest, likelihood of success) if a statute expressly authorizes the

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[38] *See, e.g., Madge v. Commissioner*, T.C. Memo. 2000-370, 2000 WL 1800520, 80 T.C.M. (CCH) 804, T.C.M. (RIA) 2000-370, *affirmed, Madge v. Commissioner*, 2001 WL 1414315 (8th Cir. Nov. 14, 2001) (upholding $25,000 sanction against §861 Argument proponent); *Furniss v. Commissioner*, TC Memo 2001-137, 81 T.C.M. (CCH) 1741, 2001 WL 649000 (2001); *Christopher v. Commissioner*, T.C. Mem. 2002-18, 2002 WL 71029 (Jan. 18, 2002); *Williams v. Commissioner*, 114 T.C. 136 (2000); *Aiello v. Commissioner*, TC Memo 1995-40, 69 T.C.M. (CCH) 1765, 1995 WL 33283 (1995); *Solomon v. Commissioner*, 66 T.C.M. (CCH) 1201, 1993 WL 444615 (1993).

[39] *See, United States v. Bosset* , (M.D. Florida, March 26, 2002) Case No. 8:01-CV-2154-T-17TBM (preliminary injunction entered against § 861 Argument promoter and return preparer); *United States v. Hearn*, No. 1:01 CV 3058 (N.D. Georgia, January 29, 2002), (return preparer permanently enjoined from promoting the § 861 Argument and preparing income tax returns again that include that or any other frivolous position).

injunction.[40] For either permanent or preliminary injunctions under IRC §§ 7407, and 7408, traditional equitable injunction factors need not be established. Instead, courts rely on the factors listed in §§ 7407 and 7408.[41] The Government similarly contends that equitable injunction factors need not be established for § 7402 injunctions, but the Eleventh Circuit has held otherwise.[42] These factors include (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest.[43]

"[A] preliminary injunction is customarily granted on the basis of procedures that are less

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[40] *Time Warner Entm't/Advance-NewHouse P'ship v. Worldwide Elecs., L.C.*, 50 F. Supp.2d 1288, 1302 (S.D. Fl. 1999) ("When express authority for issuance of 'statutory' injunctions is provided by legislative enactment, an injunction may issue without resort to the traditional 'equitable' prerequisites of such relief."); *see also Burlington N.R.R. Co. v. Dep't of Revenue*, 934 F.2d 1064, 1074-75 (9th Cir. 1991); *Time Warner Cable of New York City v. Freedom Elecs., Inc.*, 897 F. Supp. 1454, 1460 (S.D. Fla 1995).

[41] *United States v. Ernst & Whinney*, 735 F.2d 1296, 1303 (11th Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) (discussing requirements for injunctions pursuant to § 7407); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000) (In context of preliminary injunction "[t]he traditional requirements for equitable relief need not be satisfied since Section 7408 expressly authorizes the issuance of an injunction."); *United States v. White*, 769 F.2d 511, 515 (8th Cir. 1985) (§ 7408 sets forth the standards for injunctive relief); *United States v. Kaun*, 827 F.2d 1144, 1148 (7th Cir. 1987) (In § 7408 case, Government need only show violation and then likelihood of future violations to obtain injunction); *United States v. Buttorff*, 761 F.2d 1056, 1059, 1063 (5th Cir. 1985) (§ 7408 sets forth the standards for injunctive relief).

[42] *Ernst & Whinney*, 735 F.2d at 1301.

[43] *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001); *see also* Local Rules for the Middle District of Florida 4.05 and 4.06.

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 a preliminary injunction hearing."[44] A primary reason for relaxed evidentiary requirements at the preliminary-injunction stage is that it is used when quick action is necessary to prevent irreparable harm:

> [I]nasmuch as the grant of preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be held.[45]

B. A Preliminary Injunction Should Issue Under IRC § 7407.

Under § 7407, this Court has authority to grant the requested preliminary injunction if the Government establishes that (1) Rosile engaged in conduct subject to penalty under IRC §§ 6694 or 6695, or engaged in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws and (2) that injunctive relief is appropriate to prevent the recurrence of such conduct. The record submitted with the Government's motion establishes that a § 7407 preliminary injunction is appropriate. Furthermore, the record establishes that Rosile has continually and repeatedly engaged in misconduct subject to a § 7407 injunction. Thus, the Court should preliminarily enjoin Rosile from acting as a return preparer

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[44] *University of Texas v. Comenisch*, 451 U.S. 390, 395 (1981).

[45] 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2949 at 471. *See also*, *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986) ("Affidavits and other hearsay materials are often received in preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding." (Citations omitted.)

and from refusing to turn over his client list (or copies of client returns) during the course of this case.

1. Rosile engaged in conduct subject to penalty under §§ 6694 and 6695, and engaged in fraudulent and deceptive conduct that substantially interfered with the proper administration of the internal revenue laws.

IRC § 6694 imposes a penalty on an income tax return preparer who knows (or reasonably should know) that a return he prepared understated liability due to a frivolous position for which there was not a realistic possibility of being sustained on the merits. Rosile filed returns (signing his name as "preparer") asserting the IRC § 861 Argument for Snipes, Shahinian, and many other taxpayers.[46]

Rosile knew or should have known that the § 861 Argument was frivolous because:

- The Argument is absurd on its face. Moreover, judicial decisions dating back to 1993 have universally rejected the Argument. As a former CPA and prior owner of businesses providing tax-preparation services, Rosile should have been aware of all these decisions.
- The IRS issued public warnings concerning the invalidity of the IRC § 861 Argument. One of these documents, the News Release, was issued on February 12, 2001, another, the IRS Fact Sheet, was issued in April 2001, and a third, the IRS Notice, was issued in June 2001.[47]
- Most Rosile clients did not obtain refunds based on the IRC § 861 Argument.

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[46]Exhibit 6, Snipes's Amended Tax Return; Exhibit 7, Shahinian Amended Tax Returns; Arth Dec. at ¶ 14.

[47] *See* Exhibit 11, Consumer Alert; Exhibit 12, IRS Fact Sheet; Exhibit 13, IRS Notice 2001-40.

Those that did received them because of IRS mistake.[48] The IRS has investigated and assessed penalties against taxpayers who have filed returns based on this position.[49]

- On August 28, 2001, the IRS advised Rosile that he was being investigated for promoting an abusive scheme and requested his client list (or copies of client returns) that he was required by IRC § 6107 to provide. Rosile failed to provide the requested information.[50] His refusal to provide information that he was required by law to provide is strong evidence that he knew the § 861 Argument was frivolous.

Despite these clear signs that the § 861 Argument is frivolous, Rosile has continued to prepare returns asserting the Argument well after the IRS issued a public warning and after the bulk of the relevant case law was decided.[51] Worse yet, Rosile prepared § 861 returns even after the IRS advised him that he was being investigated under IRC § 6700, and after the United States sued him.[52] Rosile knew or should have known that he was preparing returns understating tax liability due to a frivolous position for which there was not a realistic possibility of being sustained. This subjects him to IRC § 6694 penalties.

IRC § 6695 imposes a penalty when an income tax return preparer does not provide copies of his clients' tax returns or a client list to the IRS on request. Rosile refused to do this,

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[48] *See* Arth Dec. at ¶¶ 10, 13 and 14.

[49] Declaration of Rae Thurell at ¶ 8.

[50] Arth Dec. at ¶¶ 4-5.

[51] *See* Exhibits 5-7, copies of tax returns of Lutz, Shahinian, and Snipes.

[52] Arth Dec. at ¶ 13; Exhibit 9, copy of Robert Spiers's 2001 tax return, signed by Rosile in February, 2002; Exhibit 10, copy of McCandless's 1999 tax return, signed by Rosile in April, 2002.

subjecting himself to the § 6695 penalty.[53]

2. Injunctive relief is appropriate to prevent the recurrence of Rosile's conduct.

As noted above, Rosile continued to prepare returns after most of the applicable court opinions were decided, after the IRS issued its public warnings, and even after the IRS advised Rosile that he was being investigated for promoting an abusive scheme. Unless this Court enjoins Rosile, he will continue to prepare frivolous returns and will continue to refuse—illegally—to turn over his client list or copies of client returns. Rosile should be enjoined during the course of this case from preparing any federal tax returns and from refusing to turn over his client list or copies of client returns.

C. A Preliminary Injunction Should Issue Based on IRC § 7408.

This Court has authority to grant a preliminary injunction under IRC § 7408 if the Government shows that Rosile engaged in conduct subject to penalty under IRC §§ 6700 or 6701 and injunctive relief is appropriate to prevent the recurrence of that conduct. The record submitted with this motion makes that showing.

1. Rosile engaged in conduct subject to penalty under § 6700 or § 6701.

Section 6700 imposes a penalty on a person who organizes or participates in the sale of any plan or arrangement and, in connection therewith, makes or furnishes a statement with respect to the excludability of any income that the person knows or has reason to know is false or

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[53] *See United States v. Nordbrock*, 38 F.3d 440 (9th Cir. 1994) (affirming permanent injunction preventing tax preparer from ever preparing returns again for his failure to provide client list to the IRS).

fraudulent as to any material matter. The evidence submitted with the Government's motion establishes that ARL is promoting and selling a bogus tax-refund plan—using the § 861 Argument—and that Rosile is working with or for ARL in promoting and implementing that plan. Rosile receives fees from ARL for preparing § 861-based returns for ARL's customers.[54]

As explained above, Rosile knew or had reason to know that the § 861 Argument is frivolous. Courts consider three factors in determining whether the Government has established § 6700's "knew or had reason to know" standard: (1) the extent of the defendant's reliance on knowledgeable professionals; (2) the defendant's level of sophistication and education; and (3) the defendant's familiarity with tax matters.[55] All these factors point to Rosile's liability for § 6700 penalties. Based on his education and experience as a CPA, Rosile at a minimum had reason to know that the § 861 Argument is frivolous.

IRC § 6701 imposes penalties on any person who aids, assists, or advises with respect to the preparation or presentation of any portion of a return, knowing or having reason to believe that such advice will be used in connection with any material matter, and who knows that such portion, if used, would result in an understatement of the liability for tax of another person. Rosile used the IRC § 861 Argument in preparing many tax returns, even after he was notified that it was frivolous. Every one of those returns understated tax liabilities. Rosile's conduct is subject to IRC § 6701 penalties.

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[54] Arth Dec. at ¶¶ 16-17; Lutz Dec. at ¶ 19.

[55] *Estate Preservation Services*, 202 F.3d at 1103.

2. Injunctive relief is appropriate to prevent the recurrence of such conduct.

Rosile has continued to prepare returns using the IRC § 861 Argument as recently as this past February.[56] Additional recent activity may be disclosed if he turns over his full client list. Rosile's refusal to stop preparing frivolous returns, despite ample warnings, demonstrates that he has no intention of altering his behavior absent an injunction.

D. A Preliminary Injunction Should Issue Based Upon 26 U.S.C. § 7402.

IRC § 7402 broadly authorizes injunctions "as may be necessary or appropriate for the enforcement of the internal revenue laws." Courts interpreting this section have concluded that the traditional equitable injunction factors should be considered in determining the propriety of a preliminary injunction.[57] As outlined below, the evidence submitted with the Government's motion satisfies these criteria.

1. There is a substantial threat that the United States and the public will suffer irreparable harm if a preliminary injunction is not issued.

Rosile continues to prepare frivolous § 861 returns. In addition, Rosile refuses to turn over his client list or copies of clients' returns. This makes it virtually impossible for the IRS to detect all of the current improper Rosile-prepared returns, creating a moving target for the IRS to chase as it attempts to locate new Rosile clients who file frivolous returns and bogus refund claims. To begin with, the IRS will have to devote substantial time and resources to detect future

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[56] Arth Dec. at ¶ 13.

[57] *Ernst & Whinney*, 735 F.2d at 1301; *Café Erotica v. St. Johns County*, 143 F. Supp. 2d 1331, 1334 (M.D. Fl. 2001) (listing the four factors).

frivolous returns. Moreover, in light of the large number of returns filed with the IRS, it may miss some frivolous Rosile-prepared refund claims—and thus may make additional erroneous refunds. The IRS will then be required to devote substantial resources to recovering those erroneous refunds, some of which the IRS may not ever be able to recover.

2. The United States is likely to prevail on the merits.

Rosile's refusal to stop asserting the § 861 Argument, despite overwhelming evidence that it is frivolous, shows that the Government will succeed in obtaining a permanent injunction.

3. The threatened injury to the United States outweighs any injury a preliminary injunction will cause.

The requested preliminary injunction will prevent Rosile from causing further irreparable injury to the Government and to future customers who will be liable for penalties if they file frivolous returns.

4. Granting the Preliminary Injunction is in the Public Interest.

If a preliminary injunction is granted, it will help to stem the spread of the frivolous §861 Argument, which is nothing more than a fraudulent scheme to file false claims with the IRS in the hope that some will escape detection and result in erroneous refunds. Stopping this scheme protects the law-abiding public, who file accurate and honest tax returns and pay what they lawfully owe.

Moreover, Rosile's past misconduct—evidenced by the disciplinary actions taken against him by two states, the SEC and the IRS—further establishes that preliminarily enjoining Rosile is in the public interest. Rosile should not be preparing tax returns for others or otherwise

participating in promoting or aiding and abetting abusive tax schemes.

Conclusion

Rosile's activities have caused and are causing substantial harm—to his clients, to the Government, and to law-abiding taxpayers who pay their proper tax liabilities. The Court should preliminarily enjoin Rosile now to prevent further harm while this case is litigated.

Respectfully submitted,

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