

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No.
	)	
EXCEL HOME CARE, INC., and	)	
DIANE E. PORTER,	)	
	)	
Defendants.	)	

**UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION**

Now comes the United States of America, upon the Declaration of Dominic Caliri, and moves for the entry of an order granting a preliminary injunction against Excel Home Care, Inc. ("Taxpayer") and Diane E. Porter as follows: (1) to require the defendants to deposit withheld income and FICA taxes, as well as the employer's share of FICA taxes of Taxpayer in an appropriate federal depository bank in accordance with federal deposit regulations; (2) to require the defendants to deposit Taxpayer's FUTA taxes in an appropriate federal depository bank in accordance with federal deposit regulations; (3) to require the defendants to sign and deliver affidavits to a designated revenue officer, or such other location as the Internal Revenue Service ("IRS") may deem appropriate, on the first day of each month, stating that the requisite withheld income, FICA and FUTA tax deposits of the Taxpayer were timely made; (4) to require the defendants to timely file all employment and unemployment tax returns of Taxpayer with the IRS; (5) to require the defendants to timely pay all required outstanding liabilities due with each tax return at the time it is filed; (6) to prohibit the defendants after the date of injunction from making any disbursements or assigning any property from the date of payment of wages until the

amounts which are required to be withheld from the payment of those wages are, in fact, paid to the IRS; (7) to require the defendants to notify the revenue officer of any new company or business Diane E. Porter may come to own or manage, in the next five (5) years; and (8) to grant any other action or relief the Court deems just and appropriate.

The United States relies upon its Memorandum of Law in Support of Motion for Preliminary Injunction and the Declaration of Dominic Caliri submitted herewith.

**WHEREFORE**, the United States requests that the Court set a hearing on its motion for a preliminary injunction against the defendants to grant such injunctive relief on a continuing interim basis until the Court enters a final adjudication on the United States' request for the issuance of a permanent injunction as outlined in its Complaint.

MICHAEL J. SULLIVAN  
United States Attorney

*/s/ Lisa L. Bellamy*

LISA L. BELLAMY  
Trial Attorney, Tax Division  
U.S. Department of Justice  
P.O. Box 55, Ben Franklin Station  
Washington, D.C. 20044-0055  
Tel: (202) 307-6416  
Fax: (202) 514-5238  
Email: [Lisa.L.Bellamy@usdoj.gov](mailto:Lisa.L.Bellamy@usdoj.gov)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No.
	)	
EXCEL HOME CARE, INC., and	)	
DIANE E. PORTER,	)	
	)	
Defendants.	)	

**UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION**

Now comes the United States of America and submits its Memorandum in Support of its Motion for a Preliminary Injunction against Excel Home Care, Inc. ("Taxpayer") and Diane E. Porter.

**STATEMENT OF FACTS**

Diane E. Porter is the President, Treasurer, Secretary, and Director of Taxpayer. Taxpayer is a Massachusetts corporation formed by Ms. Porter on or about May 8, 1997. See Ex. 1, at ¶ 2 & Ex. 2. Taxpayer provides in-home health aide services from its principal office in Tewksbury, Massachusetts. See Ex. 1 ¶¶ 2, 4. Taxpayer employs approximately 120 individuals. See Ex. 1 ¶ 3.

Taxpayer has a long history of failing to comply with its federal tax obligations by failing to file and failing to timely file federal employment and unemployment tax returns (Forms 941 and 940.) See Ex. 1, at ¶¶ 5-11. Taxpayer has failed to pay \$913,249.90 in federal employment and unemployment taxes, including assessed penalties and accrued interest through November

17, 2008, for several tax periods in 2005 through 2008. See Ex. 1, at ¶ 5. Taxpayer has failed to file Forms 941 for the quarters ending September 30, 2008, and December 31, 2008, and failed to file Form 940 for the tax period ending December 31, 2008. See Ex.1, at ¶ ¶ 9-10. Taxpayer has failed to pay any federal employment or unemployment taxes for the quarters ending December 31, 2008, and March 31, 2009. See Ex. 1, at ¶ 11.

The IRS estimates that for each new quarter that Taxpayer fails to pay its employment taxes the loss of revenue in federal income and FICA taxes approximates \$100,000. See Ex. 1, at ¶ 12. The IRS also estimates that it loses revenue in the form of FUTA taxes in excess of \$7,000 for each taxable year that Taxpayer fails to pay its unemployment taxes. See Ex. 1 ¶ 13.

The IRS has exhausted its administrative remedies and collection methods. The IRS has filed Notices of Federal Tax Lien with the Registry of Deeds for Northern Middlesex County, Massachusetts. Taxpayer leases its business space and has no significant assets from which the IRS may attempt to collect the unpaid taxes by levy. In addition, the IRS delivered numerous Notices of Intent to Levy to Taxpayer, and levied upon Taxpayer's bank accounts, insurance providers, and the Commonwealth of Massachusetts to collect the outstanding employment tax liabilities for the tax years 2000 through 2005. Despite, these collection actions, Taxpayer still continues to accrue substantial employment tax liabilities. Most recently, Taxpayer requested a Collection Due Process ("CDP") hearing in response to the issuance of Final Notices of Intent to Levy related to the employment tax liabilities for the four quarters of 2006, the four quarters of 2007 and the first and second quarters of 2008. The IRS issued a Notice of Determination on December 17, 2008, sustaining the proposed levy action. Taxpayer did not petition the United States Tax Court. See Ex. 1, at ¶ 14.

## ARGUMENT

### **A. The Standard for a Preliminary Injunction**

Section 7402(a) of the Internal Revenue Code 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. Because § 7402(a) explicitly provides that an order of injunction 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 § 7402. Rather, § 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.” See Brody v. United States, 243 F.2d 378, 384 (1st Cir. 1957).

Courts employ injunctions “to enjoin interference with tax enforcement even when such interference does not violate any particular statute.” See United States v. Ernst & Whinney, 735 F.2d 1296, 1300 (11th Cir. 1984). Here, Taxpayer and Ms. Porter have continuously and repeatedly violated §§ 3102, 3111, 3301, 3402, 6011, and 6041 of the Internal Revenue Code. These statutes require employers to withhold, report, and pay over to the United States the employers’ share of Federal Insurance Contribution Act (“FICA”) taxes, Federal Unemployment Tax Act (“FUTA”) taxes, and their employees’ share of income tax payments. This Court should enjoin the defendants by directing them, forthwith, to comply with the filing and payment requirements for employers prescribed by the internal revenue laws of the United States.

For a preliminary injunction, the United States is not required to prove the case in full, but must only show that the statutes have been violated and there is a reasonable likelihood of future violations. In addition, on deciding on a motion for preliminary injunction, the Court may

consider inadmissible evidence, such as hearsay.

It is well established that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." University of Texas v. Camenisch, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). In keeping with this principle, many of our sister Circuits have recognized that "affidavits and other hearsay materials are often received in preliminary injunction proceedings." Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986); see also Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997) (citing Asseo); Levi Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 985 (11th Cir. 1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction . . ."); Sierra Club, Lone Star Chapter v. FDIC, 992 F.2d 545, 551 (5th Cir. 1993) (courts at preliminary injunction stage "may rely on otherwise inadmissible evidence, including hearsay"); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The urgency of obtaining a preliminary injunction . . . makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may even give inadmissible evidence some weight . . ."); cf. Heideman v. South Salt Lake City, 348 F.3d 1182, 1188 (10th Cir. 2003) ("The Federal Rules of Evidence do not apply to preliminary injunction hearings.").

Kos Pharmaceuticals v. Andrx Corp., 369 F.3d 700, 702 (3d Cir. 2004).

To obtain a preliminary injunction under 26 U.S.C. § 7402, the United States submits that it need only meet the requirements of that statute – a showing that an injunction is “necessary or appropriate for the enforcement of the internal revenue laws.” See 26 U.S.C. § 7402(a).

Moreover, while the United States contends that the Government need not establish the traditional equitable standards required for a non-statutory injunction, those equitable standards are nevertheless satisfied here. In the First Circuit, “the standards for granting preliminary injunctive relief are: (1) that plaintiff will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that plaintiff has exhibited a likelihood of success on the merits; and (4) that the

public interest will not be adversely affected by the granting of the injunction.” See Asseo, 805 F.2d at 26.

**B. The United States Will Continue to Suffer Irreparable Injury if the Injunctive Relief is Not Granted**

The Internal Revenue Code requires employers to withhold federal income and FICA taxes from their employees’ wages and to pay over those amounts, in addition to their own FICA and FUTA contributions, to the IRS. See 26 U.S.C. §§ 3102 (requiring employers to withhold Social Security and Medicare taxes, which together constitute FICA taxes, from their employees’ wages), 3402 (requiring employers to withhold income taxes from their employees’ wages), 3111 (imposing FICA taxes on employers), and 3301 (imposing FUTA taxes on employers); see also United States v. Energy Resources Co., Inc., 495 U.S. 545 (1990) (“The Internal Revenue Code requires employers to withhold from their employees’ paychecks money representing employees’ personal income taxes and Social Security taxes.”). Employers must file employment tax returns on both a quarterly (Form 941) and annual basis (Form 940), and must issue annual Forms W-2 to the Social Security Administration and to each employee. See 26 U.S.C. §§ 6011(a) (requiring any person liable for a tax under the Internal Revenue Code to file a return), 6041 (requiring employers to file information wage and tax statements for each employee and to issue each employee a copy of his or her statement), 6071(a) (authorizing the Treasury Secretary to issue regulations prescribing the time for filing returns); 26 C.F.R. (Treasury Regulation) §§ 1.6041-2 (specifying W-2 requirements), 31.6071(a)-1 (setting the filing deadlines for employment tax returns).

By requiring that federal income and FICA taxes be collected at the source, Congress has

made employers critical to tax collection. The IRS relies on employers to accurately report wages, withhold federal taxes from those wages, and pay over the withheld taxes to the IRS along with the employer's own FICA and FUTA taxes. Furthermore, even if an employer collects and accounts for withholding tax for an employee, the government credits the employee for that withholding regardless of whether the employer actually paid it over to the government. See 26 U.S.C. § 31(a) ("The amount withheld as tax under chapter 24 [Collection of Income Taxes at Source of Wages] shall be allowed to the recipient of the income as a credit against the [income] tax"); United States v. Gilbert, 266 F.3d 1180, 1184 (9th Cir. 2001); Chandler v. Perini Power Constructors, Inc., 520 F. Supp. 1152, 1153 (D. N.H. 1981).

Taxpayer and Ms. Porter have harmed and continue to harm the United States. When an employer refuses to pay over withheld federal income, FICA, and FUTA taxes, the United States loses not only the employer's FICA and FUTA tax contributions, but also the employees' FICA and federal income taxes, and may even have to refund such taxes to the employees if the credits to which they are entitled result in an overpayment, even though the money was never actually deposited in the Treasury.

As of November 17, 2008, Taxpayer and Ms. Porter have already cost the United States \$913,249.90 in lost federal income, FICA, and FUTA taxes, including penalties and interest, which does not include the time incurred by IRS personnel to attempt to collect Taxpayer's tax liabilities. The pattern of untimely filings and non-payment suggests that unless Taxpayer and Ms. Porter are immediately enjoined, they will continue their past practices of non-compliance with the internal revenue laws. The IRS estimates that Taxpayer and Ms. Porterr cost the United States \$100,000 per quarter in lost federal income and FICA taxes, and more than \$7,000 in lost

FUTA taxes per year. The administrative collection remedies available to the IRS are ineffective to stem the revenue loss because Taxpayer and Ms. Porter refuse to pay over Taxpayer's taxes and file returns.

**C. The Harm to the United States Outweighs Any Possible Harm to the Defendants.**

In its Motion for Preliminary Injunction, the United States requests the Court to enjoin the defendants from continuing to interfere with various provisions of the Internal Revenue Code dealing with the filing of returns and the payment of taxes when due. The underlying relief which the United States seeks is not extraordinary; to the contrary, it simply requests that the Court order the defendants to account for and pay their taxes as every other taxpaying business in the nation. See United States v. Sifuentes, 2005 U.S. Dist. LEXIS 38055 (W.D. Tex., 2005). The harm to the United States, noted above, cannot outweigh the harm of an order enjoining the defendants merely to obey the federal tax laws.

**D. The United States Exhibits a Likelihood of Success on the Merits**

As noted above, Congress has expressly granted the courts, through § 7402(a), the power to issue orders of injunction "as may be necessary or appropriate for the enforcement of internal revenue laws." See 26 U.S.C. § 7402(a). Given the defendants' history of noncompliance with the federal tax laws, coupled with the nearly fruitless efforts of the IRS to account for and collect taxes the defendants refuse to file and pay, an injunction against the defendants becomes both a necessary and appropriate remedy to enforce the internal revenue laws. And, as noted above, the United States seeks an injunction to force the defendants to obey the federal tax laws. Certainly the United States is likely to succeed in this endeavor.

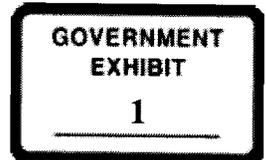
**E. The Public Interest Will Be Advanced by the Granting of the Preliminary Injunction.**

The Supreme Court has noted in the context of social security taxes that there is a “broad public interest in maintaining a sound tax system.” See United States v. Lee, 455 U.S. 252, 260 (1982). Here, as in Asseo, “the public has an interest in ensuring that the purposes of the [internal revenue laws] be furthered.” 805 F.2d at 28. The defendants give themselves an unfair business advantage in their refusal to account for and pay employment and unemployment taxes, and “obtain the same amount of labor for less total payroll cost.” See United States v. Sifuentes, 2005 U.S. Dist. LEXIS 38055 (W.D. Tex., 2005). Taxpayer’s and Ms. Porter’s improper business practices erode the benefits of a sound tax system and create an unlevel playing field with respect to business competition in the home health care industry in the service area where Taxpayer operates.

**CONCLUSION**

For the reasons stated above and to prohibit Taxpayer’s and Ms. Porter’s future violations of the internal revenue laws, the United States requests that the Court enter a preliminary injunction in its favor pursuant to 26 U.S.C. §§ 7402(a).

MICHAEL J. SULLIVAN  
United States Attorney  
*/s/ Lisa L. Bellamy*  
LISA L. BELLAMY  
Trial Attorney, Tax Division  
U.S. Department of Justice  
P.O. Box 55, Ben Franklin Station  
Washington, D.C. 20044-0055  
Tel: (202) 307-6416  
Fax: (202) 514-5238  
Email: [Lisa.L.Bellamy@usdoj.gov](mailto:Lisa.L.Bellamy@usdoj.gov)



IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 00-
	)	
EXCEL HOME CARE, INC. and	)	
DIANE E. PORTER,	)	
	)	
Defendants.	)	

DECLARATION OF DOMENIC CALIRI

I, Domenic Caliri, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am a Supervisory Revenue Officer with the Internal Revenue Service, assigned to the Stoneham, Massachusetts office. I, and Revenue Officers under my supervision, are pursuing the collection of the unpaid Federal employment and unemployment tax liabilities of Excel Home Care, Inc. (hereafter, the Taxpayer), and I have personal knowledge of their efforts to collect the liabilities of the Taxpayer, as well as the outstanding tax liabilities of the Taxpayer.
2. Diane E. Porter incorporated the Taxpayer in the Commonwealth of Massachusetts on May 8, 1997. Diane E. Porter is listed on the Taxpayer's Articles of Organization as the President, Treasurer, Secretary, and Director. The principal office of the corporation

in Massachusetts is listed as 1565 Main Street Building 2, Suite 301, Tewksbury, MA 01876 .

3. At any time, the Taxpayer employs approximately 129 people.
4. The Taxpayer provides in-home health aide services.
5. The Taxpayer is liable for unpaid Form 941 and Form 940 taxes. The taxable quarters are detailed below:

Type of Tax	Period	Assessment Date	Unpaid Assessed Balance	Balance with accruals to 11/17/2008
FICA	200512	05/29/2006	\$107,995.88	\$149,978.06
FICA	200603	10/02/2006	108,362.71	141,840.87
FICA	200606	11/06/2006	10,496.38	12,130.47
FICA	200612	04/02/2007	25,470.09	31,106.51
FICA	200703	07/16/2007	165,519.35	205,182.95
FICA	200709	11/27/2007	8,886.13	9,439.64
FICA	200712	03/31/2008	32,730.54	35,409.64
FICA	200803	08/25/2008	87,819.57	90,770.67
FICA	200809	*	*	*
FICA	200812	*	*	*
FUTA	200703	04/19/2004	27,005.27	38,756.66
FUTA	200512	05/14/2007	7,771.44	9,285.36
FUTA	200612	04/30/2007	256.09	277.93
FUTA	200712	11/17/2008	10,174.17	10,174.17
TOTAL				\$913,249.90

6. The Taxpayer has a long history of failing to file and failing to timely file federal employment and unemployment tax returns (Forms 941 and 940), which continues to this date. The Taxpayer has issued its employees IRS Forms W-2, Wage and Tax Statements,

reporting that it has paid over to the Internal Revenue Service the withheld tax payments of their employees. Despite the Taxpayer's issuing of Forms W-2, the Taxpayer has failed to pay over the amounts it withheld from its employees' wages.

7. The Taxpayer failed to timely file Forms 941 for the taxable quarters ending December 31, 2005, March 31, 2006, June 30, 2006, December 31, 2006, March 31, 2007, September 30, 2007, December 31, 2007, and March 31, 2008.
8. The Taxpayer failed to timely file Forms 940 for the taxable periods ending December 31, 2003, December 31, 2005, December 31, 2006, and December 31, 2007.
9. The Taxpayer has failed to file Forms 941 for the taxable quarters ending September 30, 2008 and December 31, 2008.
10. The Taxpayer has failed to file Form 940 for the taxable period ending December 31, 2008.
11. The Taxpayer has failed to pay any federal employment or unemployment taxes for the taxable quarters ending December 31, 2008 and March 31, 2009.
12. The Internal Revenue Service estimates that, for each new quarter for which the Taxpayer fails to pay its employment taxes, the loss of revenue in federal income

and FICA taxes is approximately \$100,000.00.

13. The Internal Revenue Service estimates that, for each new period for which the Taxpayer fails to pay its unemployment taxes, the loss of revenue in FUTA taxes exceeds \$7,000.00.
14. The Internal Revenue Service has exhausted its administrative remedies and collection methods as follows:
  - a. The Internal Revenue Service has filed our Notices of Federal Tax Lien with the Registry of Deeds for Northern Middlesex County, Massachusetts and with The United States District Court, Boston, Massachusetts. The Taxpayer leases its business space and has no substantial assets from which the IRS may attempt to collect the unpaid taxes by levy.
  - b. The Service delivered numerous Notices of Intent to Levy to the Taxpayer, and levied upon the Taxpayer's bank accounts, insurance providers and the Commonwealth of Massachusetts to collect the outstanding employment tax liabilities for the tax years 2000-2008. The Taxpayer still continues to accrue substantial employment tax liabilities.
  - c. The Taxpayer requested a collection due process

hearing in response to Final Notices of Intent to Levy related to the employment tax liabilities for the four quarters of 2006, the four quarters of 2007 and the first and second quarters of 2008. The Service issued a Notice of Determination on December 17, 2008 sustaining the proposed levy action. The Taxpayer did not petition the United States Tax Court.

I declare under penalty of perjury that the foregoing is true and accurate. Executed on this 6th day of April, 2009, at Stoneham, Massachusetts.

Domenic Caliri  
Domenic Caliri



**The Commonwealth of Massachusetts  
 William Francis Galvin**

Secretary of the Commonwealth, Corporations Division  
 One Ashburton Place, 17th floor  
 Boston, MA 02108-1512  
 Telephone: (617) 727-9640

**GOVERNMENT  
 EXHIBIT**  
2

**EXCEL HOME CARE, INC. Summary Screen**

Help with this form

Request a Certificate

The exact name of the Domestic Profit Corporation: EXCEL HOME CARE, INC.

Entity Type: Domestic Profit Corporation

Identification Number: 000575436

Old Federal Employer Identification Number (Old FEIN): 000000000

Date of Organization in Massachusetts: 05/08/1997

Date of Involuntary Dissolution by Court Order or by the SOC: 05/31/2007

Current Fiscal Month / Day: 12 / 31

Previous Fiscal Month / Day: 00 / 00

**The location of its principal office:**

No. and Street: 1565 MAIN STREET  
 BUILDING 2 SUITE 301  
 City or Town: TEWKSBURY State: MA Zip: 01876 Country: USA

**If the business entity is organized wholly to do business outside Massachusetts, the location of that office:**

No. and Street:  
 City or Town: State: Zip: Country:

**Name and address of the Registered Agent:**

Name:  
 No. and Street:  
 City or Town: State: Zip: Country:

**The officers and all of the directors of the corporation:**

Title	Individual Name First, Middle, Last, Suffix	Address (no PO Box) Address, City or Town, State, Zip Code	Expiration of Term
PRESIDENT	DIANE E. PORTER	96 TRULL RD., TEWKSBURY, MA 01876 USA	
TREASURER	DIANE E. PORTER	96 TRULL RD., TEWKSBURY, MA 01876 USA	
SECRETARY	DIANE E. PORTER	96 TRULL RD., TEWKSBURY, MA 01876 USA	
DIRECTOR	DIANE ELAINE PORTER	96 TRULL ROAD	

TEWKSBURY, MA 01876 USA			
<b>business entity stock is publicly traded:</b> <input type="checkbox"/>			
<b>The total number of shares and par value, if any, of each class of stock which the business entity is authorized to issue:</b>			
Class of Stock	Par Value Per Share Enter 0 if no Par	Total Authorized by Articles of Organization or Amendments <i>Num of Shares      Total Par Value</i>	Total Issued and Outstanding <i>Num of Shares</i>
No Stock Information available online. Prior to August 27, 2001, records can be obtained on microfilm.			
<input type="checkbox"/> Consent <input type="checkbox"/> Manufacturer <input type="checkbox"/> Confidential Data <input type="checkbox"/> Does Not Require Annual Report <input type="checkbox"/> Partnership <input type="checkbox"/> Resident Agent <input checked="" type="checkbox"/> For Profit <input type="checkbox"/> Merger Allowed			
<b>Select a type of filing from below to view this business entity filings:</b> ALL FILINGS <span style="float: right;"></span> <input type="checkbox"/> Administrative Dissolution <input type="checkbox"/> Annual Report <input type="checkbox"/> Application For Revival <input type="checkbox"/> Articles of Amendment <span style="float: right;"></span>			
<input type="button" value="View Filings"/>		<input type="button" value="New Search"/>	
<div style="border: 1px solid black; height: 20px; width: 100%; margin: 5px 0;"></div> <b>Comments</b>			
© 2001 - 2009 Commonwealth of Massachusetts All Rights Reserved			Help