

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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RONALD WESTON, SR., CLERK  
U.S. DISTRICT COURT  
WESTERN DISTRICT MICH.

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UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. )  
)  
ROBERT L. MOSHER, CAROL L. MOSHER, )  
)  
and KIMBERLY SANDERS, all d/b/a )  
)  
MOSHER ENTERPRISES TRUST, )  
)  
a purported trust )  
)  
Defendants. )

Civil No. ~~1:03 CV 0208~~

Robert Holmes Bell  
Chief, U.S. District Judge

**United States' Motion for Temporary Restraining Order and/or Preliminary Injunction  
and Brief in Support of Motion  
(Expedited Hearing Requested)**

The Government seeks a temporary restraining order (TRO) and/or preliminary injunction under 26 U.S.C. (I.R.C.) § 7407 against defendant Robert L. Mosher ("Mosher"), and anyone in active participation with him, including but not limited to the above-named defendants, (1) preventing him from preparing, or assisting in the preparation of, any federal income tax returns that do not contain Mosher's identifying number and (2) requiring that Mosher provide to the IRS a list of all customers for whom he has prepared income tax returns, amended returns, and requests for refund in the last three years, as well as copies of these documents. As set forth more fully below, a return preparer who (1) fails to keep a list of prepared returns or fails to turn over this list and copies of the returns to the IRS upon request or (2) fails to furnish his social security number on each return he prepares is subject to injunction under I.R.C. § 7407.

The Government's complaint also seeks to enjoin each of the above-named defendants under I.R.C. § 7408, which authorizes injunctions against those engaged in conduct subject to penalty under I.R.C. § 6700, and under I.R.C. § 7402, which subjects to injunction any person who engages in conduct that substantially interferes with the administration of the internal revenue laws. The United States does not seek this relief at this time, however. Rather, based on the ongoing harm to the United States and on Mosher's repeated and flagrant violations of I.R.C § 6695, the United States seeks more limited injunctive and expedited relief, the evidence supporting the issuance of which is overwhelming. The United States is aware that this motion presents unusual issues to the Court and proposes somewhat unusual remedies, *i.e.*, a TRO to compel action in addition to preventing action. As explained below, however, the unique facts and circumstances of this case justify this request.

#### FACTS

Defendants market and sell trust packages which they falsely claim allow customers to reduce or eliminate their personal income tax. See Declaration of Revenue Agent Heidi Beukema, at ¶ 4. Their customers divert income into the trusts without reporting it on their tax returns; they then use the income to pay personal expenses. Id. at ¶ 5. Mosher generally serves as the trustee of his customers' trusts, for which he often obtains an Employee Identification Number (EIN). Id. at ¶ 6. Mosher prepares personal income tax returns for individual trust purchasers, and either does not file an income tax return for the trust or files a return claiming improper deductions which result in little or no taxable income. Id. at ¶ 7.

On December 30, 2002, the IRS sent a letter to Mosher advising him that he was being investigated. Id. at ¶ 8. On January 10, 2003, the IRS agent conducting the investigation

conducted an interview with Mosher. Id. at ¶ 9. At this meeting, Mosher refused to provide his client list, claiming this information was privileged. Id. at ¶ 10. Mosher also admitted that he does not put his identifying number on the returns he prepares. Id. at ¶ 13. On January 24, 2003, the IRS served Mosher with a summons requesting that he “provide a list of your clients for whom you have prepared income tax returns or claims for refund, as required under Section 6107 of the Internal Revenue Code.” Id. at ¶ 11.

To date, Mosher has not complied with this summons. Id. at ¶ 12. The IRS agent conducting the investigation has also personally reviewed several dozen returns Mosher has prepared and found that none of these returns contained his identifying number. Id. at ¶ 14.

The IRS believes the number of returns prepared by Mosher is significantly larger than the number identified to date. The IRS has positively identified 132 trusts formed by defendants, based on matching those trusts to Employee Identification Numbers (EIN’s) obtained by Robert L. Mosher as trustee. Id. at ¶ 15. The IRS has also identified an additional 124 trusts believed to have been established by Mosher. Id. Identifying all returns Mosher has prepared will be difficult, if not impossible, unless Mosher is required to put his identifying number on the returns he prepares and to provide a list of such returns to the IRS. Id. at ¶ 16.

Defendants’ schemes, of which Mosher’s returns are an integral part, have resulted in a serious loss of revenue to the United States. The IRS has conducted or is conducting audits of ten of Mosher’s customers. Id. at ¶ 17. Five of these audits have been completed, and each resulted in an increase of tax due based on underreporting of income on returns Mosher prepared and filed. Id. at ¶ 18. For these customers, the average tax due after audit was \$13,246.33 per year per customer, for a three year period. Id. at ¶ 19. Projecting this figure across the number of

identified trusts, defendants' tax schemes have resulted in an estimated total loss to the Treasury in excess of five million dollars. Id. Therefore, it is crucial that the United States identify and track these fraudulent returns and identify all such returns that have already been filed.

## DISCUSSION

### A. Applicable legal standards

Where a party seeks a TRO and the Court holds a hearing after giving notice to the defendant, the motion is generally treated as one seeking a preliminary injunction.<sup>1</sup> If the Court instead grants the United States' TRO motion without holding a hearing, then the Court must find that the nature of harm to the United States merits imposing an *ex parte* TRO for the shorter of 20 days (10 days plus a 10-day extension) or the earliest possible hearing date.<sup>2</sup> The Court must then hold a hearing for preliminary injunction "at the earliest possible time."<sup>3</sup>

Here, the United States has arranged for personal service of this motion on the defendant and requests that, if possible, the Court hold a hearing after giving notice to the defendant. In such case, the United States requests that the Court enter a preliminary injunction. In the event that this is impossible, however, the United States requests that the Court hold an *ex parte*

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<sup>1</sup> See *MLZ, Inc. v. Fourco Glass Co.*, 470 F.Supp. 273, 275 (D. Tenn. 1978) (citing *Wright & Miller*, Federal Practice & Procedure: Civil § 2951); see also *Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965).

<sup>2</sup> See Fed. R. Civ. P. 65(b); see also *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999). Congress contemplated that courts might impose TROs against tax scammers when it passed the abusive-tax-scheme injunction section, I.R.C. § 7408. See S. Rept, PL 94-455, 10/4/76, p. 359. Further, since the Government is not requesting an *ex parte* TRO, and because the TRO is predicated on a statutory provision allowing injunctive relief, this memorandum will evaluate the TRO using solely the statutory preliminary injunction standards.

<sup>3</sup> Fed. R. Civ. P. 65(b).

hearing, issue an *ex parte* TRO, and set the matter for hearing as soon as possible.

Due to the urgent need to halt irreparable harm, preliminary injunctive relief “is customarily granted on . . . procedures that are less formal and on evidence that is less complete than a trial on the merits. A party thus is not required to prove its case in full” at this stage.<sup>4</sup> Because I.R.C. § 7407 sets forth the criteria for injunctive relief, the Government need only meet the statute’s criteria for a court to issue injunctive relief.<sup>5</sup> In this case, the United States must show that Mosher has engaged in activity subject to penalty under I.R.C. § 6695 and that injunctive relief is appropriate to prevent the recurrence of such conduct.

The evidence submitted with this motion establishes that the Court should enter a temporary restraining order under I.R.C. § 7407 against Robert L. Mosher, and anyone working in association with him, including the other named defendants: (1) preventing him from preparing, or assisting in the preparation of, any federal income tax returns that do not contain Mosher’s identifying number; and (2) requiring that Mosher provide to the IRS a list of all returns and requests for refunds he has prepared in the last three years.

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<sup>4</sup> See *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); see also *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986) (“Affidavits and other hearsay materials are often received in preliminary injunction proceedings.”).

<sup>5</sup> See *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9<sup>th</sup> Cir. 2000) (“[T]raditional requirements for equitable relief need not be satisfied since Section 7408 expressly authorizes the issuance of an injunction.”).

**B. Injunction under I.R.C. § 7407 for violations of I.R.C. § 6695**

I.R.C. § 7407 authorizes a court to enjoin a person from acting as an income-tax-return preparer if he has continually or repeatedly engaged in conduct subject to penalty under Section 6695. In turn, Section 6695 imposes penalties for violation of Section 6107. Section 6107 requires (1) a return preparer to include his identifying number on each prepared return; and (2) a return preparer provide to the IRS upon request a list of all customers for whom the preparer has prepared returns over the last three years.

Mosher's violations of Section 6695 are flagrant and admitted. He has simply failed to provide the IRS upon request a list of returns he has prepared, in violation of I.R.C. § 6107(b). Beukema Decl. at ¶¶ 10, 12. He has also admitted that he does not furnish his identifying number on the returns he prepares, in violation of I.R.C. § 6109(a)(4). *Id.* at ¶ 13. A TRO is an appropriate method to redress these admitted and continual violations of the law. I.R.C. § 7407. This Court should therefore enter an injunction against Mosher forbidding him from filing returns which do not contain his identifying number and requiring that, within 5 days of the entry of the Court's order, he provide a list of all customers for whom he has prepared returns or refunds.

**CONCLUSION**

As explained above, it is crucial that the United States stop the damage defendants' schemes are doing. The United States therefore expects to move for a preliminary injunction preventing Mosher from filing any returns, and prohibiting all defendants from promoting their tax scheme, in the near future. To enable the United States to identify the damage already done by Mosher and begin tracking Mosher's abusive returns as they are filed, this Court should enjoin

Mosher from preparing any tax returns that do not contain his identifying number and should require Mosher to provide to the United States a list of all customers for whom he has prepared returns over the last three years, both of which are clearly required by the Internal Revenue Code.

If necessary, the Court should issue an *ex parte* TRO providing this relief.

Dated: March 26, 2003

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