

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
v. ) Civil No. **WMN05CV1297**  
)  
JOHN BAPTIST KOTMAIR, JR., )  
et al., )  
)  
Defendants. )

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DEFENDANTS' REPLY TO UNITED STATES' OPPOSITION TO  
DEFENDANTS' MOTION TO EXTEND OR REINSTITUTE STAY PENDING APPEAL

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Defendants John Baptist Kotmair Jr., *pro se*, and Save-A-Patriot Fellowship (SAPF), through undersigned counsel, reply to Plaintiff's opposition to Defendants' motion to extend or reinstitute stay pending appeal.

**ARGUMENT**

The government opposes Defendants' motion on two grounds: that this Court no longer has jurisdiction to stay the enforcement of its judgment; and that the circumstances of the case no longer warrant a stay. In support of the first of these grounds, the government argues that the issuance of the mandate by the Fourth Circuit removes the District Court's jurisdiction with respect to a stay. Although it recognizes that Rule 62(c)<sup>1</sup> operates as an exception to the general rule that jurisdiction of a case

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<sup>1</sup> F.R.C.P. 62(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

transfers to the reviewing court upon perfection of the appeal, it argues that the district court's jurisdiction to issue a stay of its judgment ends as of the issuance of the Circuit Court's mandate. In *Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983), Supreme Court Justice Rehnquist disagreed, saying of Rule 62(c): "Whatever the current application of the so-called jurisdictional shift theory to modern appellate procedure, it is well-settled that a court retains the power to grant injunctive relief to a party to preserve the *status quo* during the pendency of an appeal, even to this [Supreme] Court." Thus, Justice Rehnquist recognizes that the power vested in the courts by Rule 62(c) remains so vested throughout the pendency of the appeal, including an appeal to the Supreme Court, as in the instant case.

The government also argues that 28 U.S.C. §2101(f) deprives this Court of jurisdiction. That section provides that a stay of the execution and enforcement of the final judgment of any court "may be granted by a judge of the court rendering the judgment." In this case, Defendants are appealing the final injunction order of this Court; nothing in the cited section removes from this Court the necessary jurisdiction to grant or extend the stay requested while the appeal is considered by the Supreme Court.

Finally, the government argues that the circumstances of the case have now changed considerably since the original grant of the stay by this Court. It claims that the Fourth Circuit's affirmance of the injunction "must alter the calculus of harm," in spite of the fact that the Fourth Circuit merely affirmed the injunction "for the reasons stated by the District Court,"<sup>2</sup> without addressing the serious and substantial issues, recognized by this Court, surrounding the permissible scope of the injunctive relief.

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<sup>2</sup> *United States v. Kotmair*, 234 Fed.Appx. 65 (4<sup>th</sup> Cir. 2007).

Therefore, the balance of harm has not changed. The harm that Defendants will incur as a result of enforcement of the injunction still outweighs the harm that the government will incur from an extension of the stay. This is especially true with respect to the provision of SAPF's membership list, where the harm to the rights of the members, who are innocent of any of the activities leading to the issuance of the injunction, will be immediate and permanent, while the claimed harm to the government — loss of tax revenues — will be recouped through application of penalties and interest on any amounts subsequently discovered to have been unpaid. Since the balance of harm has not changed, the need for the further balancing required by *Blackwelder* — between harm and likelihood of success — does not arise.

This Court recognized that “[a]s to the precise permissible scope of the injunctive relief, ... there are issues raised that are sufficiently ‘serious, substantial, difficult and doubtful, as to make them fair ground for litigation.’” (Docket 83) That assessment of the issues involved has been borne out by a recent decision of the District Court for the Northern District of Illinois in *United States of America v. William J. Benson*, 1:04-cv-07403 (December 17, 2007). In that case, the District Court denied the government's prayer to order Benson to turn over a list of customers who had purchased the “plan” he sold,<sup>3</sup> reaching a conclusion opposite to the one made by this Court with respect to proper injunctive relief:

“The government has not shown that the request for the customer list is appropriate injunctive relief in light of the claims and allegations in this case ... Benson's customers ... violated no laws simply by purchasing the Reliance Defense Package or related package. Nor can it be assumed that Benson's customers did not pay their taxes merely because they purchased the [package] ... The customer list is not related to preventing future misconduct by Benson. ... The request by the Government for the customer list is

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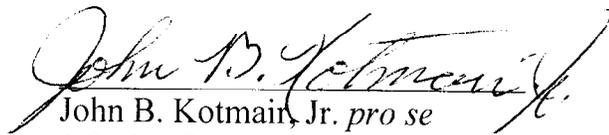
<sup>3</sup> Benson sold a “Reliance Defense Package” which the government argued was an abusive tax scheme.

beyond the scope of Benson's wrongdoing in the instant action ..." [emphasis added]  
*United States of America v. William J. Benson, supra.*

Thus, this issue is certainly one in which reasonable men might come to different conclusions, and one for which clarification by the Supreme Court is certainly needed.

For these reasons, and the reasons given in Defendants' Motion To Extend or Reinstitute Stay Pending Appeal, Defendants pray that this Court extend the stay during the pendency of Defendants' petition for writ of certiorari in the Supreme Court.

Respectfully submitted on this 21<sup>st</sup> day of December, 2007.



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**CERTIFICATE**

The undersigned hereby certifies that a printed copy of the foregoing Reply to United States Opposition to Defendants' Motion to Extend or Reinstitute Stay Pending Appeal was sent to counsel for the Plaintiff, Robert E. Fay, Trial Attorney, Tax Division, U.S. Department of Justice, Post Office Box 7238, Washington, D.C., 20044, by first class U.S. Mail with sufficient postage affixed this 22<sup>nd</sup> day of December, 2007.

/s/ George E. Harp  
GEORGE E. HARP