IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: WMN 05 CV 1297**
	)	
JOHN BAPTIST KOTMAIR, et al.,	)	
	)	
Defendants.	)	

THE UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR STAY

On May 16, 2006, the Court granted in part, and denied in part, the United States' motion to compel discovery on defendants John B. Kotmair, Jr., and Save-a-Patriot Fellowship.[1] On May 24, 2006, defendants moved to stay the Court's order and filed a motion for reconsideration.[2] The United States now files this reply, and requests that because defendants' motions present the same arguments already rejected by this Court, they should be denied.

ARGUMENT

Federal Rule 62 permits motions to stay proceedings to enforce a judgment or order. In deciding whether to grant a motion for a stay pending appeal, a district court must consider four factors: (1) whether claimant has made a *strong showing* that it is likely to succeed on the merits; (2) whether claimant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public

[1] Order, docket no. 33.

[2] Docket nos. 34 & 35 (the request for stay is presumably made under Fed.R.Civ.P. 62, although defendants reference Rule 65.)

interest lies.[3] Defendants must prove all four factors are met.[4] Moreover, numerous courts have affirmed the denial of a motion that merely presented previously-made legal arguments or those that could have been raised.[5]

Defendants seek a stay of the Court's order compelling discovery responses and the production of documents that they allege identify their customers.[6] In support of their argument that they are likely to succeed on appeal, defendants reiterate their belief that they are not a business and, as a result, the information which, although previously disclosed, is now protected by the First Amendment from discovery.[7] Because defendants presented these same arguments

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[3] *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977); *Family Foundation, Inc. v. Brown*, 9 F.3d 1075, 1076 (4th Cir. 1993); *United States v. Various Articles of Drug*, 1996 U.S. Dist. LEXIS 22868, at *3-4 (D. Md., Sept. 6, 1996)(noting that the Fourth Circuit requires a "*strong showing*" that the movant will succeed.)

[4] *Blackwelder Furniture Co.*, 550 F.2d 189, 193; *United States v. Tel. & Data Sys., Inc.*, 2002 U.S. Dist. LEXIS 19072, at *3 (W.D. Wis., Aug. 21, 2002).

[5] *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 404 (4th Cir. 1998); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)(*quoting FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)(internal quotations and citations omitted)); *see also Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)("A district court does not abuse its discretion when it disregards legal arguments made for the first time on a motion to amend" and affirmed the denial of a motion that merely presented previously-made legal arguments.)

[6] It should be noted that defendants direct their motion for stay *only* to documents and interrogatories purporting to divulge their customers' identities. Thus, their motion, (Doc. no. 35), does not relate to: Kotmair interrogatory 3, and SAPF interrogatories 9(a),11, and request for production 10.

[7] The Supreme Court has previously rejected this same argument, stating that when the IRS is legitimately investigating a particular taxpayer "any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 321 (1985); *see also SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984)("It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot not object if the third party conveys that information or records thereof to law enforcement authorities.")

in opposition to the United States' motion to compel, which the Court addressed in its Order, the renewed arguments provide the Court no reason to entertain a request to stay the Court's Order.

In support of the second prong, defendants assert their customers will be irreparably harmed if defendants are ordered to produce documents identifying them. Defendants' argument fails because this is not an irreparable harm to them because courts are able to fashion effective relief for taxpayers whose records are produced pursuant to a court order.[8] Thus, defendants have made no showing this factor is met and for this independent reason their request should be denied.

The remaining two factors are related because "there is substantial overlap between the harm to the IRS and the harm to the public" with regard to tax cases.[9] With respect to these factors, defendants' argument that, absent a stay, there is a harm to the public and no harm to the United States is without merit for at least three reasons. First, defendants ignore that this case is set for trial and their continued refusal to cooperate in discovery frustrates the preparation of the United States' case which impacts "the public['s] interests in the correct ascertainment of tax

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[8] *See Church of Scientology v. United States*, 506 U.S. 9, 12-13 (1992)(court may order records returned or destroyed); *United States v. Diversified Group*, 2002 U.S. Dist. LEXIS 23920 (S.D.N.Y. December 12, 2002); *Tel. & Data Sys., Inc.*, 2002 U.S. Dist. LEXIS 19072, at *3; *United States v. Clark*, 1980 U.S. Dist. LEXIS 10460, at *1 (M.D.N.C., Feb. 6, 1980)(The harm to [the moving party] may be minimized by requiring [the non-moving party] to make a list of the documents which they receive. In this way, the tax investigation may go forward, but [moving party's] rights, should he succeed on appeal, may be preserved.

[9] *Diversified Group*, 2002 U.S. Dist. LEXIS 23920, at *6; *See also United States v. Sweet*, 1980 U.S. Dist. LEXIS 10541, at *3 (M.D. Fl. Jan. 28, 1980); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974)(describing the government's "need to assess and collect taxes as expeditiously as possible." *Clark*, 1980 U.S. Dist. LEXIS 10460, at *1 (A stay would also subject the non-moving party to the risk of "loss of records or the dimming of memories.")

liabilities and the speedy resolution of [this] controversy..."[10]

Secondly, in cases involving an "injunction, a principal element of which is a finding of irreparable harm that is imminent, it is logically inconsistent, and in fact a fatal flaw, to subsequently find no irreparable nor even serious harm to the [p]laintiff" if a stay is granted.[11] Thus, defendants' argument that United States is not harmed by delay is also flawed because the government alleges an ongoing harm resulting from defendants' activities and requests a permanent injunction. Third, throughout their motion defendants assert that continued non-compliance with the tax laws maintains the *status quo* because any tax crime or liability will eventually be uncovered by the IRS. This argument is equally without merit because the *status quo* in tax cases is *continued compliance* and any delay in collecting taxes or continuing illegal activity alters the *status quo*.[12]

Moreover, as previously noted, defendants have represented their customers before bankruptcy courts, the IRS, and other tribunals. In doing so defendants have already disclosed their customers' identities. Thus, defendants have demonstrated no harm that results from providing the same names and information to plaintiff as part of this case. For these reasons the harm to the public and plaintiff outweighs any harm to defendants.

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[10] *Diversified Group*, 2002 U.S. Dist. LEXIS 23920, at *6; *See also United States v. Sweet*, 1980 U.S. Dist. LEXIS 10541, at *3 (M.D. Fl., Jan. 28, 1980).

[11] *Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2nd Cir. 1998)(in cases involving an "injunction, a principle element of which is a finding of irreparable harm that is imminent, it is logically inconsistent, and in fact a fatal flaw, to subsequently find no irreparable nor even serious harm to the [p]laintiff[] pending appeal.")

[12] *Barringer v. Griffes*, 810 F. Supp. 119 (D. VT., November 30, 1992). Moreover, "any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." *See also Tiffany Fine Arts, Inc.*, 469 U.S. 310, 321.

Further, because defendants have not appealed (and cannot at this stage appeal) the order granting the discovery, any request under Rule 62 is premature. Even if defendants' motion could be read as a notice of appeal or if defendants subsequently timely file a notice of an appeal, they make no effort to support their request for temporary suspension of the order.

CONCLUSION

For the aforementioned reasons, the United States requests that defendants' motion be denied. Moreover, because defendants offer no new evidence or change in circumstances the United States opposes the request for a hearing on this matter which only further delays these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION FOR STAY has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 30th day of May, 2006.

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