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.	)	

REPLY TO DEFENDANTS' OPPOSITION TO THE UNITED STATES' MOTION FOR AN ORDER LIFTING THE STAY PENDING APPEAL

On February 22, 2007, the Court granted defendants' motion to stay the permanent injunction pending appeal. (Docket No. 80.) On July 26, 2007, the Fourth Circuit affirmed this Court's decision and denied defendants' motion for new trial, and motion to alter and amend the permanent injunction. (Docket No. 85.) On August 3, 2007, the United States filed a motion to lift the stay of the permanent injunction. (Docket No. 86.) On August 17, 2007, defendants filed a response in opposition to the motion to lift the stay. (Docket No. 87.) The United States now files this reply.

In their response, defendants contend that the *status quo* should be maintained until a final mandate is issued by the Fourth Circuit. Defendants incorrectly argue that the United States' motion to lift the stay should be denied because "the conditions which existed when this Court granted the stay continue to exists." (Docket No. 87, p. 2.) Defendants are wrong, and their position should be rejected for several reasons.

First, defendants' response ignores the impact of the Fourth Circuit's decision affirming the permanent injunction. This Court made clear when it granted a stay of the permanent

injunction that the balance-of-hardship test set forth in *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), weighed in favor of a stay because serious issues exists warranting a stay. *Blackwelder* weighs the "'likelihood' of irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant; and if a decided imbalance of hardship should appear in plaintiff's favor, then the likelihood-of-success test is displaced." *Id*. at 195.

In applying that test, this Court equated the possible harm to defendants with the "serious" issues that may exist related to the "permissible scope of the injunctive relief" that outweighed that harm to the United States "occasioned by a brief delay in enforcement." (Docket No. 80.) Now, the Fourth Circuit has affirmed the permanent injunction, without modification. That fact negates any argument that the permanent injunction is impermissibly broad or that potential harm to defendants outweighs the harm to the United States. In simple terms, the decision demonstrates an absence of any potential harm related to the scope of the injunction, which unquestionably tips the balancing test in favor of lifting the stay.

Second, in *Blackwelder* the Fourth Circuit further noted that the "[t]he importance of probability of success increases as the probability of irreparable injury diminishes." *Id*. at 195. As noted above, the decision affirming this Court's Order without modification significantly diminishes any harm to defendants based on the assertion that the Order was impermissibly broad. Moreover, the Fourth Circuit's decision further confirms that defendants have no likelihood of success on the merits of their appeal. For that additional reason, the stay should be lifted.

Third, defendants incorrectly assert that the stay should continue to maintain the *status quo ante litem*. Defendants misconstrue the term *status quo* and assume that it means the

situation that existed immediately before the permanent injunction was granted—i.e., Defendants conducting business as usual, selling their tax-fraud scheme. This interpretation is wrong. Instead, the *status quo ante litem* is "the last uncontested status which preceded the pending controversy." *Goto.com v. Walt Disney Company*, 202 F.3d 1199, 1210 (9th Cir. 2000). Kotmair and defendants' customers have gone to jail and have incurred civil penalties for implementing this scheme. The Government hardly left defendants' pre-lawsuit assertions and actions uncontested. Thus, the last uncontested status existed immediately before defendants sold their first tax-evasion product.

Along those same lines, ending the stay in this case would logically follow from the decision in *Blackwelder* and the United States' interpretation of the term *status quo ante litem*. In *Blackwelder*, the Court observed that the "balance-of-hardship test [] emphasizes that, where *serious* issues are before the court, it is a sound idea to maintain the *status quo ante litem*, provided that it can be done without imposing too excessive an interim burden upon the [other party.]" *Id*. at 194-95. A careful reading of *Blackwelder* reveals that the plaintiffs appealed the denial of their motion for a temporary restraining order, which the Fourth Circuit reversed for two reasons. First, the Fourth Circuit reversed the District Court decision because the incorrect test was applied — i.e., requiring a "strong showing" of success on the merits rather than balancing "irreparable harm to the plaintiff against the 'likelihood' of harm to the defendant." *Id*. at 195.

Second, the Fourth Circuit further reversed that District Court's decision denying the injunction the so that the *status quo ante litem* could be maintained. Thus, *status quo ante litem* in that case meant enjoining the defendants and restoring the positions of the parties before the

controversy at issue, which is in accord with the United States' position. This confirms that continuing the *status quo* does not provide defendants the right to carry out their scheme, which they have done unfettered for the length of the stay in this case.

Fourth, defendants argue that they stay should continue so that the appeal process can run its course. Defendants assert that they may file a petition for rehearing or rehearing *en banc*. Defendants litigation strategies in this case are irrelevant. Indeed, the crux of defendants' argument is that they intend to use every "delay tactic possible,"[1] a strategy they advocate as part of their scheme. In that regard, defendants' efforts should not be lauded, and the stay should be lifted to end the proliferation of their scheme.

Respectfully submitted,

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[1]*Save-A-Patriot Fellowship v. United States*, 962 F. Supp. 695 (D. Md. 1996)(noting that advocate that customers use every delay tactic possible).

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing REPLY IN SUPPORT OF MOTION FOR AN ORDER LIFTING THE STAY OF THE PERMANENT INJUNCTION has been made upon the following by depositing a copy in the United States mail, postage prepaid, this 20th day of August, 2007.

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