UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. WILLIAM J. BENSON, Defendant - Appellant,	)	Appeal No.: 08-1312

APPELLANT'S MOTION TO DISMISS CROSS-APPEAL OF THE UNITED STATES

Appellant, William J. Benson (hereinafter "Benson"), by and through his undersigned attorney of record, moves this Court to dismiss the cross-appeal filed by the United States on the grounds that the United States has received all the relief sought in the trial court, and therefore the issue raised in the cross-appeal is moot. In support of this motion, Benson makes the following showing:

1. The complaint filed by the United States sought an injunctive order compelling Benson to produce the names, addresses, social security numbers, telephone numbers and e-mail addresses of the persons to whom Benson gave or sold, directly or indirectly, "The Reliance Defense Package." (Doc. 1, pp. 7-8).

2. Not being satisfied with the length of time the District Court was taking in ruling on the United States' motion for summary judgment, the United States sought to obtain the information by discovery. (Doc. 64).

3. Benson notified the District Court that the Criminal Investigation Division was interested in Benson, and therefore Benson would be exercising his right to remain silent

regarding the discovery wanted by the United States. (Doc. 66).

4. On April 19, 2007, during a telephonic status conference, the District Court suggested, in light of Benson's assertion of his right to remain silent, the United States seek an order of immunity. In making said suggestion, the District Court implicitly recognized the propriety of Benson's Fifth Amendment assertion. (See Doc. 70).

5. On July 2, 2007, John Doe I, John Doe II and Jane Roe filed a motion for leave to intervene (Doc. 74) and together with Benson, a motion for a protective order (Doc. 77), as well as an extensive memorandum of law (Doc. 80) detailing why the requested information was protected from disclosure under the First Amendment to the Constitution.

6. On August 20, 2007, the United States filed a motion for an order of immunity (Doc. 88), and filed an exact duplicate motion for an order of immunity on August 27, 2007 (Doc. 93).

7. On December 17, 2007, the District Court entered its Minute Entry (Doc. 105) and Memorandum Opinion (Doc. 106) specifically denying the United States' request for the names, addresses, social security numbers, telephone numbers and e-mail addresses of the persons to whom Benson gave or sold, directly or indirectly, "The Reliance Defense Packages."

8. The reason given by the District Court for denying the United States' request was: "The Government has not provided a compelling reason why Benson's customer list should be disclosed and the customers be investigated and scrutinized by the Government solely because they bought the Reliance Defense Package or related package...The request by the Government for the customer list is beyond the scope of Benson's wrongdoing in the instant action, and absent a compelling reason given by the Government for its disclosure, the request cannot be

granted" (Doc. 106, p. 19-20).

9. At the same time, the District Court denied, as moot, the motions to intervene, for a protective order, and for immunity. (Doc. 106, p. 21).

10. On January 11, 2008, the United States filed its motion to alter or amend the judgment (Doc. 119), asking the District Court to order Benson to supply the requested information.

11. On January 13, 2008, Benson and Applicant Intervenors filed their opposition to the United States motion to alter or amend (Doc. 127).

12. On January 16, 2008, the District Court denied the United States motion to alter or amend the judgment. (Doc. 137).

13. Being dissatisfied with the District Court's order, the United States employed an alternate remedy to obtain the requested information. On February 14, 2008, the Internal Revenue Service, the real party in interest in the District Court litigation, issued an administrative summons directing Benson to provide to it the identical information it had requested in the Complaint for Injunctive Relief.

14. On February 21, 2008, Benson and the Applicant Intervenors filed a motion to quash the summons (Doc. 144), and a memorandum in support (Doc. 145). Benson and the Applicant Intervenors argued that the Internal Revenue Service was the real party in interest in the District Court litigation, and the District Court's order denying the requested information was *res judicata*.

15. On February 22, 2008, the United States filed its opposition. (Doc. 150).

16. On February 27, 2008, the District Court issued its minute order denying the

motion to quash the summons, thereby specifically allowing the United States to obtain the requested information through the administrative summons process. (Doc. 158).

17. On February 28, 2008, Benson timely responded to the Revenue Agent who had issued the administrative summons. To date, the United States has not conveyed any objection to Benson's compliance, and has filed no action to enforce the summons.

18. On March 10, 2008, the United States filed its Notice of [Cross] Appeal, appealing "from that portion of the permanent injunction which declined the United States' request for an injunction requiring the defendant, William Benson, to turn over a list of the customers to whom he had sold his 'Reliance Defense Package.'" (Doc. 164).

19. A party who has received all the relief sought in the trial court is not aggrieved and cannot bring an appeal. *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992). An appeal that no longer presents a live controversy is moot and should be dismissed. *Henco, Inc. v. Brown*, 904 F.2d 11, 13 (7th Cir. 1990). *See also Selcke v. New England Ins. Co.*, 2 F3d 790, 792 (7th Cir. 1993) (burden of proof on party asserting appellate jurisdiction if challenged). "The...test for mootness on appeal is...whether it is still possible to 'fashion some form of meaningful relief' to the appellant in the event he prevails on the merits." *Flynn v. Sandahl*, 58 F.3d 283, 297 (7th Cir. 1995), *quoting Church of Scientology v. United States*, 1123 S.Ct. 447, 450 (1992). *See also Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* (2003 Ed.), p. 14-15.

20. While the United States did not receive an injunctive order from the District Court requiring Benson to turn over the requested information, it did receive a minute order which, in essence, required Benson to turn over the identical requested information. There is no more relief

to which the United States can obtain than it has already obtained.

21. Another reason to dismiss the appeal is that the Applicant Intervenors are not before this Court, their motion for leave to intervene having been denied. They attempted to appear in the District Court to protect their First Amendment rights knowing that some courts have held a litigant does not have standing to assert constitutional rights of third parties.

22. In light of Benson's compliance with the administrative summons, it appears unlikely the United States will bring an action to enforce compliance under 26 U.S.C. § 7604. That however, is the remedy available to the United States, a remedy which will also give the Applicant Intervenors an opportunity to be heard should it become necessary.

23. Any relief that would be granted to the United States by cross-appeal should it prevail has already been given. The Seventh Circuit could do no more than remand for the District Court to order Benson to provide the information. The District Court has already done so when it refused to grant Benson's motion to quash the summons.

WHEREFORE, the cross-appeal by the United States is impermissible under prevailing Seventh Circuit precedent, and the cross-appeal should be dismissed.

Dated: March 13, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2008, I mailed a copy of the foregoing document to the attorney for the Appellee by first class mail, postage prepaid, to the following address:

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