

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**CASE NO. 08-3897**

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Berne Corp. and B&Bf Corp., Twenty-One Queens )  
Quarter, Inc., Miller Properties, Inc., Equivest St. )  
Thomas, Inc., Robert Schmidt, Kim Holdsworth, )  
Robert Schmidt Development Corp., Dori P. Derr, )  
Cyril V. Francois Associates, LLC, Shell Seekers, )  
Inc., Charles W. Consolvo, Linda B. Consolvo, )  
Snegle Gade Associates LP, Yvette Lederberg, )  
Arthur B. Choate, Stewart Loveland and Stacy )  
Loveland, Elisabeth Sharp, Lindon Corp., Gordon L.)  
Coffelt, Soraya Diase Coffelt, One Stop, Inc., )  
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Appellees, )  
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v. )  
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GOVERNMENT OF THE VIRGIN ISLANDS, )  
ROY MARTIN, in his official capacity as Tax )  
Assessor, and the Virgin Islands Board of Tax )  
Review, )  
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**MOTION FOR CLARIFICATION OR RECONSIDERATION  
OF ORDER OF OCTOBER 10, 2008**

COMES NOW Appellee BERNE CORPORATION, by and through its undersigned counsel of record, and moves the Court for clarification of its Order of October 10, 2008. Alternatively, to the extent it was the intent of the Court to lift the injunction of May 12, 2003, such that the Government is now allowed to send out tax bills during the pendency of this appeal, Appellee moves for reconsideration of said Order on the grounds that it is contrary to law.

Initially, it is important to note that Appellee does not challenge the discretion of this Court to order a stay pending appeal. However, the relief sought by the Government goes far beyond a

mere stay Order, and the simple notation in this Court's Order that the Motion for Stay is "Granted" does nothing to clarify matters.

Specifically, Appellant's Motion, captioned as a Motion to Stay District Court Contempt Order Pending Appeal, actually asks that this Court stay *two* separate Orders. There is also a conflict in the Motion regarding the relief sought by the Government. Specifically, at page 2 of the Motion the Government merely asks for a stay of the two Orders of the District Court entered on September 11, 2008. However, at page 11 of the Motion Appellants reveal the true scope of the relief being sought:

"Defendants pray that this Honorable Court, stay the September 11, 2008, Contempt Order of the District Court and permit the Government to issue property tax bills at the 2006 rate pursuant to Act No. 6991, and remove the daily sanctions against the Appellants."

Thus, the Government does not merely seek a stay to maintain the *status quo* established under the District Court's Order of May 12, 2003. Rather, the Government asks this Court to - in effect - grant the relief sought in the underlying appeal from the Order granting in part and denying in part the Government's Motion to Lift the Permanent Injunction and Vacate the Order of May 12, 2003.

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- a. nullify the Order of May 12, 2008, prohibiting the Government from issuing tax bills until it had complied with certain pre-conditions;
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rates without complying with the terms of the earlier injunction; and,

- c. vacate (and not simply stay) imposition of sanctions until the Government complies with the Order of September 11, 2008.

The Government has made clear that it fully intends to treat this Court's Order of October 10, 2008, as giving it a green light to ignore the injunction issued on May 12, 2003. Attached hereto as Exhibit A is a true and correct copy of a press release just issued by the Governor's office. As indicated there, the Government now takes the position that "The suspension of the September 11, 2008 Order not only allows for the Government to re-issue 2006 Property Tax Bills at newly assessed values . . . ."

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Given the fact that both the District Court and this Court previously found that the actions of the Government constituted constitutional due process violations, it is hard to conceive that a simple notation that a stay is "granted" could wipe out those due process violations and, literally, give the Government a blank check to ignore Appellants' constitutional rights.

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DOES NOT GIVE THIS COURT JURISDICTION TO DISSOLVE,  
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Moreover, the *Frith* Court specifically recognized that an underlying order, especially one that has already been affirmed on appeal, is final and not reviewable in a collateral proceeding. (*Frith, supra*, at 901).

The District Court also recognized that a stay request is not the proper vehicle for challenging the underlying injunction. See *Berne Corp. v. Government of the Virgin Islands* (Docket No. in Civil No. 00-141 in the District Court:

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In fact, the District Court noted the factually defective basis for seeking a stay pending appeal (exactly the same arguments raised in the Motion for Stay before this Court.). In rejecting those arguments the District Court stated:

“Defendants argue that the Partial Vacatur Ruling: (1) violates the separation-of-powers doctrine; (2) compels the Defendants to enforce repealed laws and to ignore valid laws; and (3) is overbroad. Whatever the merits of those arguments, as noted above, they are improperly asserted in a motion for a stay pending appeal.

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For the foregoing reasons, and each of them, Appellee respectfully requests that this Court either clarify the scope of its Order of October 10, 2008, or reconsider the scope of the relief purportedly granted by that Order.

DATED: October 13, 2008

Respectfully Submitted,

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James M. Derr, Esq.  
P.O. Box 664  
St. Thomas, V.I. 00804  
(340) 244-2566  
jimderr@earthlink.net

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of October, 2008, I caused a true and correct copy of the foregoing Pleading to be mailed, via pre-paid U.S. mail, to:

Terryln Smock, Esq.  
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Department of Justice  
34-38 Kronprindsens Gade  
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The Government has made clear that it fully intends to treat this Court's Order of October 10, 2008, as giving it a green light to ignore the injunction issued on May 12, 2003. Attached hereto as Exhibit A is a true and correct copy of a press release just issued by the Governor's office. As indicated there, the Government now takes the position that "The suspension of the September 11, 2008 Order not only allows for the Government to re-issue 2006 Property Tax Bills at newly assessed values . . . ."

Noticeably absent from the press release is any indication that the Government treats this Court's Order as being interlocutory, or that the final ability of the Government to issue tax bills is dependent in any fashion on the pending appeal. As far as the Government is concerned, this Court's Order staying enforcement of the September 11, 2008 Orders of the District Court is "game, set and match." It is clear that the Government believes that this Court's simple entry of a stay order not gives the Government free rein to ignore the terms of the injunction, that this Court's Order eliminates the need to have the new tax system certified by the District Court, and that the simple stay order also wipes out the requirement that the Board of Tax Review be fully functioning before tax bills are sent out.

Given the fact that both the District Court and this Court previously found that the actions of the Government constituted constitutional due process violations, it is hard to conceive that a simple notation that a stay is "granted" could wipe out those due process violations and, literally, give the Government a blank check to ignore Appellants' constitutional rights.

**RULE 8(a) OF THE FEDERAL RULES OF APPELLATE PROCEDURE  
DOES NOT GIVE THIS COURT JURISDICTION TO DISSOLVE,  
EVEN TEMPORARILY, THE UNDERLYING INJUNCTION**

In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5<sup>th</sup> Cir. 1975), the Fifth Circuit, in discussing the scope of relief available under Rule 8(a), noted that “Rule 8(a) only authorizes stays or injunctions pending appeal. It does not provide for the relief sought in appellant’s petition for dissolution: in effect, a vacation of an injunction entered by the district court.” That is exactly what Appellant is seeking from this Court, if the Order of October 10, 2008, is given the wildly expansive interpretation asserted by the Government.

Moreover, the *Frith* Court specifically recognized that an underlying order, especially one that has already been affirmed on appeal, is final and not reviewable in a collateral proceeding. (*Frith, supra*, at 901).

The District Court also recognized that a stay request is not the proper vehicle for challenging the underlying injunction. See *Berne Corp. v. Government of the Virgin Islands* (Docket No. in Civil No. 00-141 in the District Court:

Here, the Partial Vacatur Ruling keeps the May 12, 2003 Decree in force but imposes no affirmative obligation on the Defendants. The Defendants’ several arguments, however, appear to challenge the foundation of the Partial Vacatur Ruling. In raising those arguments, the Defendants essentially seek reconsideration of the Partial Vacatur Ruling. Such relief, however, must be sought pursuant to Rule 60 of the Federal Rules of Civil Procedure and Rule 7.3 of the Local Rules of Civil Procedure. The Defendants have not sought relief pursuant to those rules.”

In fact, the District Court noted the factually defective basis for seeking a stay pending appeal (exactly the same arguments raised in the Motion for Stay before this Court.). In rejecting those arguments the District Court stated:

“Defendants argue that the Partial Vacatur Ruling: (1) violates the separation-of-powers doctrine; (2) compels the Defendants to enforce repealed laws and to ignore valid laws; and (3) is overbroad. Whatever the merits of those arguments, as noted above, they are improperly asserted in a motion for a stay pending appeal.

Furthermore, in raising those arguments, the Defendants gloss over the fact, as they appear to have done throughout these proceedings, that the May 12, 2003 Decree contemplated the satisfaction of two conditions before the Defendants could issue property tax bills at a rate other than that set by the May 12, 2003 Decree.”

**THIS COURT SHOULD CLARIFY OR, IF NECESSARY,  
RECONSIDER THE SCOPE OF ITS BRIEF ORDER GRANTING  
THE CONFLICTING RELIEF SOUGHT BY THE GOVERNMENT**

As discussed above, the relief sought by the Government at the beginning of its Motion is different from the relief sought at the end. This court’s simple order granting the Motion leaves unclear the intended scope of the stay and, given the expansive interpretation of the Order taken by the Government, completely guts the underlying injunction, whose validity is not even before this Court. Indeed, that underlying injunction has already been unanimously affirmed by a panel of this Court.

For the foregoing reasons, and each of them, Appellee respectfully requests that this Court either clarify the scope of its Order of October 10, 2008, or reconsider the scope of the relief purportedly granted by that Order.

DATED: October 13, 2008

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of October, 2008, I caused a true and correct copy of the foregoing Pleading to be mailed, via pre-paid U.S. mail, to:

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mere stay Order, and the simple notation in this Court's Order that the Motion for Stay is "Granted" does nothing to clarify matters.

Specifically, Appellant's Motion, captioned as a Motion to Stay District Court Contempt Order Pending Appeal, actually asks that this Court stay *two* separate Orders. There is also a conflict in the Motion regarding the relief sought by the Government. Specifically, at page 2 of the Motion the Government merely asks for a stay of the two Orders of the District Court entered on September 11, 2008. However, at page 11 of the Motion Appellants reveal the true scope of the relief being sought:

"Defendants pray that this Honorable Court, stay the September 11, 2008, Contempt Order of the District Court and permit the Government to issue property tax bills at the 2006 rate pursuant to Act No. 6991, and remove the daily sanctions against the Appellants."

Thus, the Government does not merely seek a stay to maintain the *status quo* established under the District Court's Order of May 12, 2003. Rather, the Government asks this Court to - in effect - grant the relief sought in the underlying appeal from the Order granting in part and denying in part the Government's Motion to Lift the Permanent Injunction and Vacate the Order of May 12, 2003.

This Court's abbreviated notation that the Motion is "Granted" is ambiguous because it does not indicate whether what is being "granted" is the Government's request at the beginning of its brief to simply maintain the status quo as it existed on September 11, 2008, immediately before the two Orders were issued, or whether this Court is "granting" the omnibus request in the Conclusion of the brief asking that this Court:

- a. nullify the Order of May 12, 2008, prohibiting the Government from issuing tax bills until it had complied with certain pre-conditions;
- b. affirmatively grant the Government the right to issue bills at the unapproved 2006

rates without complying with the terms of the earlier injunction; and,

- c. vacate (and not simply stay) imposition of sanctions until the Government complies with the Order of September 11, 2008.

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DATED: October 13, 2008

Respectfully Submitted,

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