UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

SEXUAL MINORITIES UGANDA,

Plaintiff,

v.

SCOTT LIVELY, individually and as President of Abiding Truth Ministries,

Defendant.

Civil Action

3:12-CV-30051-MAP

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STAY ACTION PENDING SUPREME COURT'S DECISION IN *KIOBEL V. ROYAL DUTCH PETROLEUM*

Defendant's Motion to Stay this action pending the United States Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, No. 10-1491, should be denied.

I. Introduction

Before even filing a responsive pleading, Defendant moves to stay this case in its entirety, pending the Supreme Court's disposition of *Kiobel v. Royal Dutch Petroleum* – a case that has been set for re-argument in October and may not be decided until one year from now, in June 2013. Defendant bases this remarkable request on a supposition that the Supreme Court might go so far as to eliminate almost entirely the 1789 Alien Tort Statute ("ATS"), 28 U.S.C. §1350, and upon a proposed reading of a handful of cases that is belied by the very high burden those cases place on a Defendant seeking a

stay in these circumstances. Under the law of this Circuit, a stay of this case is not appropriate.

First, contrary to Defendant's speculation, the Supreme Court's request for re-argument in *Kiobel,* a case involving foreign corporate defendants, foreign plaintiffs and foreign conduct, in no way augurs the demise of the extraterritorial application of the ATS, particularly in cases against individuals. Twice before, the Supreme Court has considered cases brought against individuals under the ATS involving extraterritorial conduct and has not questioned the extraterritorial reach of the statute as a general matter. Additionally, every single federal circuit court to address the issue (and a district court in this Circuit) has held the statute to apply extraterritorially. Those justices who expressed concern with some applications of the ATS' extraterritorial scope in *Kiobel* – again, a case involving foreign *corporate* defendants – made clear that their preoccupation is with applying the statute to cases having only foreign plaintiffs, foreign defendants and foreign conduct – that is, cases with "no connection to the United States whatsoever."[1] This is in stark contrast to the facts in this case where the Defendant is a United States citizen and a Massachusetts resident, and who is sued for his conduct occurring both within the United States and abroad. Indeed, a defendant's presence in the forum is among the oldest and most sound bases for the exercise of jurisdiction over him.

Second, even accepting for the sake of argument that some feature of the *Kiobel* outcome would impact some portion of this case, Defendant is incorrect to suggest that

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[1] Tr. of Feb. 28, 2012 Oral Argument in *Kiobel v. Royal Dutch Petroleum,* No. 10-1491, at 12:1-2. *Available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf.

the grant of a stay in such circumstances is "routine." Def. Mot. at 6. Rather, the Supreme Court has stressed that it is only in "rare circumstances" that a litigant should be "compelled to stand aside" pending resolution of another matter. *Landis v. North Amer. Co.,* 299 U.S. 248, 254-55 (1936). Underscoring the exceptional nature of this relief, *Landis*, the primary case upon which Defendant relies in support of the uncontroversial proposition that courts possess the *power* to grant stays, actually vacated the stay at issue as an abuse of discretion. *Id*. To help ensure that such relief remained "exceptional" rather than "routine," the Court identified a number of considerations to constrain these decisions, which lower courts have further refined. *Id. See also, Taunton Gardens Co. v. Hills,* 557 F.2d 877, 879 (1st Cir. 1977) (interpreting Landis as placing a "heavy burden" who wishes to stay an action pending disposition of another) and *Marquis v. F.D.I.C.,* 965 F.2d 1148, 1155 (1st Cir. 1992) (holding that "stays cannot be cavalierly dispensed").

Defendant fails to adequately address these factors. In fact, many of the arguments Defendant makes in urging a stay – such as the importance of adjudicating Defendant's anticipated defenses to this action – actually weigh in favor of moving this case forward. Moreover, Defendant gives surprisingly short shrift to the seriousness of the allegations Plaintiff raises surrounding the ongoing persecution encouraged, promoted and assisted by Defendant – persecution that has served to criminalize the very existence and political participation of Plaintiff.

In light of the gravity of the situation underlying Plaintiff's claims and given the improbability that *Kiobel* will materially affect the outcome of this case, Defendant has fallen far short of the heavy burden he must satisfy to obtain such relief.

II. LAW AND ARGUMENT

A. MOVANTS BEAR A "HEAVY BURDEN" AND STAYS ARE ONLY TO BE GRANTED IN "RARE CIRCUMSTANCES."

As Defendant observes, the Supreme Court long ago confirmed the uncontroversial proposition that courts have the inherent power to stay a proceeding in order to control the disposition of the cases on their docket, and that this power extends to situations in which one suit may be affected by the disposition of another. *Landis,* 299 U.S. at 254-55 (1936). Defendants fail to mention, however, that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id*., at 255. To ensure that such extraordinary relief would remain the exception rather than the rule, the *Landis* Court further instructed that "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one *[sic]* else." *Id.* Significantly, in *Landis,* the Court vacated the stay at issue in that case as immoderate and an abuse of discretion. *Id.*

The Supreme Court's extreme caution in affirming the power of district courts to grant stays followed its earlier pronouncement that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co. v. United States, et al,* 272 U.S. 658, 672 (1926). Subsequent to *Landis*, in considering circumstances under which federal district courts should stay proceedings pending related state litigation, the Court emphasized that federal courts have a "virtually unflagging obligation… to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States,* 424

U.S. 800, 813, 817 (1976) (citing *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-189 (1959)).

The First Circuit has rightly interpreted *Landis* to place a "heavy burden" on the party requesting a stay that would force "a litigant in one cause to stand aside while a litigant in another action settles the rule of law that will define the rights of both." *Taunton Gardens Co.,* 557 F.2d at 879. The First Circuit later confirmed that "stays cannot be cavalierly dispensed" and that there must be "good cause for their issuance; they must be reasonable in duration; and the court must ensure that competing equities are weighed and balanced." *Marquis,* 965 F.2d at 1155 (citing *Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co. of P.R.,* 818 F.2d 1034, 1039 (1st Cir. 1987) (denying stay of performance of contract because applicant did "not come close to meeting the requirements necessary" for a stay).

Adhering to the strict standards governing stays pending disposition of other cases, district courts in this Circuit have routinely denied stays of the sort requested by Defendant. *See e.g., Cardelli v. DAE Aviation Enters, Corp*., 2012 U.S. Dist. LEXIS 42179, at *2-4 (D. Me. Mar. 28, 2012) (denying stay pending resolution of declaratory judgment in another court dealing with related issues); *Steele v. Ricigliano*, 789 F.Supp. 2d 245, 247-248 (D. Mass. 2011) (denying stay pending disposition of appeal in related case); *Solis-Alarcon v. Abreu-Lara,* 722 F. Supp. 2d 157, 161 (D.P.R. 2010) (denying stay pending disposition of appeal in prior case); *Diomed, Inc. v. Total Vein Solutions,* 498 F.Supp. 2d 385, 387 (D. Mass. 2007) (denying stay even though federal circuit could "issue relevant and significant decision on a related appeal" in light of limitations set forth in *Landis*); *Nomos Corp. v. Zmed*, 2002 U.S. Dist. LEXIS 12241, 2-3 (D. Mass.

June 26, 2002) (denying stay pending resolution of related actions because movant had "not established 'a clear case of hardship or inequity in being required to go forward'"); *Dow Chemical Co. v. Composite Container Corp.,* 1984 U.S. Dist. LEXIS 17752 (D. Mass. Apr. 10, 1984) (denying stay pending final resolution of related actions and finding that expenses of litigation do not amount to hardship justifying a stay); *Manchester Bank v. Connecticut Bank and Trust Company,* 497 F. Supp. 1304 (D. N.H 1980) (denying stay pending the outcome of related criminal proceedings and finding that movant had not met its burden).

Defendant ignores the overwhelming weight of this authority.

B. Particularly Because *Kiobel* Is Unlikely to Resolve An Issue of Significance in this Case, its Consideration by the Supreme Court Does Not Amount to a "Rare Circumstance" Necessitating a Stay of This Action.

Contrary to Defendant's conjecture, it is highly doubtful that *Kiobel* will have any bearing on this case. The Supreme Court, by a six-vote majority, has already recognized in cases against *individuals* that the ATS can apply extraterritorially. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (citing with approval a number of lower court cases where the conduct at issue occurred in foreign territory, including exclusively in foreign territory); *See also, Samantar v. Yousuf*, 130 S.Ct. 2278 (June 1, 2010) (holding that the Foreign Sovereign Immunities Act did not provide immunity for an individual defendant in a case brought under the ATS by Somali plaintiffs against a former Somali government official residing in the United States for his conduct in Somalia).

Defendant oversimplifies to an extreme the concerns identified by the Court in its decision to re-list *Kiobel* for re-argument. Defendant claims that "several justices expressed great skepticism that the Alien Tort Statute can confer subject-matter

jurisdiction over extraterritorial conduct in a United States court." Def. Mot. at 8. This dramatically overstates the core concern expressed by the justices – a concern that is simply not implicated in this case. In fact, the core concern of the several justices questioning the extraterritorial reach of the ATS, as succinctly expressed by Justice Alito, has to do with cases having "no connection to the United States whatsoever." Tr. of Feb. 28, 2012 Oral Argument in *Kiobel v. Royal Dutch Petroleum,* No. 10-1491, at 12:1-2. In *Kiobel*, the plaintiffs are residents of Nigeria who sued Royal Dutch Petroleum Company ("Royal Dutch") and Shell Transport and Trading Company, PLC ("Shell"), which were incorporated, respectively, in the Netherlands and the United Kingdom. Royal Dutch and Shell were sued through a Nigerian subsidiary for aiding and abetting the Nigerian Government in committing human rights abuses. *See Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 123 (2d Cir. 2010). Unlike in the instant matter, none of the defendants were citizens or residents of the United States, nor did any of the alleged conduct occur within the United States. Thus, *Kiobel*, according to some justices, has "no connection to the United States whatsoever."

In explicating the distinction between an uncontroversial ATS case such as this one, and what he perceived to be the potentially problematic facts in *Kiobel*, Justice Kennedy contrasted *Kiobel* with *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980) – a landmark case brought under the ATS in which alien plaintiffs brought suit against a defendant who was residing in New York for torture and murder in Paraguay:

> …[W]e can assume that *Filartiga* is a binding and important precedent, for the Second Circuit [out of which *Kiobel* emerged]. But in that case, the only place they could sue was in the United States. He was an individual. He was walking down the streets of New York, and the

> victim saw him walking down the streets of New York and brought the suit.
>
> In this case, the corporations have residences and presence in many other countries where they have much more – many more contacts than here. (Tr. at 13:21-14:5)

Justice Ginsburg also shared the view that in *Sosa* the Supreme Court had previously "accepted that *Filartiga* would be a viable action under the Tort Claims Act." Tr. at 13:12-17. In *Sosa*, both the plaintiff and defendant were Mexican nationals and the actionable conduct took place in Mexico as well as in the United States. 542 U.S. 692 (2004). The six-vote majority in *Sosa* affirmed that the ATS is a jurisdictional statute enacted on the assumption that the courts would use their common law powers to recognize a small number of common law claims for violations of international norms that are specific, obligatory and universal. *Id.* The Seventh Circuit later observed that "*Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained." *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011) (Posner, J.).

It is also significant that every federal circuit court to address the issue of extraterritorial conduct under the ATS has unanimously affirmed the extraterritorial reach of the statute. *See, e.g.*, *Flomo,* 643 F.3d at 1025 ("no court to our knowledge has ever held that [ATS] doesn't apply extraterritorially."). In *Doe v. Exxon Mobil Corp.*, the D.C. Circuit "conclude[d] that the extraterritoriality canon does not bar appellants from seeking relief based on Exxon's alleged aiding and abetting of international law violations committed in Indonesia." 654 F.3d 11, 24-26 (D.C. Cir. 2011) (affirming that the ATS applies extraterritorially and stating that "[e]xtraterritorial application of the ATS would reflect the contemporaneous understanding that . . . a transitory tort action

arising out of activities beyond the forum state's territorial limits could be tried in the forum state. It also would reflect an understanding that a violation of the law of nations could occur within the territorial jurisdiction of a foreign country and be civilly remediable in the United States courts." (citations omitted)).

Moreover, a district court in this Circuit applied the ATS extraterritorially in a case brought by alien plaintiffs and an American nun against a former Guatemalan Minister of Defense for torture, assault, false imprisonment and the death of relatives in Guatemala. *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995).

Thus, the law in the Supreme Court – and federal courts of appeal – currently holds that the ATS reaches extraterritorial conduct. The farthest that the some justices of the Court *may* consider limiting the ATS is in situations where all the parties are foreign and when all the conduct occurs in foreign territory. It is thus unlikely in the extreme that *Kiobel* will have any relevance to this case, where the Defendant, an individual, resides and much of his actionable conduct took place in Springfield, Massachusetts.[2]

C. The Issues of Great Public Importance Identified by Defendant Are Not Implicated by *Kiobel*.

In seeking accountability for Defendant's role and participation in the persecution of persons on the basis of their sexual orientation and gender identity, Plaintiff readily agrees that there are issues of great, and even urgent, importance in this case. The basic fundamental rights of lesbian, gay, bisexual and transgendered people to,

[2] It is perhaps worth noting that courts of general jurisdiction have long exercised jurisdiction over torts occurring extraterritorially. *See e.g. McKenna v. Fisk*, 42 U.S. 241, 248-49 (1843), expounding on the doctrine of transitory torts which holds that the tortfeasor's wrongful acts give rise to an obligation to make reparations which follow him and is enforceable wherever he could be found. *See also, Burnham v. Superior Court of California,* 495 U.S. 604 (1990).

inter alia, life, personal security, speech, assembly, association, political participation, non-discrimination and to be free of cruel, inhuman and degrading treatment are constantly threatened thanks in no small part to the longstanding and ongoing efforts of the Defendant. These issues of great public importance weigh heavily in favor of moving this case forward.

Ignoring Plaintiff's substantial interests in obtaining justice and remediation of these grave harms, Defendant chooses to identify several other issues of "extraordinary public moment" as required by *Landis*.[3] Those include "bedrock principles of United States constitutional law," including "whether the First Amendment of the United States Constitution trumps, or is subservient to, international law," and "time-honored fundamental rights, such as the right to free speech and to petition government." Def. Mot. at 10-11. Remarkably, Defendant fails to recognize that *none* of these issues will be resolved by or addressed through the Supreme Court's review of *Kiobel*, which is limited to the questions of corporate liability and extraterritoriality under the ATS. As such, if Defendant believes these issues of "extraordinary public moment" are implicated by this case, he must concede that they should be decided now, rather than await a one year stay.

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[3] Defendant cites to *Landis* as a basis for urging that the court view the issues he identifies as of "public moment." But the Supreme Court in *Landis* was faced with a situation in which dozens of companies had brought suits in different districts to enjoin enforcement of the newly enacted Public Utility Holding Company Act of 1935 at the same time as the Supreme Court would be assessing the validity of the act. *Landis*, 299 U.S. 248. Likewise, in affirming a stay, the First Circuit in *Taunton* was addressing a situation involving the administration of a major federal program and the disbursement of a significant amount of federal money and where the Defendant government agency had been called upon to litigate the same issue in more than ten district courts, and ordered to make payments in those cases while implementation of the program at issue had been stayed by the Supreme Court. *Taunton,* 557 F.2d 877.

Likewise, Plaintiff has a profound interest in confronting and dispensing these potential legal defenses so as to move on to the actual claims and conduct at the heart of this case.

D. There Is More Than a Fair Possibility that Plaintiff Will Be Harmed by a Stay.

In presuming to represent to the Court that Plaintiff will not be harmed by a stay of as long as a year, Defendant again identifies facts that actually support the opposite conclusion. Defendant suggests that Plaintiff has somehow dragged its feet in bringing this case as Defendant's conduct at issue dates back at least ten years. As detailed in the complaint and as acknowledged, at least implicitly, by Defendant himself, the level of persecution and repression has dramatically increased over the past ten years and has recently reached a more perilous and pernicious level than ever before. *See* Compl. ¶¶ 34-71. Defendant has proudly acknowledged the success of his efforts over the past decade in building, stoking and helping to sustain and expand the climate of repression of sexual minorities in Uganda. Compl. ¶¶ 66-67 (boasting of the comparison of his 2009 efforts in Uganda to a "nuclear bomb" and stating that he "hoped the nuclear bomb spreads across the whole world, against the gay movement.")

Defendant's suggestion also blames the victim of severe repression for not having been able to advocate on their own behalf in this way sooner – a particularly disingenuous notion in light of the fact that Defendant has to a great extent successfully advocated for and helped bring about the criminalization of the Plaintiff's existence, speech and advocacy in Uganda.

The more time passes, the more the situation is likely to worsen and further deteriorate, increasing the risks for Plaintiff and other sexual minorities. Moreover, in

terms of this litigation, the longer the delay the harder it may be to locate and identify potential witnesses. And, as always, with more time evidence may be lost or destroyed.

There is far more than a mere "fair possibility" that Plaintiffs will be harmed by further delay in their effort to seek accountability for and thereby prevent further worsening and spread of persecution in Uganda.

E. Mere Litigation Burdens and Expenses Identified by Defendant Are Not Implicated at this Point and In Any Event Are Insufficient to Support a Stay.

The Defendant will not be harmed by denial of a stay. Defendant suggests that it would be "patently unreasonable to expect and require Mr. Lively to engage earnestly" in this matter given the "time and financial resources" in litigating this case with witnesses in Uganda. Def. Mot. at 12-13. First, the mere recitation of "the expenses of litigation," is insufficient to justify a categorical stay of all proceedings in the manner Defendant seeks. *Dow Chemical Co. v. Composite Container Corp.,* 1984 U.S. Dist. LEXIS 17752 (D. Mass. Apr. 10, 1984) (denying stay pending final resolution of related actions and finding that "expenses of litigation" do not amount to hardship justifying a stay). The Ninth Circuit has also held that being required to defend a suit and proceed to trial, without more, "does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*." *Lockyer v. Mirant Corp.,* 398 F.3d 1098, 1112 (9th Cir. 2005). Moreover, as is detailed in the complaint, Defendant has had ready access to many of the key participants in the joint criminal enterprise alleged in the complaint, including former government ministers, parliamentarians and other leaders of the society and is likely much better-positioned than Plaintiff to gain access to such persons.

Second, this potential concern has not even ripened. Defendant is attempting to stay all proceedings even before filing a responsive pleading of any kind. As in any case, the Court and the parties have ample tools to manage discovery should problems ultimately arise in the future. Meanwhile, the mere prospect of a cost associated with foreign depositions, potentially months into the future life of this case, cannot override Plaintiff's manifest interest in advancing its claims for justice. It certainly does not rise to the level of the "rare circumstance" necessary to stay this case.

CONCLUSION

For the foregoing reasons, Defendant has failed to demonstrate that a rare circumstance exists necessitating a stay in this matter. As a result, the Court should deny this motion.

Dated: May 25, 2012

Respectfully submitted,

/s/Pamela Spees

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically, that it will be served electronically upon all parties of record who are registered CM/ECF participants via the NEF, and that paper copies will be sent to any parties indicated on the NEF as non registered participants on May 25, 2012.

/s/Pamela Spees
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