**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MASSACHUSETTS**
**SPRINGFIELD DIVISION**

| | | |
|---|---|---|
| **SEXUAL MINORITIES UGANDA,** | : | **CIVIL ACTION** |
| | : | |
| **Plaintiff,** | : | **3:12-CV-30051-KPN** |
| | : | |
| **v.** | : | **MAGISTRATE JUDGE** |
| | : | **KENNETH P. NEIMAN** |
| **SCOTT LIVELY,** | : | |
| | : | **ORAL ARGUMENT REQUESTED** |
| **Defendant.** | : | |

# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SCOTT LIVELY'S MOTION TO STAY ACTION PENDING SUPREME COURT'S DECISION IN *KIOBEL V. ROYAL DUTCH PETROLEUM*

## INTRODUCTION

In addition to many other weighty and complex questions of international and constitutional law, this case involves, as a threshold question, the issue of whether a foreign entity could challenge in a United States court, under the Alien Tort Statute, speech or conduct that took place on a distant continent, outside the sovereign territory of the United States. This exact same question is now pending before the United States Supreme Court, in a similar but unrelated case. Because the forthcoming Supreme Court decision will have significant, and perhaps dispositive, consequences for this case, this Court should exercise its inherent power and discretion to stay this action until the Supreme Court decides the issue. A stay of a few months will not harm Plaintiff (a) because it waited over a decade to challenge some of the speech or conduct at issue in this case, (b) because it waited at least three years to challenge the remaining speech and conduct it finds offensive, and (c) because Plaintiff seeks monetary damages and no injunctive relief. Conversely, denying a stay would severely harm Defendant and the efficient administration of justice, because it would force the parties to litigate a massive case on another

continent, without the benefit of the forthcoming guidance from the Supreme Court, and at the substantial risk of having the Supreme Court nullify their efforts. The balance of equities weighs in favor of a stay, and, therefore, a stay should be granted.

## BACKGROUND FACTS

On March 14, 2012, Plaintiff, Sexual Minorities Uganda ("SMUG" or "Plaintiff"), a foreign entity, filed this suit against Defendant Scott Lively ("Mr. Lively" or "Defendant"), a United States citizen, under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). (Complaint, dkt. 1, ¶ 1). In a nutshell, SMUG's forty-seven page Complaint alleges that Mr. Lively's **speech** on pornography and homosexuality in Uganda over the last decade, which SMUG goes to great lengths to transform into "**conduct**," constitutes "persecution" against "sexual minorities" in Uganda, and is thus civilly punishable as a crime against humanity in a United States Court, under the ATS. (*Id.*, at pp. 1-47).

Importantly, each of the six specific acts of "persecution" alleged by Plaintiff took place, if at all, **entirely outside the sovereign territory of the United States**, and specifically in Uganda. (*Id.* at ¶¶ 104-132, pp. 36-43).[1] SMUG does not allege that Mr. Lively himself perpetrated or orchestrated those six incidents (*id.*), but claims that Mr. Lively's **speech** (or so-called "conduct") which offends SMUG "encouraged" and "invited" these incidents, and created the "climate" in which these incidents could take place. (*Id.* at ¶¶ 34-71, pp. 12-22). As with the specific incidents of persecution themselves, Mr. Lively's alleged speech (or "conduct") also took place, if at all, **outside the sovereign territory of the United States**, specifically during trips that he allegedly made to Uganda in 2002 and 2009. (*Id.*).

---

[1] The paragraph numbering in the Complaint contains several errors, such as use of the same numbers for different paragraphs. To facilitate review, Defendant will provide Complaint page numbers in addition to paragraph numbers.

SMUG **waited over a decade** to challenge some of Mr. Lively's speech (or "conduct") that dates back to 2002, and **waited at least three or more years** to challenge the remainder of Mr. Lively's speech (or "conduct") that allegedly took place during his last visit to Uganda in the Spring of 2009. **SMUG does not seek a restraining order, an injunction, or any injunctive relief.** (*Id.* at Prayer for Relief, p. 47). It **seeks only money damages** (compensatory and punitive), as well as attorney's fees and declaratory relief. (*Id.*).

Meanwhile, currently pending at the Supreme Court of the United States is the case of *Kiobel v. Royal Dutch Petroleum*, S. Ct. Dkt. No. 10-1491. In *Kiobel*, Nigerian residents alleged that several corporations involved in oil exploration and production in Nigeria aided and abetted the Nigerian government in committing human rights abuses in Nigeria, in violation of international law, and sought to hold them liable in a United States federal court under the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010) *reh'g denied,* 642 F.3d 268 (2d Cir. 2011) and *cert. granted,* 132 S. Ct. 472 (2011). While the case at the Supreme Court initially involved the question of whether a corporation (as opposed to individuals only) could be held liable for violating international law under the ATS, at oral argument on February 28, 2012 several Supreme Court justices expressed grave doubts and skepticism over a more basic, threshold question: whether the ATS could be used to invoke the jurisdiction of a United States court **over extraterritorial conduct**, that is, conduct taking place outside the sovereign territory of the United States. (Transcript of oral argument available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf). A few days later, on March 5, 2012, the Supreme Court ***sua sponte*** restored the case to the calendar for reargument during the October 2012 term, and directed the parties to brief a supplemental question:

> **Whether** and **under what circumstances** the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

*Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (Mem) (2012) (emphasis added).

Briefing is currently under way on this issue. Because the Supreme Court's forthcoming decision in *Kiobel* has significant, if not entirely dispositive, consequences for this case, the Court should stay this action until the extraterritoriality question is decided in *Kiobel.*

## LAW AND ARGUMENT

### A. THIS COURT HAS THE INHERENT AUTHORITY AND DISCRETION TO GRANT A STAY PENDING A SUPREME COURT DECISION IN AN UNRELATED CASE, AND SUCH STAYS ARE ROUTINELY GRANTED.

"It is beyond cavil that, absent a statute or rule to the contrary, federal district courts possess the inherent power to stay pending litigation when the efficacious management of court dockets reasonably requires such intervention." *Marquis v. F.D.I.C.*, 965 F.2d 1148, 1154 (1st Cir. 1992) (citing *Landis v. North Amer. Co.,* 299 U.S. 248, 254-55 (1936)). *See also*, *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 878-79 (1st Cir. 1977) (a federal district court has "inherent discretionary power to control its own docket," which includes the power to stay proceedings pending the outcome of unrelated cases).

In *Landis*, the Supreme Court made clear that a court's inherent power to stay one case pending the outcome of another does **not** require that the parties to the two actions be the same, or that the issues be identical. 299 U.S. at 254 ("we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical"). Moreover, a case may be stayed pending the disposition of an unrelated case, "**even if [the unrelated case] should not dispose of *all* the questions involved, [if it would] narrow the issues in the pending case and assist in the determination of the questions of law involved**." *Id.*, at 253

(emphasis added) ("True, a decision in the [unrelated case] may not settle every question of fact and law in [the] suits [sought to be stayed], but in all likelihood it will settle many and simplify them all").

That said, this Court's inherent power and discretion to grant a stay is not without limits. "Of course, stays cannot be cavalierly dispensed: 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. "[T]he 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 else." *Landis*, 299 U.S. at 255 (emphasis added). At bottom, a motion to stay "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.*, at 254-55.

However, while stays in other contexts are sometimes disfavored, **federal courts routinely stay actions, while the Supreme Court considers issues of significance to those actions in unrelated cases**. *See e.g.*, *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 171 (D.D.C. 2008) (noting that the court had ordered a four-month stay while the Supreme Court heard and decided an "issue of considerable significance" in unrelated case); *Ashby v. Farmers Group, Inc.*, 01-CV-1446-BR, 2006 WL 3169381, *1 (D. Or. Oct. 30, 2006) (granting motion to stay action pending Supreme Court's determination of unrelated case potentially dispositive of stayed action); *Daimler-Benz Aktiengesellschaft v. U.S. Dist. Court for W. Dist. of Oklahoma*, 805 F.2d 340, 341-42 (10th Cir. 1986) (staying appeal and action below while Supreme Court decides a relevant question of law in an unrelated case). *See also*, *Gabriella v. Wells Fargo Fin., Inc.*, C 06-4347SI, 2009 WL 188856, *1 (N.D. Cal. Jan. 26, 2009) (granting stay of action while California Supreme Court reviewed issue of class certification in unrelated case, "because the

Supreme Court's decision in [the unrelated case] will significantly determine the course of this litigation"); *Gruening v. Shell Oil Products Co.*, C 96-2451 VRW, 1998 WL 473895, *3 (N.D. Cal. July 31, 1998) (noting that the court had granted a stay of the litigation while the California Supreme Court reviewed an unrelated "case that held the promise of determining" a question of law relevant to the stayed action).

Examining one illustrative case in more detail, the defendant in *Ashby* was accused of willfully violating the Fair Credit Reporting Act ("FCRA"). 2006 WL 3169381, *1. While the litigation was pending, the Supreme Court granted review in two unrelated actions, in which it agreed to decide what constitutes a willful violation of FCRA. *Id.* The defendant in *Ashby* asked the district court to stay that action pending the Supreme Court's determination of the willfulness issue in the unrelated cases, arguing that this issue was "of particular significance" to its defense that it did not willfully violate the FCRA. *Id.* The court "agree[d that] the Supreme Court's opinion as to the proper standard for determining willfulness **may** be relevant to" the defense asserted by the defendant. *Id.* (emphasis added). Thus, the court granted a stay in October 2006, which was **in effect for eight months**, until June 2007, when the Supreme Court decided the willfulness issue in the unrelated cases. [2]

Thus, while Plaintiff might be inclined to invoke authorities denying stays in other contexts, the Court should remain focused on authorities such as those discussed above, involving motions to stay while the Supreme Court decides an issue of significance to the pending litigation. In this context, and on the facts herein, a stay is entirely appropriate and warranted.

---

[2] The length of the stay granted in *Ashby* is not readily apparent within the Order granting the stay, 2006 WL 3169381, *1, but is quickly discernible from the court's docket in that case (*e.g.*, dkts. 368-369), available electronically through PACER at https://ecf.ord.uscourts.gov (Case No. 01-CV-1446-BR).

## B. THE COURT SHOULD STAY THIS LITIGATION.

Under the foregoing authorities, the Court should grant a stay in this action pending the Supreme Court's determination of the extraterritoriality issue in *Kiobel*, because: (1) the forthcoming *Kiobel* decision will decide an issue of significance to this case; (2) this case involves complex issues of great public importance; (3) Plaintiff will not be harmed by a stay; and (4) the denial of a stay will harm Mr. Lively and the efficient administration of justice.

### 1. The Forthcoming *Kiobel* Decision Will Decide an Issue of Significance to this Case.

There is no doubt that the forthcoming *Kiobel* decision will decide an "issue of considerable significance" to this case, *Johnson*, 541 F. Supp. 2d at 171, which "will significantly determine the course of this litigation." *Gabriella*, 2009 WL 188856 at *1. The Supreme Court's decision, ***sua sponte*** to add the extraterritoriality question to the case under review, and to delay decision until that question can be briefed, is a strong indication that several justices are concerned about the extraterritorial reach of the Alien Tort Statute, and are prepared to limit it in some fashion. This was borne out in the first oral argument in *Kiobel*, where several justices expressed great skepticism that the Alien Tort Statute can confer subject-matter jurisdiction over extraterritorial conduct in a United States court. (Transcript available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf).

If the Supreme Court decides in *Kiobel* that the Alien Tort Statute does not cover extraterritorial conduct, it would deprive this Court of subject-matter jurisdiction and **completely dispose** of this case, because **all three counts advanced by Plaintiff here are grounded in the Alien Tort Statute**, (Complaint, ¶ 2), and **all acts (or speech) alleged to constitute persecution took place, if at all, outside of the United States**. (*Id.*, at ¶¶ 104-132, pp. 36-43). But even if the Supreme Court does not entirely exclude extraterritorial conduct from the reach of the Alien Tort

Statute, and does not completely dispose of this case, there is no doubt that the *Kiobel* decision may at least "narrow the issues in the pending case and assist in the determination of the questions of law involved." *Landis*, 299 U.S. at 253. This is because the Supreme Court has agreed to decide not only "**whether**" the Alien Tort Statute covers extraterritorial conduct, but also, if it does, "**under what circumstances**" such conduct is covered. 132 S. Ct. 1738 (Mem) (2012). The guidance that will be offered by the Supreme Court on this essential question of law will be key to adjudicating a principal defense of Mr. Lively in this case.

Importantly, while there is no reason to doubt that the Supreme Court's forthcoming *Kiobel* ruling will at least be significant to, if not entirely dispositive of, this case, issuing a stay does not require absolute certainty. It requires only a "**likelihood,**" *Landis*, 299 U.S. at 253 (emphasis added), that the *Kiobel* ruling "**may** be relevant," *Ashby*, 2006 WL 3169381 at *1 (emphasis added), or that it "**[holds] the promise** of determining," some of the issues in this case. *Gruening*, 1998 WL 473895 at *3 (emphasis added). Thus, while Plaintiff may quibble with Defendant on the potentially dispositive implications of *Kiobel* for this litigation, it cannot deny that *Kiobel* is at least "relevant" or "likely" to answer one or more significant question(s) of law here.

Finally, Plaintiff may not avoid a stay simply by arguing that other lower courts have answered the extraterritoriality question in a manner that benefits Plaintiff. In *Daimler-Benz*, the Tenth Circuit was deciding whether the Hague Convention on Taking Evidence Abroad applies to discovery sought in the United States against a party subject to the jurisdiction of a United States court. 805 F.2d at 341. The Tenth Circuit noted that, in two unrelated cases, two sister circuits – the Fifth and the Eighth – had already answered the same question in the negative, and it was inclined to agree with them. *Id.* Nevertheless, while the appeal was pending at the Tenth

Circuit, the Supreme Court had agreed to review the Eighth Circuit's decision in the unrelated case. *Id.* As a result, the Tenth Circuit stayed both the appeal, and the order below, pending the outcome of the Supreme Court's review. *Id.* at 342. The same outcome should obtain here. The Supreme Court's *sua sponte* decision to review the extraterritoriality question in *Kiobel* casts doubt on previous interpretations or applications of the Alien Tort Statute by lower courts, and has at least the potential to dispose of this case.

**2. This Case Involves Complex Issues of Great Public Importance.**

The Supreme Court has counseled that stays pending the outcome of other litigation are appropriate "[e]specially in cases of extraordinary public moment, [where] the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Landis*, 299 U.S. at 256. Stays are also appropriate where, as here, "great issues are involved, great in their complexity, [and] great in their significance." *Id.* While a simple case involving a "bill of goods" may not warrant a stay, "an application for a stay in suits so weighty and unusual" should be granted. *Id.* The First Circuit affirmed this principle in *Taunton*, where it affirmed a stay because "this case presents issues of 'public moment.'" 557 F.2d at 879.

Both Plaintiff and Defendant agree that this case involves novel and complex issues of great public importance. Plaintiff's counsel characterize this suit as "the first known Alien Tort Statute (ATS) case seeking accountability for persecution on the basis of sexual orientation and gender identity." (*Press Release*, Center for Constitutional Rights, available at http://www.ccrjustice.org/LGBTUganda/SMUG_press_release.pdf). Far from being a simple case about "a bill of goods," this case is clearly one of "extraordinary public moment." *Landis*, 299 U.S. at 256. It involves not only complex questions of international law, but also bedrock

principles of United States constitutional law. The Court will be called upon to decide, among many other weighty questions, whether the First Amendment of the United States Constitution trumps, or is subservient to, international law. Time-honored fundamental rights, such as the right to free speech and to petition government, are squarely at stake. Indeed, if this case does not present the type of "great issues ... in complexity [and] in their significance" worthy of a stay, *id.*, it is difficult to imagine what case would ever qualify.

**3. Plaintiff Will Not Be Harmed by a Stay.**

In analyzing and balancing competing interests and equities, *Marquis*, 965 F.2d at 1155, the Court should have no trouble concluding that the modest stay sought by Mr. Lively will not harm Plaintiff. **SMUG, a foreign entity, seeks only money damages** (compensatory and punitive) and declaratory relief in this suit. (Complaint, Prayer for Relief, p. 47). **Plaintiff does not seek any injunctive relief**. (*Id.*). As such, it does not claim that any delay will cause irreparable harm. (*Id.*).

Moreover, some of Mr. Lively's speech (or so called "conduct") which SMUG complains about and seeks to challenge in this lawsuit goes back **one decade**, to his first alleged trip to Uganda **in 2002**. (*Id.*, at ¶¶ 22, 35-42). All other speech (or "conduct") of Mr. Lively which SMUG does not like and seeks to punish dates back **at least three years**, to Mr. Lively's last visit to Uganda in the Spring of 2009. (*Id.*, at ¶¶ 43-68). Indeed, other than a brief reference to a February 2011 blog article written by Mr. Lively (*id.*, at ¶ 69), Plaintiff does not allege any speech (or "conduct") by Mr. Lively following his **Spring 2009** visit to Uganda. If Plaintiff could wait ten years to challenge some of Mr. Lively's speech (or "conduct"), and more than three years to challenge other of Mr. Lively's speech (or "conduct"), Plaintiff cannot credibly claim harm now from a brief stay of a few months, while the Supreme Court decides questions of

law that are critical to this case. **This is particularly true since the relief sought by Plaintiff is monetary, and Plaintiff has the opportunity to offset any delay by seeking prejudgment interest, should it ultimately prevail on the merits**.

As the authorities above demonstrate, stays pending Supreme Court determinations of other cases **on its current docket** are considered moderate and definite in duration, and are routinely granted. The First Circuit has expressly affirmed as reasonable a stay pending the outcome of a pending appeal. *Taunton*, 557 F.2d at 879 ("We also think that the duration of the stay is adequately circumscribed by reference to the determination of the appeal presently pending"). The *Kiobel* case is currently being briefed on the extraterritoriality issue, and will be heard in the October 2012 term, with a decision likely to be issued soon thereafter. Thus, the stay sought by Mr. Lively here is no different from the **eight-month** stay granted in *Johnson*, 541 F. Supp. 2d at 171, or any of the other cases, and should be granted.

**4. Denial of a Stay Will Harm Mr. Lively and the Efficient Administration of Justice.**

While a stay of this litigation pending the outcome in *Kiobel* will not harm Plaintiff, denial of a stay will harm not only Mr. Lively, but also the efficient administration of justice. As discussed above, this lawsuit concerns speech and so-called "conduct" that allegedly took place on a different continent, over the span of an entire decade. Other than Mr. Lively, all witnesses and parties, including Plaintiff and its members and employees, are on a different continent. Some of those witnesses are members of the Ugandan Parliament and other government bodies. Some, perhaps many, witnesses do not speak English. All witnesses are outside of the subpoena power of this Court, and the parties will likely encounter great difficulty in compelling their attendance at depositions, to the extent such discovery devices are even recognized or permitted in Uganda.

Needless to say, the parties face an enormous task, in terms of both time and financial resources, in litigating this case in Uganda. It is patently unreasonable to expect and require Mr. Lively to engage earnestly in these efforts required to exonerate him, and to trouble this Court with lengthy and complex dispositive motions raising novel questions of international and constitutional law, while there is a very real possibility that the Supreme Court may dispose entirely of this case in the near future. And even if the Supreme Court does not foreclose SMUG's claims under the Alien Tort Statute altogether, it may delineate the boundaries of those claims in such a manner as to nullify some or all of the parties' intense labor in this case up to that point. One could easily foresee a scenario where the parties depose several members of the Ugandan Parliament in Uganda (assuming depositions are legally available there), only to subsequently have the Supreme Court enunciate in *Kiobel* previously unknown parameters for extraterritorial conduct, which would then require a second deposition of those witnesses. Even if principles of international comity permit a first deposition, persuading foreign government officials to submit to a second deposition may prove impossible legally and prohibitive financially.

This Court has the power and discretion to avoid those complications, and can ensure the "efficacious management of [its] docket" by staying this action for a few months until the relevant threshold questions are answered in *Kiobel*. *Marquis*, 965 F.2d at 1154. The Court should do just that.

## CONCLUSION

For the foregoing reasons, the Court should stay this action pending the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum*, and render such other and further relief to which Defendant is justly entitled.

Respectfully submitted,

Philip D. Moran
(MA Bar # 353920)
265 Essex Street, Suite 202
Salem, Massachusetts 01970
Tel: (978) 745-6085
Fax: (978) 741-2572
Email: philipmoranesq@aol.com

Attorneys for Defendant Scott Lively

/s/ Horatio G. Mihet
Mathew D. Staver
Admitted *Pro Hac Vice*
Horatio G. Mihet
*Admitted Pro Hac Vice*
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854-0774
800-671-1776 Telephone
407-875-0770 Facsimile
court@lc.org

## REQUEST FOR ORAL ARGUMENT

Pursuant to L.R. D. Mass. 7.1(d), Defendant Scott Lively respectfully requests oral argument on this Motion, on the grounds that this case is of great public importance and oral argument will assist the Court in deciding the issues raised herein.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Defendant Scott Lively

## CERTIFICATE OF CONFERRAL

Pursuant to L.R. D. Mass. 7.1(a)(2), I certify that I conferred in good faith with counsel for Plaintiff prior to filing this motion, but was unable to resolve or narrow the issues raised herein.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Defendant Scott Lively

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on May 11, 2012. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/ Horatio G. Mihet
Horatio G. Mihet
Attorney for Defendant Scott Lively