ARGUED JANUARY 23, 2013, DECIDED APRIL 19, 2013

Nos. 11-7096; 12-7025; 12-7026

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID L. de CSEPEL, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants-Appellants/Cross-Appellees.

On Appeal From The United States District Court
For The District of Columbia

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION TO STAY THE COURT'S MANDATE PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Federal and D.C. Circuit Rule of Appellate Procedure 41, Plaintiffs-Appellees David L. de Csepel, Angela Maria Herzog and Julia Alice Herzog ("Plaintiffs") respectfully oppose Defendants-Appellants' ("Defendants") Motion to Stay the Court's Mandate Pending Disposition of Petition for Writ of Certiorari, dated June 10, 2013.

PRELIMINARY STATEMENT

Defendants fail to offer any good reason for this Court to stay the issuance of its mandate, and none exists. Defendants identify no valid conflict between this Court's decision and any decision of the Supreme Court or another court of appeals. Nor do they identify any other compelling reason for the Supreme Court to review this Court's decision. Therefore, there is simply no "reasonable probability" that the Supreme Court will grant certiorari, nor is there a "fair prospect" that the Supreme Court will reverse this Court's well-reasoned decision in the unlikely event that certiorari is granted.

Defendants' vague assertions of "severe and irreparable harm" in the event the mandate issues are unpersuasive. Defendants cite the burden of submitting to the jurisdiction of the United States courts and the "costly and distracting" proceedings that may result upon remand. However, mere litigation expenses – however substantial – do not constitute irreparable injury. Nor does Defendants'

status as foreign sovereigns give them an automatic right to a stay of the mandate pending Supreme Court review.

Defendants' meritless defenses – including their defense of sovereign immunity under the FSIA – have already been rejected three times: first by the district court, then by the panel, and finally (implicitly) by the full Court in denying *en banc* review. Delaying issuance of the mandate will only harm Plaintiffs, two of whom are elderly. This case was filed nearly three years ago. It is time to allow Plaintiffs to proceed past the Rule 12 stage and to move forward with their claims.

ARGUMENT

DEFENDANTS' MOTION TO STAY THIS COURT'S MANDATE SHOULD BE DENIED

I. The Standard For Granting A Stay Of Mandate Is High, And Cannot Be Met Here

To merit a stay of mandate, Defendants "must show that the certiorari petition would present a substantial question and there is good cause for a stay." Fed. R. App. 41(d)(2)(A) (emphasis added); *see also* D.C. Cir. R. 41(a)(2) ("A motion for a stay of the issuance of mandate will not be granted unless the motion sets forth facts showing good cause for the relief sought."). More specifically, to obtain a stay:

> First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to

> grant certiorari…. Second, the applicant must persuade [the court] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous…. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay…. And fourth, in a close case it may be appropriate to 'balance the equities' – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rotsker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (cited at Def. Br. at 4). This analysis has consistently been applied by the Supreme Court in granting or denying stays of lower court orders. *See, e.g., Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsberg, J., in chambers); *Packwood v. Senate Select Comm. On Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, J., in chambers); *South Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, J., in chambers). Lower courts have also consistently applied substantially the same standards – including in the cases relied on by Defendants. *See, e.g., Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (applying a similar four-part analysis); *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *Nanda v. Bd. Of Trustees of the Univ. of Ill.*, 312 F.3d 852, 854 (7th Cir. 2002); *Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995).

Defendants wrongly suggest that "[t]his Court has employed a less stringent standard" (Def. Br. at 4), relying on this Court's decision in *Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1128 (D.C. Cir. 1978). Even if *Deering* could be construed

as Defendants suggest (which it cannot),[1] *Deering* pre-dates *Rotsker* and the 1994 amendments to FRAP 41 that added the requirement that a stay motion "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A) (emphasis added).

As discussed *infra*, none of the questions that Defendants propose to raise in their petition has a "reasonable probability" of receiving certiorari, much less a "fair prospect" of reversal on the merits. A petition for a writ of certiorari will be granted only for "compelling reasons," such as (i) where the Court of Appeals "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter;" (ii) "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;" (iii) "has decided an important question of federal law that has not been, but should be, settled by this Court;" or (iv) "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10 (also clarifying that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a

[1] *Deering* found the issues presented to be substantial, 647 F.2d at 1128, and concluded that "the balance of the equities" favored continuing the stay of the mandate that had been imposed under the court's then-policy of applying an automatic stay to cases in which a petition for certiorari was filed within 21 days.

properly stated rule of law."). None of the criteria for granting certiorari applies here.

Nor have Defendants shown that they will be irreparably harmed if a stay is denied or that the balance of the equities favors a stay. Therefore, Defendants' motion for a stay of mandate should be denied. *See United States v. Microsoft*, 2001 WL 931170, *1 (D.C. Cir. 2001) (denying motion for stay of mandate where defendant "failed to demonstrate any substantial harm that would result from the reactivation of proceedings in the district court during the limited pendency of the certiorari petition"); *Doe I. v. Miller*, 418 F.3d 950, 953 (8th Cir. 2005) ("Given the relatively modest showings by the appellees on the likelihood of further review and the risk of irreparable harm, we believe that the equities and the public interest ultimately tip the balance against a stay of the mandate."); *Nanda*, 312 F.3d at 853 (denying stay of mandate where defendant made no showing of a reasonable chance of success on the merits of its proposed certiorari petition).[2]

[2] The remaining cases cited by Defendants (Def. Br. at 4-5) likewise provide no support for staying the mandate in this case because none arose in the context of an interlocutory appeal from a denial of a motion to dismiss and each is entirely distinguishable on its facts. *See United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 481 U.S. 1301, 1302-03 (1987) (staying mandate where Court had already granted certiorari in a case raising identical legal issues); *Rotsker*, 448 U.S. at 1308 (granting stay of enforcement of Selective Services Act); *Books v. City of Elkhart*, 239 F.3d 826, 827-28 (7th Cir. 2001) (granting parties' joint request for stay of mandate requiring parties to develop remedies for Establishment Clause violation); *Williams*, 50 F.3d at 1361 (granting stay of execution in death penalty case).

II. Defendants Have Failed To Show Any Substantial Question Meriting Supreme Court Review

A. This Court Applied The Correct Standards To The Complaint At The Rule 12 Stage

Defendants lead with the baseless argument that certiorari is appropriate because this Court somehow misapplied the standards applicable to review of a complaint at the Rule 12(b)(6) stage by "considering materials not properly before it and by impermissibly amending Plaintiffs' complaint in an effort to clarify their bailment claim." (Def. Br. at 5-7.) Without citing any authority, Defendants baldly assert that "this Court's decision creates an internal and external circuit split" as to "the proper scope of and review of a motion to dismiss." (Def. Br. at 7.) Defendants wholly mischaracterize this Court's decision, and ignore the relevant standards for granting petitions for certiorari.

Contrary to Defendants' assertions (Def. Br. at 6), this Court in no way "consider[ed] materials not properly before it" nor "impermissibly amend[ed] Plaintiffs' complaint." On appeal, as in the district court, Defendants pointed to certain statements in Plaintiffs' initial district court brief (submitted in opposition to Defendants' motion to dismiss and included in the Joint Appendix submitted by the parties on appeal) that Defendants claimed supported their argument that Plaintiffs' bailment claim was predicated solely on the 1947 Peace Treaty. (Response and Reply Brief of Appellants/Cross-Appellees at 8-11.) This Court

acknowledged Defendants' argument (Slip Op. at 13 (noting that "[i]t is true, as Hungary emphasizes, that certain statements in the family's district court briefs seem to suggest that the bailment arose from the Peace Treaty"), but agreed with the district court that Plaintiffs had clarified any ambiguity in their initial brief on sur-reply and – most importantly – that "nothing in the complaint contradicts this assertion." Slip Op. at 14 (emphasis added and citing Compl. ¶¶ 36, 72). *See also de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 135 (D.D.C. 2011) (recognizing that "Plaintiffs' bailment claims … do not depend on the existence of a bailment created by the Peace Treaty itself. Rather, the Complaint alleges breach of express and/or implied bailment agreements between defendants and the Herzog family") (emphasis in original). Therefore, this Court – like the district court before it – properly relied solely on the allegations of the Complaint in concluding that Plaintiffs had adequately pleaded a bailment claim that "does not rely on the Peace Treaty as the sole source of the bailment obligations." Slip Op. at 13.

Defendants do not cite a single case from this Circuit or elsewhere supporting their allegation of an "internal and external circuit split" resulting from this Court's correctly reasoned decision. (Def. Br. at 7.) Moreover, an "internal" circuit split – even if one existed (which it does not) – is not grounds for granting a petition for a writ of certiorari. *See* Supreme Court Rule 10; *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). Accordingly, there is simply no

substantial question concerning this Court's construction of Plaintiffs' Complaint that would merit Supreme Court review.

B. This Court Correctly Held That Dismissal On Grounds Of Comity Was Premature

Defendants' argument that this Court improperly "ignored circuit precedent, non-circuit precedent, and the Supreme Court by rejecting" Defendants' international comity defense at the Rule 12 stage (Def. Br. at 7-9) is also meritless.

As discussed *supra*, even if this Court's decision created a conflict with "circuit precedent" (which it does not), that would not be grounds for granting a petition for a writ of certiorari. Nor can Defendants show that this Court ignored relevant "non-circuit precedent, and the Supreme Court." (Def. Br. at 9-10.) To the contrary, both the cases relied on by this Court in its decision (Slip. Op. at 28-29) and the cases relied on by Defendants make clear that a plaintiff is not required to anticipate and plead around an affirmative defense in its Complaint; rather, it is only where the allegations of the complaint on their face suffice to establish the affirmative defense that dismissal at the Rule 12 stage may be appropriate. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 215-16 (2007) (cited at Def. Br. at 8) (holding that plaintiff was not required to plead exhaustion – a statutory requirement under the Prison Litigation Reform Act – in its complaint because exhaustion is an affirmative defense); *Smith-Haynie v. D.C.*, 155 F.3d 575, 578 (D.C. Cir. 1998) (cited at Def. Br. at 8 and Slip Op. at 29) (explaining that an affirmative defense

may only "be raised by pre-answer motion under Rule 12(b) when the facts that give rise to the defense are clear from the face of the complaint"); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (*en banc*) (cited at Slip Op. at 29) (an affirmative defense may be resolved by Rule 12(b)(6) motion only in "the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint").

Recognizing these well-established standards, this Court correctly found that the district court erred in granting Defendants' motion to dismiss on grounds of comity because the defense of comity was not sufficiently established on the face of the complaint. Slip Op. at 29 (noting that "nothing in the complaint contradicts the family's claims of due process violations."). Moreover, as this Court correctly recognized, Defendants can renew their defense of comity at the summary judgment stage. *Id.* Defendants' complaints about this Court's decision to defer adjudication of Defendants' international comity defense are nothing more than meritless attempts to show the "misapplication of a properly stated rule of law" – a ground on which certiorari is "rarely granted." Supreme Court Rule 10.

C. This Court's Application Of The "Direct Effect" Prong Of The Commercial Activity Exception Does Not Merit Supreme Court Review

Defendants' argument that this Court misapplied the "direct effect" prong of the commercial activity exception to the Foreign Sovereign Immunities Act, 28

U.S.C. § 1605(a)(2) ("FSIA"), also does not merit review by the Supreme Court and therefore provides no valid basis for staying this Court's mandate. Defendants claim that this Court wrongly concluded that the "direct effect" prong of the exception was satisfied by unreasonably inferring that the bailment agreements described in the Complaint contemplated performance in the United States. (Def. Br. at 10-14.)

This Court correctly recognized that the Complaint pleads that the bailment agreements between Plaintiffs and Defendants required specific performance (*i.e.*, return of the artworks), and that this performance was to be directed to members of the Herzog family whom Hungary knew to be residing in the United States. *See* Slip Op. at 15-16 citing Compl. ¶¶ 36, 101. This Court also correctly concluded that those allegations were sufficient to establish a "direct effect" in the United States at the Rule 12 stage, where Plaintiffs are entitled to "all reasonable inferences," particularly where Defendants never requested jurisdictional discovery in the district court. *Id.* at 16.

Defendants' argument that there can be no "direct effect" in this case because various Hungarian laws would have prevented the export of artwork of "historical and cultural significance … unless permission is first sought and granted" (Def. Br. at 11) was never raised in Defendants' appellate briefs nor addressed by the District Court and therefore cannot properly be the subject of a

petition for a writ of certiorari. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (the Supreme Court is "a court of review, not of first view"); *Christian Legal Soc. Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2995 (2010) ("Neither the District Court nor the Ninth Circuit addressed an argument that Hastings selectively enforces its all-comers policy, and this Court is not the proper forum to air the issue in the first instance.").[3]

Likewise, none of the cases cited by Defendants (Def. Br. at 12-14) are sufficient to show a "conflict" among the circuits warranting Supreme Court review.[4] Indeed, *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 818 (6th Cir.

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[3] Regardless, even if Hungary had not waived the argument by failing to raise it on appeal in this Court, the application of Hungary's export laws presents issues of fact that are not suitable for resolution on a Rule 12(b)(6) motion to dismiss.

[4] With one exception, Defendants never cited any of these cases in their appellate briefs. Regardless, this Court expressly distinguished *Westfield v. Federal Republic of Germany*, 633 F.3d 409, 415 (6th Cir. 2011) in its decision. *See* Slip. Op. at 15. The remaining cases are likewise factually inapposite. *See Filetech S.A. v. France Telecom, S.A.*, 212 F. Supp. 2d 183, 189 (S.D.N.Y. 2001) (determining only after "exhaustive" jurisdictional discovery that the direct effect prong was not satisfied), *aff'd*, 304 F.3d 180 (2d Cir. 2002); *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69 (2d Cir. 2010) (finding no direct effect in U.S. where plaintiff's injuries were caused by her husband's larcenous withdrawal in Turkey of funds transferred to Turkish bank from New York bank); *Big Sky Network Can. Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1191 (10th Cir. 2008) (granting motion to dismiss where only jurisdictionally relevant "direct effect" identified by foreign plaintiff was lost profits suffered by its Nevada parent corporation); *Antares Aircraft L.P. v. Fed. Republic of Nigeria*, 999 F.2d 33, 36-37 (2d Cir. 1993) (direct effect of defendant's detention of plaintiff's plane was the loss of the use of the aircraft and the physical damage it suffered in Nigeria and not the financial loss that Antares suffered in the United States); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (Saudi Ministry of Communications breached

2002) (cited at Def. Br. at 14 n.3) actually supports this Court's conclusion that a complaint sufficiently pleads a "direct effect" where, as here, it alleges facts sufficient to suggest that the plaintiff had the option of demanding performance in the United States. *See Keller*, 277 F.3d at 818 (where plaintiff was entitled to establish an escrow account anywhere and set up the account in Ohio, a direct effect occurred in the United States when Nigeria failed to deposit the funds there), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *See also DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010) (holding that where bonds placed no restrictions on where holder could demand payment and holder demanded payment in Ohio, the failure to pay caused a direct effect in the United States), *cert. denied*, 132 S. Ct. 1140 (2012); *Hanil Bank v. PT Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (finding direct effect in the United States where letter of credit gave the plaintiff the discretion to choose the place for payment); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (where letter of credit did not specify place for payment,

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contract to compensate U.S. citizen for services to be performed in Saudi Arabia); *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 140 (2d Cir. 2012) (finding no direct effect based on Brazilian state-owned company's refusal to convert bonds into preferred shares where there was no requirement that payment be made in the United States nor any provision permitting the holder to designate a place of performance); *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 240 (2d Cir. 2002) (finding no direct effect where other actors intervened between government's issuance of press release and any alleged injurious effect on the plaintiff and where no direct contractual obligation ran from defendant to plaintiff, much less one to be performed in the United States).

direct effect occurred when China failed to send payment to U.S. location designated by presenting party), *cert. denied*, 525 U.S. 1041 (1998); *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (finding direct effect in the United States where agreement gave plaintiff broad discretion to name any non-Nigerian bank, including one in the U.S., as the place where money was to be deposited).

Finally, the fact that only one of the three Plaintiffs is a U.S. citizen has no bearing on the "direct effect" analysis. In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court expressly rejected "Argentina's suggestion that the 'direct effect' requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States" and observed that "[w]e expressly stated in *Verlinden* that the FSIA permits 'a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied.'" *See Weltover*, 504 U.S. 607, 619 (1992) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983)).

III. Defendants Have Failed To Show That They Will Be Irreparably Harmed Without A Stay

Defendants argue that they will be irreparably harmed in the absence of a stay because they will be "stripped of [their] presumptive immunity and subjected to jurisdiction of foreign courts" and subjected to "costly and distracting proceedings that may prove in the end to be of no avail." (Def. Br. at 15.)

However, Defendants point to no authority suggesting that a defendant's assertion of sovereign immunity – particularly when rejected by two courts without a dissent and denied *en banc* consideration – should automatically entitle it to a stay of the mandate pending the filing of a petition for certiorari. Moreover, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 740 (D.C. Cir. 1987) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *McSurely v. McClellan*, 697 F.2d 309, 317 n. 13 (D.C. Cir. 1982).

Finally, Defendants make no effort to explain how or why the "equities favor a stay" (Def. Br. at 15) and in fact they do not. This action has been pending for nearly three years. Plaintiffs have been waiting for decades for the return of their property. Two of the Plaintiffs – Alice and Julia Herzog – are elderly, as are other witnesses in this case, including Plaintiff de Csepel's grandmother, Martha Nierenberg. While Defendants believe that a "ninety day delay" will pose no hardship to Plaintiffs (Def. Br. at 15), the "delay" in reality will be far longer if this Court grants Defendants' motion because in that event, the filing of the petition for certiorari within the 90 days would continue the stay until the petition is disposed of – which would likely not be before 2014. *See* Fed. R. App. P. 41; D.C. Cir. Rule 41.

IV. The Supreme Court Is Extremely Unlikely To Grant Defendants' Petition

Defendants' argument that the Supreme Court is likely to grant certiorari here because it has allegedly granted approximately 15 petitions principally involving FSIA issues since 1981 (Def. Br. at 16) is unavailing. Defendants ignore the fact that the only FSIA issue they propose to present in their petition is this Court's application of the "direct effect" prong of the commercial activity exception, 28 U.S.C. § 1605(a)(2). In the 37 years since the FSIA was enacted in 1976, the Supreme Court has issued one opinion directly addressing the application of the "direct effect" test – *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). Indeed, the Supreme Court routinely denies review of cases addressing that aspect of the commercial activity exception, including as recently as 2012 in connection with a Sixth Circuit decision abrogating defendant's sovereign immunity where the dissent in the court of appeals argued that the majority opinion would "gut the laws of sovereign immunity." *See DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010), *cert. denied*, 132 S. Ct. 1140 (2012). Likewise, the Supreme Court has not hesitated to deny petitions for certiorari in other cases where a foreign sovereign's presumption of immunity has been rejected. *See, e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (sustaining jurisdiction over Spain under the expropriation exception to the

FSIA in action seeking recovery of a painting), *cert. denied*, 131 S. Ct. 3057 (2011); *Voest-Alpine*, 142 F.3d 887 (5th Cir. 1998) (sustaining jurisdiction over Bank of China under "direct effect" prong of commercial activity exception), *cert. denied*, 525 U.S. 1041 (1998). Here, in the absence of a dissent from the panel, *en banc* consideration, or an amicus brief from the United States government supporting Defendants at the Circuit Court level, the Supreme Court is even less likely to grant certiorari.

V. Defendants Overstate The International Implications Of This Court's Decision

Finally, Defendants' suggestion that Supreme Court review is warranted because "this Court's decision may have important and significant implications for foreign relations" is meritless. (Def. Br. at 18.) As noted *supra*, the United States has made no submission in support of Hungary in the three years since this case was filed, including after the district court initially sustained jurisdiction against Hungary under the expropriation exception to the FSIA, 28 U.S.C. 1605(a)(3). The government's silence suggests that it does not believe that this private bailment action by a United States citizen and his relatives has "important and significant implications" for foreign relations in general or United States-Hungary relations in particular.

Defendants warn that "[f]oreign sovereigns" may be "troubled by a decision empowering federal courts to strip a sovereign entity of its immunity where the

alleged wrong occurred outside the United States and two of the three plaintiffs are non-U.S. citizens." (Def. Br. at 18.) However, the Supreme Court in *Weltover* and *Verlinden* expressly recognized that foreign citizens have the right to bring claims against foreign governments under the FSIA provided that, as here, the requirements of the statute are otherwise satisfied. *See supra* at 13. Here, the commercial activity exception to the FSIA expressly recognizes "an act outside the territory of the United States in connection with the commercial activity of a foreign state elsewhere" as a valid ground for sustaining jurisdiction. *See* 28 U.S.C. § 1605(a)(2).

Finally, nothing in the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) suggests that the Supreme Court is likely to grant certiorari here. *Kiobel* involved jurisdiction under the Alien Tort Statute ("ATS") – not the FSIA – and held that nothing in the ATS "evinces the requisite clear indication of extraterritoriality." Rather, the Court held, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application…. If Congress were to determine otherwise, a statute more specific than the ATS would be required." *Id.* at 1669.[5] Here, the FSIA – and specifically

[5] The United States' withdrawal from the International Court of Justice and its decision not to join the International Criminal Court of Justice have no bearing on Plaintiffs' ability to assert jurisdiction in this case. Congress committed the United

the commercial activity exception thereto – is highly specific in outlining the elements necessary to defeat sovereign immunity and the statute on its face requires, in relevant part, a showing of a "direct effect" in the United States.

CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs-Appellees respectfully request that this Court deny Defendants' Motion to Stay the Court's Mandate Pending Disposition of Petition for Writ of Certiorari.

Dated: June 24, 2013

Respectfully submitted,

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States to the "restrictive theory" of foreign sovereign immunity when it enacted the FSIA and both the executive branch and the courts have consistently supported the application of the FSIA – including the commercial activity exception – over the last three decades.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs-Appellees' Opposition to Defendants-Appellants' Motion to Stay the Court's Mandate Pending Disposition of Petition for Writ of Certiorari was served this 24th day of June, 2013, via the Court's electronic filing system and first class mail on the following individuals:

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