

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

FRANCE.COM, INC., a California
corporation,

Plaintiff,

v.

Civil Action No. 1:18cv460

THE FRENCH REPUBLIC, et al.

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
MOTION TO STAY PENDING APPEAL**

Defendants The French Republic, Atout France, the Ministry for Europe and Foreign Affairs (collectively the “State Defendants”), and <france.com>, a domain name (the “Domain Name”), Jean-Yves Le Drian (the “Minister”) (collectively the “Defendants”), by counsel and pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure, respectfully submit this memorandum of law in support of their motion to stay all proceedings in this matter pending their appeal of the Court’s May 31, 2019, order (Dkt. No. 40). Alternatively, Defendants respectfully ask the Court to find that Defendants’ notice of appeal automatically divests this Court of jurisdiction over all remaining matters while the appeal is pending before the Fourth Circuit.

On June 17, 2019, Defendants filed a notice of appeal of that part of the Court’s May 31 order denying Defendants’ motions pursuant to Federal Rule of Civil Procedure 12(b)(1), which sought dismissal of the action on the grounds that the State Defendants and the Domain Name are immune from suit under the Foreign Sovereign Immunities Act, and the Minister is immune from suit as an official of a foreign sovereign. Dkt. No. 42. A district court order denying a claim of foreign sovereign or official immunity is an immediately appealable collateral order pursuant to

28 U.S.C. § 1291. *Eckert Int'l v. Gov't of the Sovereign Democratic Rep. of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994); *Bashe Abdi Yousuf v. Mohamed Ali Samantar*, 699 F.3d 763, 768 n.1 (4th Cir. 2012).

A notice of appeal of such a denial ordinarily divests the district court of jurisdiction over all remaining proceedings. *See Eckhart Int'l v. Gov't of the Sovereign Democratic Rep. of Fiji*, 834 F. Supp. 167, 174-75 and n. 12 (E.D. Va. 1993) (“Fiji’s motion for a stay pending appeal is moot because this Court is divested of jurisdiction pending resolution of the § 1291 appeal.”) (citing cases); *Ungar v. PLO*, 402 F.3d 274, 293 (1st Cir. 2005) (holding that “a district court’s denial of a motion to dismiss a complaint on the ground of foreign sovereign immunity . . . ordinarily divests the district court of jurisdiction to proceed with the litigation pending its resolution.”); *Princz v. Federal Republic of Germany*, 998 F.2d 1, *1-2 (D.C. Cir. 1993) (denying as unnecessary an emergency motion for stay in an FSIA case because the appeal “divested] the district court of control over those aspects of the case on appeal [and] exclusive jurisdiction to resolve the threshold issue this case presents vests in this court”); *see also Carrington v. Duke Univ.*, 2011 U.S. Dist. LEXIS 156404, at *9 (M.D. N.C. 2011); *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Stewart v. Donges*, 915 F.2d 572, 575-80 (10th Cir. 1990); *Apostol v. Gallon*, 870 F.2d 1335 (7th Cir. 1989).

Because the question of whether there can be continued proceedings against Defendants is “inextricably tied to the question of [their] immunity” from suit in the first instance, “it makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one.” *Eckhart Int'l*, 834 F. Supp. at 174 n.12 (quoting *Apostol*, 870 F.2d at 1338); *see United States v. Christy*, 3. F.3d 765, 768 (4th Cir. 1993) (“The filing of a notice of appeal is an event of

jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”).

As the cases above establish, an exception to the general rule is where the district court certifies that the appeal is frivolous. *Eckert Int’l v. Gov’t of the Sovereign Democratic Rep. of Fiji*, 32 F.3d 77, 79 (4th Cir. 1994); *see Stewart v. Donges*, 915 F.2d 572, 575-80 (10th Cir. 1990) (citing cases and holding that “[o]nce a notice of appeal on an appealable issue such as qualified immunity is filed, the status quo is that the district court has lost jurisdiction to proceed. To regain jurisdiction, it must take the affirmative step of certifying the appeal as frivolous.”). To the extent the plaintiff makes any such contention, it is without merit.

“In order for an interlocutory appeal to be deemed frivolous, it must be both meritless and substantively inappropriate.” *Eckhart Int’l*, 834 F. Supp. at 174. Defendants’ appeal is neither. Defendants’ appeal will be based on the grounds set forth in its motion to dismiss, which include first the non-frivolous argument that Plaintiff’s complaint was facially inadequate because it failed to plead facts that, if true, would establish that Defendants are not entitled to the protections of sovereign and official immunity. Therefore, Defendants will argue on appeal, respectfully, that the court erred in denying Defendants’ 12(b)(1) motions and in deferring resolution of the immunity question until after discovery. *See, e.g., Rux v. Republic of Sudan*, CA No. 2:04cv428, 2005 U.S. Dist. LEXIS 36575, at *19 n.9 (E.D. Va. 2005); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 (5th Cir. 1992) (holding that when a complaint is not adequately pleaded, “permitting discovery will not cure the FSIA jurisdictional deficiency.”); *Trigeant LTD. v. Petroleos De Venezuela, S.A.*, Case No. 08-80584-CIV, 2009 U.S. Dist. LEXIS 139377, at *22 (S.D. Fl. 2009) (“The Court is granting Defendant's Motion to Dismiss due to lack of subject matter jurisdiction without allowing further jurisdictional discovery because Plaintiffs have failed to allege *specific*

facts that, if verified through jurisdictional discovery, would establish an exception to immunity.”). Although this court rejected those arguments, “they cannot properly be deemed frivolous.” *Eckhert Int’l*, 834 F. Supp. at 174 (opining that immunity argument was “unconvincing” but denying plaintiff’s argument that the appeal was frivolous). Defendants’ appeal is consistent with the interests of judicial economy and seeks clarity on whether Defendants may be subjected to suit; it is not specious or otherwise substantively inappropriate.

WHEREFORE, for the foregoing reasons, The French Republic, Atout France, the Ministry for Europe and Foreign Affairs, and <france.com>, a domain name, Jean-Yves Le Drian respectfully request that the Court grant its motion to stay all proceedings in the district court until the Fourth Circuit has resolved the pending appeal; or, alternatively, that it declare these proceedings automatically stayed under the circumstances, and that the Court order such other and further relief as it deems just.

Respectfully submitted,

THE FRENCH REPUBLIC, ATOUT FRANCE, THE MINISTRY FOR EUROPE AND FOREIGN AFFAIRS, JEAN-YVES LE DRIAN, IN HIS OFFICIAL CAPACITY AS THE FRENCH REPUBLIC’S MINISTER FOR EUROPE AND FOREIGN AFFAIRS and <FRANCE.COM>, A DOMAIN NAME

By: Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, I electronically filed the foregoing Memorandum in Support of Defendants' Motion to Stay Pending Appeal with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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