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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**
13 **WESTERN DIVISION**

14 ROY MANOJKUMAR SAMATHANAM, *et al.*,

15 *Plaintiffs,*

16 v.

17 NANDASENA GOTABAYA RAJAPAKSA,

18 *Defendant.*

Case No. 2:19-cv-02626-JWF-PLA

**DEFENDANT’S NOTICE OF
MOTION AND MOTION TO
STAY CASE; MEMORANDUM
OF POINTS AND
AUTHORITIES**

*[Declaration of Malinda
Seneviratne and Proposed Order
submitted concurrently herewith]*

Date: September 23, 2019

Time: 1:30 P.M.

Location: Courtroom 7A, U.S.

Courthouse, 350 W. 1st Street

Judge: Hon. John F. Walter

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Attorneys for Defendant
Nandasena Gotabaya Rajapaksa

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Please take notice that on Monday, September 23, 2019 at 1:30 pm, or as soon
3 thereafter as this matter may be heard, in the courtroom of the Honorable John F. Walter,
4 Courtroom 7A, U.S. Courthouse, 350 W. 1st Street, Los Angeles, CA 90012, Defendant
5 Nandasena Gotabaya Rajapaksa will and hereby does move the Court for an order
6 immediately staying this case pending Sri Lanka's presidential election, and, if
7 Defendant is elected president, until he assumes office.

8 Mr. Rajapaksa's motion is based on this Notice of Motion; the accompanying
9 Memorandum of Points and Authorities; the Declaration of Malinda Seneviratne; the
10 complete files and records in this action; and such other argument or evidence as this
11 Court may consider.

12 This motion is made following the conference of counsel pursuant to L.R. 7-3
13 which took place on August 14, 2019.

14 Dated: August 26, 2019

ARNOLD & PORTER
KAYE SCHOLER LLP

17 By: /s/ John C. Ulin
18 John C. Ulin
19 Robert N. Weiner*
20 Raul R. Herrera*
R. Stanton Jones*

21 *Attorney for Defendant*
22 *Nandasena Gotabaya Rajapaksa*

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES iii

INTRODUCTION..... 1

LEGAL STANDARD 3

BACKGROUND..... 3

ARGUMENT 4

I. Defendant’s Election as President of Sri Lanka Would Require
Dismissal of This Case 4

II. Principles of International Comity Counsel in Favor of a Stay 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

1

2

3

4 *Ahimsa Wickrematunge v. Nandasena Gotabaya Rajapaksa*, No. 2:19-cv-
2577-R (C.D. Cal.)..... 2

5

6 *Clinton v. Jones*, 520 U.S. 681 (1997)..... 2

7 *Devi v. Rajapaksa*, No. 11 Civ. 6634, 2012 WL 3866495 (S.D.N.Y. Sept.
4, 2012) 5

8

9 *Doğan v. Barak*, ___ F.3d ___, 2019 WL 3520606 (9th Cir. Aug. 2, 2019)..... 1, 4

10 *Gallion v. Chart Commc’ns Inc.*, 287 F. Supp. 3d 920 (C.D Cal. 2018) 6

11 *Habyarimana v. Kagame*, 696 F.3d 1029 (10th Cir. 2012)..... 4

12 *In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181 (S.D.N.Y.
2015) 5

13

14 *JPMorgan Chase Bank v. Altos Hornos de Mexico, S.A. de C. V.*, 412
F.3d 418 (2d Cir. 2005)..... 7

15

16 *Landis v. North Am. Co.*, 299 U.S. 248 (1936)..... 2

17 *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2005) 3

18 *Manoharan v. Rajapaksa*, 711 F.3d 178 (D.C. Cir. 2013) 1, 4, 5

19 *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014) 7

20 *Purcell v. Gonzalez*, 549 U.S. 1 (2006) 8

21

22 *Samantar v. Yousuf*, 560 U.S. 305 (2010)..... 1, 4

23 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S.
Dist. of Iowa*, 482 U.S. 522 (1987)..... 2

24

25 *Weiming Chen v. Ying-jeou Ma*, No. 12-cv-5232, 2013 WL 4437607
(S.D.N.Y. Aug. 19, 2013) 4

26 *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) 4

27

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1
2
3
4
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19
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21
22
23
24
25
26
27
28

STATUTES

Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C § 1350 note 3

OTHER AUTHORITIES

Manco Colombage, *From Defamation to Extra-Judicial Killing: Lasantha’s daughter escalates civil litigation against Gotabaya*, Sunday Observer, July 28, 2019 7

RULES

Fed. R. Civ. P. 1 1

INTRODUCTION

1
2 On August 11, 2019, Defendant Gotabaya Rajapaksa was nominated by Sri
3 Lanka’s leading opposition party as its presidential candidate in the upcoming Sri
4 Lankan elections on December 7, 2019. He is widely expected to win the election.
5 This change in circumstances and the legal and foreign-policy issues it raises—
6 including Mr. Rajapaksa’s potential entitlement to head-of-state immunity and the risk
7 that this case will affect a foreign election—dictate an immediate, but brief, stay of the
8 case. Staying this case through the Sri Lankan presidential election, which must be
9 concluded by December 7, 2019, will promote judicial economy, respect principles of
10 international comity, and “secure the . . . inexpensive determination” of this action.
11 [Fed. R. Civ. P. 1.](#)

12 If Mr. Rajapaksa wins the Sri Lankan presidential election, as expected, he will
13 be entitled under the common law to absolute “head-of-state” or “status-based,”
14 immunity from suit. *See Doğan v. Barak*, ___ F.3d ___, [2019 WL 3520606](#), at *4 (9th
15 [Cir. Aug. 2, 2019](#)) (recognizing that status-based immunity arises from a foreign
16 official’s status as head of state); *see also Samantar v. Yousuf*, [560 U.S. 305, 311-12 &](#)
17 [n.6 \(2010\)](#) (explaining that, under the common law, “officials qualifying as the ‘head
18 of state’ could claim immunity on that basis”). Where head-of-state immunity applies,
19 the court must dismiss the suit. *See Manoharan v. Rajapaksa*, [711 F.3d 178, 179-80](#)
20 [\(D.C. Cir. 2013\)](#) (affirming dismissal based on the determination that “President
21 Rajapaksa, as the sitting head of a foreign state, enjoys head of state immunity from
22 the jurisdiction of U.S. courts in light of his current status”). The most practical and
23 efficient way forward is therefore to stay this case immediately because any further
24 briefing or other proceedings in the interim will be entirely mooted and wasteful if Mr.
25 Rajapaksa is elected President of Sri Lanka.

26 In addition, principles of international comity strongly support a stay. As the
27 Supreme Court has counseled, “[c]omity refers to the spirit of cooperation in which a
28 domestic tribunal approaches the resolution of cases touching the . . . interests of other

1 sovereign states.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for*
2 *the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987). Staying this case would respect
3 the interests of Sri Lanka and its people to hold a free, fair, and democratic election
4 without undue interference arising from litigation in a foreign country against a leading
5 candidate in the presidential election. But Plaintiffs appear to want the opposite.
6 Having waited a decade to file this lawsuit until just after it became apparent Mr.
7 Rajapaksa intended to run for president, it appears that Plaintiffs intend their lawsuit to
8 influence Sri Lanka’s elections.¹ Were the roles reversed, the United States surely
9 would expect a foreign government to abstain from conduct that would likely interfere
10 in an American election. Principles of comity dictate that Plaintiffs not be permitted to
11 succeed in that strategy.

12 A brief stay would not prejudice Plaintiffs. Rather, should Mr. Rajapaksa lose
13 the election, this case may proceed on close to the same timing that it is now
14 proceeding. But an electoral victory for Mr. Rajapaksa will end this case. Any
15 litigation in the meantime would therefore impose unnecessary burdens on the Court
16 and the parties.

17 Accordingly, Defendant respectfully requests that this Court briefly stay this
18 matter until Sri Lanka’s election concludes in early December and, if Mr. Rajapaksa is
19 elected, until he takes office in early January 2020—at which point the case would
20 have to be dismissed.

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24 ¹ Plaintiffs also coordinated with a different party to serve Mr. Rajapaksa at the
25 same time that Plaintiffs did. The plaintiff in the related case has filed a materially
26 identical lawsuit against Mr. Rajapaksa asserting similar causes of action arising out of
27 similar alleged actions that Mr. Rajapaksa took while serving in his official capacity in
28 the Sri Lankan government. *See Ahimsa Wickrematunge v. Nandasena Gotabaya Rajapaksa*, No. 2:19-cv-2577-R (C.D. Cal.). This appears to be a coordinated effort to interfere in Sri Lanka’s election.

1 **LEGAL STANDARD**

2 A district court “has broad discretion to stay proceedings as an incident to its
3 power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997)
4 (citing *Landis v. North Am. Co.*, 299 U.S. 248 (1936)). When considering whether to
5 stay proceedings, courts consider (1) the possible damage that may result from
6 granting a stay; (2) the hardship or inequity that a party may suffer if required to go
7 forward; and (3) the orderly course of justice, measured in terms of whether issues,
8 proof, and questions of law would likely be simplified or complicated. *Lockyer v.*
9 *Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

10 **BACKGROUND**

11 Mr. Rajapaksa served as Secretary to the Sri Lankan Cabinet Ministry of
12 Defence, Public Security, Law and Order from November 2005 until January 2015.
13 Plaintiffs allege that, in that capacity and under Sri Lankan law, Mr. Rajapaksa
14 authorized Sri Lanka’s military forces to perform, or failed to prevent them from
15 performing, various acts that Plaintiffs believe violate the Torture Victim Protection
16 Act of 1991 (“TVPA”), 28 U.S.C § 1350 note, and California tort law.

17 On August 11, 2019, Mr. Rajapaksa became the presidential candidate for the
18 Sri Lanka Podujana Peramuna party, one of Sri Lanka’s major political parties. *See*
19 *Seneviratne Decl.* ¶¶ 3, 6. Reliable sources from Sri Lanka suggest that Mr. Rajapaksa
20 is likely to win the upcoming presidential election.² *Id.* ¶¶ 9, 10, 13. Under Sri
21 Lankan law, the presidential election must be held no later than December 7, 2019, and
22 the winner will take office in early January 2020.

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² In correspondence between counsel, Plaintiffs have suggested that Mr.
26 Rajapaksa is unqualified to become Sri Lanka’s president because he has not
27 renounced his U.S. citizenship and is not a Sri Lankan citizen. These allegations are
28 baseless and false and appear to be an attempt to bring campaign-trial innuendo into
this Court in order to influence Sri Lanka’s presidential election.

ARGUMENT

I. Defendant’s Election as President of Sri Lanka Would Require Dismissal of This Case

An immediate stay of this case until the conclusion of Sri Lanka’s December 7, 2019 presidential election and, if Mr. Rajapaksa wins, until he assumes office in January 2020—a modest hiatus by any measure—is a fair and practical path forward that will not prejudice Plaintiffs, will prevent equitable hardships that Mr. Rajapaksa would suffer if required to litigate now, and will promote judicial economy by simplifying the issues to be resolved after the stay.³

Under long-settled principles of common law, foreign heads of state enjoy absolute immunity from suit in U.S. courts. *See Manoharan*, 711 F.3d at 179-80; *Yousuf v. Samantar*, 699 F.3d 763, 768-69 (4th Cir. 2012); *Habyarimana v. Kagame*, 696 F.3d 1029, 1032 (10th Cir. 2012); *Weiming Chen v. Ying-jeou Ma*, No. 12-cv-5232, 2013 WL 4437607, at *2-3 (S.D.N.Y. Aug. 19, 2013). Here, Mr. Rajapaksa is the nominee of a major political party and the leading candidate in Sri Lanka’s presidential election. Should the Sri Lankan people elect him to that office on December 7, 2019, he will become Sri Lanka’s head of state and will be immune from suit in U.S. court.⁴ Indeed, in recent years, federal courts have dismissed lawsuits

³ During the meet and confer, Plaintiffs’ counsel offered to stay the entire case during the pendency of Mr. Rajapaksa’s presidency (which could last five, or even ten, years if he is reelected). Such a stay would be illogical. Upon becoming head of state, Mr. Rajapaksa will be entitled to absolute immunity from suit, which will divest this Court of subject-matter jurisdiction. A prolonged stay, moreover, would be an affront to Sri Lanka’s sovereign dignity and would undermine the very purpose of foreign-official immunity, which is meant to allow a head of state to manage a nation’s affairs unencumbered by foreign litigation.

⁴ If elected president, Mr. Rajapaksa’s entitlement to head-of-state immunity would not depend on whether the State Department issued a suggestion of immunity in this case. Even absent a suggestion of immunity, the Court would have to analyze the common-law principles independently and determine for itself whether Mr. Rajapaksa is entitled to absolute immunity as Sri Lanka’s head of state, which he surely would

1 against the then-sitting president of Sri Lanka that were substantially similar to this one
2 for this very reason. *See Manoharan*, 711 F.3d at 178; *Devi v. Rajapaksa*, No. 11 Civ.
3 6634, 2012 WL 3866495, at *1 (S.D.N.Y. Sept. 4, 2012).

4 It is irrelevant that the allegations in the First Amended Complaint refer to
5 conduct that purportedly occurred *before* Mr. Rajapaksa would assume head-of-state
6 status. Unlike conduct-based immunities, status-based immunities are absolute: they
7 depend on the foreign official's status, not on the nature of the alleged conduct. *In re*
8 *Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d 181, 185 (S.D.N.Y. 2015)
9 (explaining that “[s]tatus-based immunities enable certain incumbent foreign officials
10 to perform their duties unencumbered by legal proceedings,” whereas “[c]onduct-
11 based immunities shield individuals from legal consequences for acts performed on
12 behalf of the state during their tenure in office” (quotation marks omitted)). Thus, a
13 case against a sitting head of state must be dismissed regardless of the specific facts
14 plaintiffs allege or the theories of liability they assert.

15 Under these circumstances, a brief litigation stay is appropriate for three
16 reasons. *First*, a stay would enhance the orderly course of justice by simplifying the
17 issues for this Court to determine. If Mr. Rajapaksa becomes president of Sri Lanka,
18 long-established principles of head-of-state immunity will require dismissal of the suit.
19 But if this Court resolves the pending motion to dismiss and moves forward to a
20 decision, it will have to decide complicated questions of constitutional and
21 international law that may be mooted in a few months. Thus, a brief stay will promote
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24 be. *Samantar*, 560 U.S. 305, 311-12 (discussing the two-step analysis for foreign
25 official immunity); *Doğan*, 2019 WL 3520606, at *4 (finding former Israeli Prime
26 Minister Ehud Barak immune from suit both as the result of a suggestion of immunity
27 and under the Court's own independent analysis). That said, it bears emphasis that the
28 State Department has twice issued suggestions of immunity for Sri Lankan heads of
state in recent years, and, if it were to do so again here, this Court would have to
surrender jurisdiction and dismiss Plaintiffs' lawsuit. *See infra*.

1 judicial economy and may provide a straightforward legal basis on which to efficiently
2 and effectively dispose of this case.

3 *Second*, a stay pending Sri Lanka’s election would not prejudice Plaintiffs, who
4 concede that the relevant conduct alleged in the First Amended Complaint occurred
5 over a decade ago, in 2007. First Amended Compl. (“FAC”), ECF No. 35 ¶ 56.
6 Plaintiffs did not initiate this lawsuit until April 2019. ECF No. 2. Having waited over
7 a decade to sue, Plaintiffs cannot plausibly argue that a two- or three-month stay—one
8 that would indisputably promote judicial economy—pending Sri Lanka’s election
9 would cause them harm. See *Gallion v. Chart Commc’ns Inc.*, 287 F. Supp. 3d 920,
10 932 (C.D Cal. 2018) (holding that a brief stay does not prejudice a plaintiff). And if
11 Mr. Rajapaksa is not elected president, then this Court can lift the stay and the case can
12 proceed.

13 *Third*, Mr. Rajapaksa would experience undue hardship and inequity if required
14 to litigate a case in a U.S. court during the final period leading up to Sri Lanka’s
15 presidential election. He is fully committed to a national election campaign, on which
16 he will spend virtually every waking hour until December 7, 2019. It would be unfair
17 to divert Mr. Rajapaksa from the election campaign to participate in this case,
18 particularly when he might receive absolute immunity from suit in just a few short
19 months.

20 Further, because no scheduling order has been issued, discovery will not close
21 and summary judgment or trial certainly will not occur prior to this year’s election.
22 Consequently, if Sri Lanka’s people elect Mr. Rajapaksa to the office of president, the
23 parties will have to supplement any briefing already filed in connection with the
24 pending motion to dismiss, ECF No. 61, to address the issue of head-of-state immunity
25 or file new motions altogether. For these reasons, proceeding in this case in its current
26 posture would be a wasteful exercise for this Court and for the parties. Rather, the
27 most fair, economical, and prudent course is to stay the case immediately, but briefly,
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1 until after the election so that the parties can streamline briefing and the Court may
2 focus on the dispositive legal issues.

3 **II. Principles of International Comity Counsel in Favor of a Stay**

4 International comity offers an additional reason to stay the case briefly. Foreign
5 elections are uniquely sovereign acts, and a brief stay of a case that otherwise might
6 affect or interfere in a foreign election is necessary to respect the sovereignty of a
7 foreign nation.

8 “International comity is a doctrine of prudential abstention.” *Mujica v. AirScan*
9 *Inc.*, 771 F.3d 580, 598 (9th Cir. 2014). It is designed to “maintain[] amicable working
10 relationships between nations, a shorthand for neighbourliness [*sic*], common courtesy
11 and mutual respect.” *Id.* (quoting *JPMorgan Chase Bank v. Altos Hornos de Mexico,*
12 *S.A. de C. V.*, 412 F.3d 418, 423 (2d Cir. 2005)). The principles underlying
13 international comity weigh in favor of a stay pending Sri Lanka’s presidential election.

14 The election of a head of state is a sovereign and official act that deserves the
15 respect of the international community. Actions taken by the United States’ executive,
16 legislative, or judicial branches that might appear to interfere, or *permit* interference,
17 with such a sovereign act may have political and diplomatic repercussions. Indeed, the
18 current dialogue in the United States demonstrates the sensitivity of allegations
19 regarding foreign interference in the electoral process.

20 Whatever Plaintiffs’ intentions, this lawsuit has created a media circus in Sri
21 Lanka. Many outlets in Sri Lanka’s national media have reported Plaintiffs’ unverified
22 allegations against Mr. Rajapaksa—which he vehemently denies—as if they were
23 conclusively established. For example, the Sunday Observer, Sri Lanka’s most
24 circulated weekly English-language newspaper, has published articles detailing the
25 allegations with specificity, often in a way that is slanted against Mr. Rajapaksa.⁵
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27
28 ⁵ See, e.g., Manco Colombage, *From Defamation to Extra-Judicial Killing: Lasantha’s daughter escalates civil litigation against Gotabaya*, Sunday Observer,

1 Continued litigation on a motion to dismiss prior to Sri Lanka’s election would only
2 exacerbate this reporting. In the intensity of an election campaign, every action by the
3 Court or the parties in this case will be disseminated, amplified, and potentially
4 distorted in ways that are beyond this Court’s control. This Court could find itself a
5 major factor in a foreign election, potentially even influencing its outcome.⁶

6 In addition, a temporary stay pending an election is a familiar course of action
7 for federal courts. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). It is beyond
8 question that each U.S. state has a “compelling interest in preserving the integrity of its
9 election process,” *id.*, and by logical extension foreign states have a materially
10 identical interest. Comity obliges respect for this interest and dictates a stay of this
11 case until the election concludes.

12 Moreover, Plaintiffs’ delay in bringing this action counsels in favor of a stay
13 pending the election. Plaintiffs waited nearly a decade to bring this action from the
14 time their claims accrued, filing their suit, coincidentally or not, just after it became
15 apparent that Mr. Rajapaksa would likely be a presidential candidate. The Court
16 should consider this delay in assessing the appropriateness of a temporary stay pending
17 Sri Lanka’s election.

18 Federal courts should avoid entanglement in electoral politics, where they
19 cannot fully anticipate or control the ramifications of their actions. That is especially
20 true in the context of a foreign country’s politics. The potential consequences of any
21 other course counsel staying this litigation as a matter of international comity. Doing
22

23 _____
24 July 28, 2019, <http://www.sundayobserver.lk/2019/04/20/news-features/defamation-extra-judicial-killing-lasantha%E2%80%99s-daughter-escalates-civil/>.

25 ⁶ Moreover, under U.S. law all briefing for a motion to dismiss must assume the
26 truth of the factual allegations. There is real danger that Mr. Rajapaksa’s opponents
27 will mischaracterize his legal arguments at the motion to dismiss stage as concessions
28 of the underlying facts. Activity in this Court could mislead, or could be used to
mislead, members of the Sri Lankan electorate as they head to their polling stations.

1 so will promote the democratic right of Sri Lanka’s electorate to choose their president
2 without the interference of publicity surrounding unproven allegations asserted in a
3 foreign court.

4 **CONCLUSION**

5 For these reasons, Defendant respectfully requests this Court to temporarily stay
6 this case pending Sri Lanka’s presidential election, and, if Defendant is elected
7 president, until he assumes office.

8 Dated: August 26, 2019

ARNOLD & PORTER
KAYE SCHOLER LLP

9
10
11 By: /s/ John C. Ulin

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Robert N. Weiner*
Raul R. Herrera*
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15 *Attorneys for Defendant*
16 *Nandasena Gotabaya Rajapaksa*

17 *Admitted *pro hac vice*.
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CERTIFICATE OF SERVICE

I certify that on August 26, 2019, I electronically filed the foregoing **DEFENDANT’S NOTICE OF MOTION AND MOTION TO STAY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MALINDA SENEVIRATNE; AND PROPOSED ORDER** with the Clerk by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Maria Hansen

Maria Hansen