No. _____

In The
Supreme Court of the United States

EUGENE NYAMBAL,

Petitioner,

v.

THE INTERNATIONAL MONETARY FUND,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998) and *OSS Nokalva, Inc. v. European Space Agency*, 671 F.3d 756 (3d Cir. 2010), the D.C. and Third Circuit Courts of Appeal issued split decisions on the question of whether the "commercial activities" exception to the sovereign immunity of a foreign state, as provided in the Foreign Sovereign Immunity Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(1)-(2), applies to an international organization.

The Question Presented is:

Whether the present-day scope of immunity enjoyed by international organizations is absolute and unrestricted, as it was for foreign states prior to the enactment of FSIA; or whether it is now limited by the commercial activities exception to sovereign immunity contained in FSIA.

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The opinion of the D.C. Circuit Court of Appeals is published at *Nyambal v. The International Monetary Fund*, 772 F.3d 277, 2014 U.S. App. LEXIS 22232 (D.C. Cir. 2014). It is reprinted in the Appendix at 1-12. The District Court issued two Minute Orders, both of which are reprinted in the Appendix at 13-15 and 16-18, respectively.

JURISDICTION

The D.C. Circuit filed its decision on November 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1245(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

International Organizations
Immunities Act of 1945
22 U.S.C. § 288a

> International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows: (a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity – (i) to contract; (ii) to acquire and dispose of real and personal property; (iii) to institute legal proceedings. (b) International organizations,

their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract. (c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable. (d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents, and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

Foreign Sovereign Immunity Act of 1976
28 U.S.C. § 1605(a)(1)-(2)

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may

purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

The petitioner, Eugene Nyambal, was formerly a senior advisor to the board of directors of the respondent, The International Monetary Fund ("IMF"). In 2009, Nyambal exposed corruption in the IMF's funding of a mining project in Cameroon and was summarily terminated. Shortly thereafter, Nyambal visited the IMF Staff Credit Union ("Credit Union") to transact personal business. The Credit Union is open to the general public and is located in space leased from the IMF at the IMF's premises in Washington, D.C. The IMF provided security personnel to guard the Credit Union under the terms of a commercial contract. The security personnel accosted Nyambal and threw him out of the Credit Union "in full view of the public and a professional colleague. . . ." Complaint, at 6, ¶13, *Nyambal v. IMF*, No. 1:12-cv-01037

(D.D.C. May 2, 2014). Nyambal filed suit against the IMF, asserting claims for assault, false imprisonment, and intentional infliction of emotional distress based on the incident.

Nyambal stated in his Complaint that the District Court had personal jurisdiction over the IMF because the "IMF's commercial activities occur in the District of Columbia; and, the IMF's wrongful acts, perpetrated in the course of its commercial activities, occurred in the District of Columbia." *Id.*, at 2, ¶4. In doing so, Nyambal relied on the commercial activity exception to a foreign state's sovereign immunity set forth in FSIA, 28 U.S.C. § 1605(a)(1)-(2). A nexus could be drawn between the IMF's commercial activities (leasing of the Credit Union space and provision of security services to the Credit Union on commercial terms) and the injury Nyambal suffered at the hands of the security personnel. *See generally Kirkham v. Air France*, 429 F.3d 288 (D.C. Cir. 2005).

The IMF moved to dismiss the Complaint claiming absolute and unrestricted immunity from all judicial process by virtue of its Articles of Agreement and the International Organizations Immunities Act of 1945, 22 U.S.C. § 288, *et seq*. ("IOIA"). The immunities and privileges contained in Article IX, § 3, of the Articles of Agreement are non-self-executing provisions. Immunity under the Articles became domestic,

U.S. law only upon enactment of 22 U.S.C. § 286h[1] (July 31, 1945); which was in turn superseded by enactment of the IOIA (December 29, 1945), and the designation of the IMF as an international organization in Executive Order 9751 on July 11, 1946. *See Whitney v. Robertson*, 124 U.S. 190 (1888) (the "later-in-time" rule allows Congress to supersede the domestic legal effect of a treaty by means of subsequently enacted legislation). Accordingly, the Articles of Agreement do not establish the scope of the IMF's sovereign immunity in the United States separate and apart from the scope of immunity provided for in the IOIA. The only question is whether the IMF's immunity under the IOIA was modified subsequently by FSIA.

Nyambal moved to stay the motion to dismiss pending jurisdictional discovery. The District Court subsequently authorized limited, jurisdictional discovery. App. 16-18 The IMF produced a less-than-complete response to Nyambal's discovery request, and moved for reconsideration of the District Court's Order. The request for reconsideration was denied. App. 13-15. The IMF appealed to the D.C. Circuit, which accepted jurisdiction to hear the interlocutory appeal under the collateral order doctrine. *Nyambal*

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[1] The provisions of article IX, sections 2 to 9 . . . shall have full force and effect in the United States . . . upon acceptance of membership by the United States in, and the establishment of, the Fund and the Bank, respectively.

v. The International Monetary Fund, 772 F.3d 277, 279-80 (D.C. Cir. 2014).

In briefing the motion for reconsideration, Nyambal acknowledged the binding authority of the D.C. Circuit's opinion in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998), but reserved argument that the IMF's commercial activities in Washington, D.C., subjected it to jurisdiction under the "commercial activities" exception to immunity under FSIA, 28 U.S.C. § 1605(a)(1)-(2), in accordance with *OSS Nokalva, Inc. v. European Space Agency*, 671 F.3d 756 (3d Cir. 2010). The D.C. Circuit reversed the District Court's Orders permitting jurisdictional discovery, 772 F.3d, at 283, and declined to reconsider the reasoning of *Atkinson* in light of *Nokalva*. *Id*., at 281.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE A SPLIT BETWEEN THE D.C. AND THIRD CIRCUITS ON THE ISSUE OF WHETHER INTERNATIONAL ORGANIZATIONS ENJOY UNRESTRICTED IMMUNITY UNDER THE IOIA OR WHETHER THE SCOPE OF THEIR IMMUNITY IS LIMITED BY THE COMMERCIAL ACTIVITY EXCEPTION SUBSEQUENTLY ENACTED IN FSIA

The IOIA provides that designated international organizations "enjoy the same immunity from suit

and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(a)(b). The D.C. and Third Circuits agreed that in drafting the IOIA, "Congress was legislating in shorthand, referring to another body of law – the law governing the immunity of foreign governments – to define the scope of the new immunity for international organizations." *Atkinson*, 156 F.3d, at 1340; *Nokalva,* 671 F.3d, at 762. And, while both Circuits addressed the question of whether the IOIA should be understood to require incorporation of subsequent changes in the law of foreign sovereign immunity, they reached different and incompatible conclusions. *Nokalva*, *Id.*; *Atkinson*, at 1340.

The most important change to the immunity of foreign sovereigns under U.S. law since 1945 was enactment of FSIA in 1976. *See* 28 U.S.C. §§ 1330, 1602, *et seq*. FSIA "affords foreign governments immunity from the jurisdiction of the United States courts . . . except in specific circumstances," including those in which the action is based upon a commercial activity carried on in the United States by the foreign state. *Id*. § 1605(a)(1)-(2); *Nokalva*, at 762. The D.C. Circuit adopted the view that the IOIA granted in perpetuity "virtually absolute" immunity to international organizations; just as foreign sovereigns enjoyed in 1945, the later restrictions of FSIA notwithstanding. *Atkinson*, *Id*. The contrary view, that

"Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity," was adopted by the Third Circuit. *Nokalva*, at 764. According to the *Nokalva* court, the "effect of 'legislating in shorthand' created a link between the immunity of international organizations and that of foreign governments." *Id.*, at 762. Hence, enactment of FSIA placed restrictions on what was previously an absolute immunity for international organizations. *Id*., at 764.

The Third Circuit based its holding on a rule of statutory interpretation it referred to as the "Reference Canon." *Id*. Thereunder, "[a] statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. *This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted*." *Id*., *citing Atkinson*, at 1340 (quoting 2B Sutherland Statutory Construction § 51.08, at 192 (Norman J. Singer, 5th ed. 1992). It stated:

> If Congress wanted to tether international organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA passed, it could have used language to expressly convey this intent. For example, Congress could have simply stated that international organizations would be entitled to the 'same immunity as of the date of this Act.' Or, it could have just specified the substantive scope of the immunity it was conferring.

Id.

The D.C. Circuit took a different approach. While acknowledging that the IOIA is a "reference statute," the *Atkinson* court held that Congress did not intend the IOIA to incorporate subsequent changes to the immunity enjoyed by foreign governments. *Atkinson*, at 1341.[2] It declined to apply the Reference Canon, stating that the IOIA's subject matter and the terms of the enactment in its total environment took precedence. *Atkinson*, 156 F.3d at 1341 (quotes omitted). The D.C. Circuit placed great weight on a provision in the IOIA that grants the President authority to "modify, condition, limit, and even revoke the . . . immunity of a designated organization," referring to it as an "explicit mechanism for monitoring the immunities of designated international organizations. . . ." *Id*. The court reasoned that because the President is empowered by the IOIA to amend the immunity of international organizations, Congress intended that to be the sole manner by which a designated international organization's immunity could be altered after 1945. *Id*.

The *Nokalva* court pointed to several reasons why the *Atkinson* court's reasoning was flawed. First, there is nothing in the IOIA's statutory language or legislative history to suggest that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the

[2] The Supreme Court of Alaska followed *Atkinson* in *Price v. Unisea, Inc*., 289 P.3d 914 (Alaska 2012).

immunity of foreign sovereigns. *Nokalva*, at 763. Second, the State Department expressed support for the contention "that the same restrictive immunity conferred on foreign governments in the FSIA" should be applied to international organizations. *Id*. (*citing* Letter from Robert B. Owen, Legal Advisor, State Department, to Leroy D. Clark, General Counsel, E.E.O.C. (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice in the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 917-18 (1980)). It found the position of the State Department to be persuasive. *Id*., at 765.

And, third, the *Atkinson* court's interpretation of the IOIA leads to an anomalous result. If a foreign government is engaged in a commercial activity, as opposed to an international organization, it may be sued under the commercial exception provision of FSIA. The Third Circuit stated:

> We find no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations.

Id., at 764.

The opinions of the D.C. Circuit and Third Circuit cannot be reconciled. The scope of sovereign immunity afforded by the United States to international

organizations is an important issue with both national and international implications. Due to the present split in circuit decisions, litigants contesting the scope of immunity enjoyed by an international organization face contradictory and inconsistent results. In particular, in the case of Nyambal, if the D.C. Circuit were to have adopted the Third Circuit's reasoning in *Nokalva*, the District Court's jurisdiction over the IMF for its commercial activities in Washington, D.C., would have been established.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the D.C. Circuit Court of Appeals.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 5, 2014 Decided November 25, 2014

No. 13-7115

EUGENE NYAMBAL,
APPELLEE

v.

THE INTERNATIONAL MONETARY FUND,
APPELLANT

Consolidated with 14-7025

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01037)

Patrick J. Carome argued the cause for appellant. With him on the brief were *Christopher L. Morgan* and *Adam I. Klein*.

John M. Shoreman argued the cause and filed the briefs for appellee.

Before: TATEL and BROWN, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: The International Monetary Fund's ("Fund's") motion to dismiss this tort suit was converted into a discovery dispute when the district court, over the Fund's objections, granted plaintiff's request for jurisdictional discovery. The Fund sought reconsideration of the discovery order; the court denied it and separately disposed of the motion to dismiss as moot because the plaintiff had filed an amended complaint. Because we think more than a bare assertion that "something may turn up" is necessary to justify jurisdictional discovery in the face of the Fund's broad immunity, we reverse.

I

Eugene Nyambal, a former senior advisor to the Fund, says he was terminated after raising allegations of corruption. Shortly after he and the Fund went their separate ways, Mr. Nyambal says he entered the Bank-Fund Staff Credit Union ("Credit Union"), a public credit union located in leased space on the Fund's premises, to transact personal banking business and was "accosted" by the Credit Union's security personnel who "escorted [him] from the Credit Union in full view of the public and a professional colleague. . . . " Complaint at 6 ¶ 13, Nyambal v. Int'l Monetary Fund, No. 1:12-cv-01037 (D.D.C. May 2, 2014). Based on this incident, Nyambal filed suit against the Fund, asserting claims for assault, false imprisonment, and intentional infliction of emotional distress.

The Fund submitted affidavits categorically denying any express waiver of the absolute immunity conferred by its Articles of Agreement and the International Organization's Immunity Act (IOIA), *see generally* Articles of Agreement, Art. IX § 3 (given force of law by 22 U.S.C. § 286h); IOIA, Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified at 22 U.S.C. § 288a(b)). When the Fund moved to dismiss, invoking its absolute immunity, Nyambal countered by moving to stay the dismissal motion and seeking jurisdictional discovery to show the Fund had expressly waived its immunity in its contracts with the Credit Union or the security services firm. Although the Fund's affidavits confirmed no express waiver had been contemplated, presented to the Board, or approved, the district court authorized jurisdictional discovery. The Fund moved for reconsideration and voluntarily furnished complete copies of the Credit Union and security services contracts. The Fund's overtures proved unavailing. The district court rebuffed its entreaty for reconsideration; in the court's view, full disclosure of the two pertinent contracts did not, "obviate the need for further jurisdictional discovery." Minute Order, Nyambal v. Int'l Monetary Fund, No. 1:12-cv-01037 (D.D.C. Feb. 12, 2014).

The district court agreed with Nyambal that "inconsistencies in the contracts," *id.*, rendered reconsideration ill-advised. Article 28 of the Credit Union lease contract expressly provides for non-waiver. *See* Patterson Aff. ¶ 2 ("[T]he Fund "does not, by virtue of this Lease, waive [its] immunities, which may only be

waived by a decision of the Executive Board of the International Monetary Fund."). Yet Article 13.1 provides that the Fund "shall not be liable for any personal injury to, or damages to the personal property of, Tenant, Tenant's . . . business invitees, . . . customers, clients, [or] . . . guests[,] . . . arising from the use, occupancy and condition of the Premises or the Building, *unless* such personal injury or damage to property resulted solely from the negligence or willful misconduct of the Landlord, its agents or employees." Brief of Defendant-Appellant at 48, Nyambal v. Int'l Monetary Fund, No. 13-7115 (D.C. Cir. May 2, 2014) (emphasis added). Thus, in Nyambal's – and the district court's – view the second sub-clause of Article 13.1 is suggestive of waiver or is otherwise in tension with Article 28's broad and express denial.

In a separate order, issued the same day, the court also granted Nyambal's motion to amend his complaint. In light of Nyambal's amended complaint, the court denied the Fund's motion to dismiss as moot.

Twice spurned below on the issue of jurisdictional discovery, the Fund now challenges the district court's discovery orders on appeal. The Fund also contests the denial of its motion to dismiss.

II

A couple of preliminary questions about our jurisdiction must be resolved before we can consider the substance of the Fund's claims. Ordinarily, we have

jurisdiction only to review final decisions of the district court, 28 U.S.C. § 1291, but under collateral order doctrine, section 1291 jurisdiction is available for a small subset of decisions which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require [ ] appellate consideration to be deferred. . . ." *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546 (1949). Thus, a decision may be collaterally appealed if it: [1] "conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from final judgment." *Will v. Hallock,* 546 U.S. 345, 349 (2006).

A district court's grant of discovery against an absolutely immune defendant is sufficiently conclusive to qualify for collateral review. *See generally Foremost-McKesson, Inc. v. Islamic Republic of Iran,* 905 F.2d 438, 443 (D.C. Cir. 1990). "[A] trial court's denial of an immunity defense entitles the defendant to an immediate appeal. . . ." *In re Papandreou,* 139 F.3d 247, 251 (D.C. Cir, 1998). Just as a district court's denial of sovereign immunity finally determines the foreign state's right to be immune from the burden of a lawsuit, a court's grant of jurisdictional discovery denies an international organization protection from similar burdens. *See Beecham v. Socialist People's Libyan Arab Jamahiriya,* 424 F.3d 1109,

1111 (D.C. Cir. 2005). "Here too . . . immediate review is appropriate." *In re Papandreou,* 139 F.3d at 251.

Similarly, the denial of a motion to dismiss on immunity grounds would satisfy the *Cohen* criteria for interlocutory review. *Kilburn v. Socialist People's Arab Jamahiriya,* 376 F.3d 1123, 1126 (D.C. Cir. 2004). However, in this case, the district court's denial did not rest on the Fund's claim of immunity. Instead, the court found Nyambal's filing of an amended complaint mooted the motion to dismiss. Because the court did not resolve the question of immunity in denying the motion to dismiss, interlocutory review is available for the grant of jurisdictional discovery but not the determination of mootness. As the Fund itself concedes, Nyambal's amended pleading "effect[s] no material change in his factual allegations or legal theories," Brief of Defendant-Appellant at 55, or otherwise requires more than a single renewal of the Fund's pre-existing motion.

III

Our review of "[a] foreign nation's entitlement to sovereign immunity raises questions of law reviewable de novo." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1105 (D.C. Cir. 2001), *vacated on other grounds*, 320 F.3d 280 (D.C. Cir. 2003). *See also Kirkham v. Société Air France*, 429 F.3d 288, 291 (D.C. Cir. 2005). However, "we review the district court's findings of fact – including facts that bear upon immunity and therefore upon

jurisdiction – for clear error; hence, . . . once the facts have been settled, we decide de novo whether those facts are sufficient to divest the foreign sovereign of its immunity." *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004). We apply the same analytical approach to an international organization's claim of immunity.

In the context of the IOIA, we have noted that "immunity, where justly invoked, [] shields defendants not only from the consequences of litigation's results but also from the burden of defending. . . ." *Tuck v. Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981). The sweep of the Fund's immunity is broader than the protection afforded by the IOIA's aegis alone. Under the dual protections conferred by the Fund's Articles of Agreement and the IOIA, "[t]he Fund . . . enjoy[s] immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract." Articles of Agreement, Art. IX § 3; IOIA, Pub. L. No. 79-291, 59 Stat. 669 (1945). Nyambal does not dispute that the Fund is immune absent express waiver under its Articles of Agreement. In light of the Third Circuit's decision in *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010), he nonetheless requests this Court to "re-visit" its decision in *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998), and narrow the scope of IOIA sovereign immunity for international organizations. We decline to do so. *Atkinson* remains vigorous as Circuit law;

international organizations "enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations [ ] expressly waive their immunity." 156 F.3d at 1337. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) ("[Prior] decisions . . . bind the circuit unless and until overturned by the court en banc or by Higher Authority.").

The Fund argues that its multi-layered immunities warrant blanket protection from effectively all forms of jurisdictional discovery. Such a result is unwarranted; though unusually expansive, the Fund's immunity may be defeated by a showing of express waiver. The Fund's entitlement . . . to immunity from suit therefore remains "a critical preliminary determination" and the parties "must be afforded a fair opportunity to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." *Foremost-McKesson, Inc.*, 905 F.2d at 449. While jurisdictional discovery may be warranted only in comparatively rare circumstances, it is appropriate where a plaintiff articulates a "specific, well-founded allegation that an express waiver exists." *Polak v. Int'l Monetary Fund,* 657 F. Supp. 2d 116, 122 (D.D.C. 2009); *see Jacobs v. Vrobel*, 724 F.3d 217, 221 (D.C. Cir. 2013) (looking to the "plausibility" of allegations, in the context of a waiver of immunity under the Federal Tort Claims Act).

Nyambal stumbles at this threshold hurdle of plausibility. "[D]iscovery should be ordered circumspectly

and only to verify allegations of specific facts crucial to an immunity determination." *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176 (2d Cir. 1998). Yet Nyambal relied below upon little more than bare assertion in support of his initial requests for discovery; for example, simply speculating that the Credit Union and security service contracts would "undoubtedly address the [Fund's] liability for actions arising from acts and occurrences related to" public transactions performed under the contract without offering any specific, non-conclusory factual allegations to explain why such contracts could plausibly be thought to incorporate an express waiver of the Fund's immunity as to third party invitees. Plaintiff's Response to Motion to Dismiss at 6, Nyambal v. Int'l Monetary Fund, No. 1:12-cv-01037 (D.D.C. Dec. 28, 2012). Because Nyambal's assertions amount to mere "conjecture and surmise," they cannot provide sufficient support to justify jurisdictional discovery. *Crist v. Republic of Turkey*, 995 F. Supp. 5, 13 (D.D.C. 1998).

Moreover, the Fund's subsequent voluntary disclosure of the Credit Union contract conclusively resolved any question of waiver.[1] Article 13.1 of the contract provides that the Fund "shall not be liable for any personal injury to or damage to . . . [the Credit Union's] business invitees, . . . customers, clients, [or]

[1] The Fund's contract with the security services firm was also voluntarily furnished. Waiver under that contract is not directly contested on appeal.

. . . guests . . . unless such personal injury or damage to property resulted solely from the negligence or willful misconduct of the Landlord." Brief of Defendant-Appellant at 48. Nyambal postulates that the "unless" sub-clause is an express waiver that directly contradicts the contract's Article 28 blanket non-waiver provision. He therefore argues that the Fund's voluntary release of the contract did not eliminate the need for further discovery because, in his view, the contract "raise[s] more questions than [it] answer[s]." Brief of Plaintiff-Appellee at 18-20, Nyambal v. Int'l Monetary Fund, No. 13-7115 (D.C. Cir. June 4, 2014).

Nothing in Article 13.1 of the Credit Union contract, however, directly contradicts Article 28's broad language of non-waiver. Indeed, the thrust of the article's intent is clear from its title: it deals with "*limitations* o[n] liability" to the Fund under the contract. The article's "unless" sub-clause can readily be interpreted as a limitation on waiver where the Fund has *already* expressly waived its immunity, rather than a curiously obscure form of express waiver buried in a clause intended to limit the scope of liability owed by the Fund. *See* 17A Am. Jur. 2d Contracts § 384 ("No contract provision should be construed as being in conflict with another unless no other reasonable interpretation is possible."). Read in context, the "unless" sub-clause of Article 13.1 is simply insufficient to be interpreted as constituting a potential express waiver warranting further discovery. Moreover, the Fund's affidavits, *e.g.*, Lin Aff. at

¶¶ 3-4, and the unambiguous language of Article 28's contractual non-waiver clause require that any waiver of immunity occur through a "decision of the Executive Board of the International Monetary Fund," Patterson Aff. at ¶ 3 (quoting Article 28). Nyambal has not raised any specific, plausible assertion that the contracts contain an express waiver; or that the Board itself has actually ratified any purported contractual waiver; nor has he otherwise suggested that an express waiver can occur in the absence of such ratification.[2] Consequently, the Fund's voluntary disclosure of the contested contracts did obviate the need for any further discovery.

Nyambal raises a secondary argument that the Credit Union's Article 15 indemnification clause is inexplicable absent an intention for the Fund to waive its immunity. Nyambal reasons that the contract thereby creates a "framework" to allow the Fund to expressly waive its immunity in the normal course of business. But a "framework" permitting the possibility of waiver is *not* a "specific, well-founded allegation that an express waiver [actually] exists." *Polak*, 657 F. Supp. 2d at 122. It is undisputed that the Fund

[2] In addition to the Board ratification requirement of Article 28 of the Credit Union contract, the Fund's affidavits assert any purported waiver is inoperative absent ratification under the Fund's Articles of Agreement and its By-Laws. Lin Aff. at ¶ 3. Whether an express waiver of immunity in a contract signed by an executive officer of the Fund would be nullified by the absence of Board ratification is a question we leave for another day.

"could" waive its immunities. Nyambal's framework theory consists of nothing more than unsupported speculation that the Fund "may" have done so.

IV

For the foregoing reasons we reverse the district court's orders permitting jurisdictional discovery. We remand for further proceedings consistent with this decision.

So ordered.

U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 2/12/2014 at 10:33 AM EDT and filed on 2/12/2014

Case Name: NYAMBAL v. INTERNATIONAL MONETARY FUND
Case Number: 1:12-cv-01037-EGS
Filer:
Document Number: No document attached

Docket Text:

MINUTE ORDER denying Defendant IMF's [19] Motion for Reconsideration. Rule 59(e) permits a party to file a motion to alter or amend judgment. Fed. R. Civ. P. 59(e). The disposition of a motion originating under Rule 59(e) is entrusted to the district court's discretion, and "'need not be granted unless the district court finds there is an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or to prevent manifest injustice.'"

Ciralsy v. Cent. Intelligence Agency, 355 F.3d 661, 675 (D.C. Cir. 2004) (quoting Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). Although courts have "considerable discretion in ruling on a Rule 59(e) motion," Piper v. U.S. Dep't of Justice, 312 F. Supp. 2d 17, 20 (D.D.C. 2004), such motions are "disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances," Niedermeier v. Office of Baucus, 153

F. Supp. 2d 23, 28 (D.D.C. 2001). Such motions are rarely granted and are not "simply an opportunity to reargue facts and theories upon which a court has already ruled." State of New York v. United States, 880 F. Supp. 37, 38 (D.D.C. 1995). The IMF makes two arguments in support of its motion. First, it reiterates the arguments made in opposition to Plaintiff's motion for jurisdictional discovery regarding its absolute immunity from judicial process. See Mot. for Reconsideration at 5-8. Second, the IMF argues that to the extent that Plaintiff sought documents to prove that it had waived immunity in various relevant contracts, those contracts, which are attached to the Motion for Reconsideration, show the opposite. Id. at 9. According to the IMF, the contracts attached to its motion for reconsideration obviate the need for further jurisdictional discovery because they prove that it did not contractually waive its immunity. Id. at 9-13. The IMF thus argues that "the evidence shows that any of the expansive discovery sought by Mr. Nyambal beyond the contracts is wholly unnecessary and would only serve to place undue burdens on the Fund and delay the inevitable dismissal of this case." Id. at 14. Plaintiff argues in opposition that the IMF has used its motion for reconsideration as an opportunity to reiterate arguments made in earlier pleadings, which the Court already found to be unavailing. See Pl.'s Opp'n at 4-6. Plaintiff also points to various inconsistencies in the contracts that he claims require further jurisdictional discovery. Id. at 6-9. The Court agrees. The IMF has provided no basis for reconsideration of the Court's

July 19, 2013 order granting Plaintiff's motion for limited jurisdictional discovery. Nor do the contracts that the IMF has filed in support of its motion resolve the jurisdictional questions Plaintiff has raised. It is well settled that a motion to reconsider under Rule 59(e) is not "an opportunity to reargue facts and theories upon which a court has already ruled, nor a vehicle for presenting theories or arguments that could have been advanced earlier." SEC v. Bilzerian, 729 F. Supp. 2d 9, 14 (D.D.C. 2010). The IMF has does just that. Accordingly, Defendant's motion is hereby DENIED. Signed by Judge Emmet G. Sullivan on February 12, 2014. (Icegs1)

U.S. District Court

District of Columbia

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Case Name: NYAMBAL v. INTERNATIONAL MONETARY FUND
Case Number: 1:12-cv-01037-EGS
Filer:
Document Number: No document attached

Docket Text:

MINUTE ORDER. Pending before the Court is [11] Plaintiff Eugene Nyambal's motion to stay pending jurisdictional discovery. Upon consideration of the motion, the opposition and reply thereto, the relevant case law, and the record in this case, the Court hereby GRANTS the motion to stay pending jurisdictional discovery. Defendant International Monetary Fund ("IMF" or "Fund") argues that pursuant to the Bretton Woods Agreements Act ("BWAA"), which codified the Articles of Agreement of the IMF, and the International Organizations Immunity Act ("IOIA"), it has immunity from judicial process entirely unless it expressly waives that immunity. See [6] IMF Mot. to Dismiss at 5-6. According to the Fund, it has not expressly waived immunity in the instant matter. In support of that proposition, the Fund has submitted the Affidavit of Brian Patterson, Senior Counsel, who attests that no such waiver exists in the contract that the Fund entered into with the Bank-Fund Staff

Credit Union or with its provider for security services. Mr. Patterson cites to specific language in both agreements which purportedly establishes that the Fund has not waived immunity, but he has not attached the specific agreements to his affidavit. See [13-1] IMF Reply, Exhibit A at 1-2. Plaintiff argues, however, that because the question of whether the IMF has expressly waived immunity is a legal question, he should be afforded the opportunity to conduct limited jurisdictional discovery. See [10] Plaintiffs Opp'n at 6-7. Plaintiff further argues that Mr. Patterson's Affidavit is "far too selective in its disclosure of what the Fund considers pertinent language of relevant documents" and that he should be able to engage in limited discovery, especially because the relevant evidence to conclusively resolve the waiver issue is within the exclusive control and possession of the Fund. See [16] Plaintiff's Reply at 2-3. In this Circuit, "immunity, where justly invoked, properly shields defendants not only from the consequences of litigation's results, but also from the burden of defending themselves." Tuck v. Pan Am. Health Org., 668 F.2d 547, 549 (D.C. Cir. 1981). Moreover, pursuant to the BWAA and the IOIA, the Fund is immune from every form of judicial process, including discovery. See 22 U.S.C. § 228a(b); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990). Nevertheless, despite this immunity from judicial process, limited jurisdictional discovery "may be proper [if] pertinent facts bearing on the issue of jurisdiction are in dispute." Osserian v. Int'l Fin. Corp., 498 F. Supp. 2d 139, 145 n. 2 (D.D.C. 2007).

The Court finds that the discovery that Plaintiff proposes is narrowly tailored to determine the issue of whether there has been an express waiver of immunity in either of the two relevant contracts. Therefore, the Court GRANTS Plaintiff's motion. Defendant is hereby ordered to respond to Plaintiff's Interrogatories and Document Request, attached as Exhibit 1 and 2 to [11] Plaintiff's motion to stay pending jurisdictional discovery, by no later July 31, 2013. If necessary, the parties should confer and file a joint stipulated protective order by no later than July 18, 2013. The parties are directed to file a joint status report, including recommendations for further proceedings, by no later than August 7, 2013. In the event that counsel are unable to agree upon a joint recommendation, each party shall file an individual recommendation by that time. SO ORDERED. Signed by Judge Emmet G. Sullivan on July 9, 2013. (Icegs1)