UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. TÜRKIYE HALK BANKASI A.Ş., Defendant.	S6 15 Cr. 867 (RMB)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO STAY FURTHER PROCEEDINGS

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The United States Supreme Court has recognized that a petition for a writ of mandamus is the proper means of challenging a trial judge's refusal to recuse and that a party faces irreparable harm when the district judge whose impartiality can reasonably be questioned continues to preside over the case. *See Berger v. United States*, 255 U.S. 22, 32 (1921). Halkbank respectfully requests a stay of these proceedings so that it will not be irreparably harmed while the Second Circuit addresses Halkbank's mandamus petition, which it intends to file no later than September 3, 2020.

Courts consider four factors in determining whether to grant a stay pending resolution of a mandamus petition: (1) the likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay would substantially injure the other parties interested in the proceeding; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also SEC v. Citigroup Glob. Markets Inc.*, 673 F.3d 158, 162 (2d Cir. 2012). The movant need not show "probability of success"; under such a standard, a party could never obtain a stay from the district court to appeal that court's ruling. *See LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994). "Rather, it can satisfy the first factor by raising in its appeal questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Hassoun v. Searls*, 2020 WL 3496302, at *7 (W.D.N.Y. June 29, 2020) (internal citation omitted). Moreover, "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (alterations omitted) (quoting *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977)). That is, if the prospect of irreparable harm is sufficiently serious but "the likelihood of success is not high," a stay is still warranted. *See id.*

When "the balance of the equities weigh[] heavily in favor of granting the stay," "the movant need only present a substantial case on the merits [on] a serious legal question." *LaRouche*, 20 F.3d at 72.

Likelihood of Success on the Merits. Halkbank's recusal motion presents serious, substantial, and difficult questions that warrant review by a panel of unquestionably disinterested judges. *See* ECF Nos. 637, 642, 644, 648. First, the Court's opinion *sua sponte* raises issues of constitutional importance that have not been briefed by either party. For example, the Court reasons that Halkbank is precluded from making arguments raised by co-defendants before Halkbank was a party to this case, ECF No. 648 at 16–19, which is an extraordinary and unprecedented proposition. *See, e.g.*, *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 219 (2d Cir. 2002) ("The 'law of the case' doctrine may be properly invoked only if the parties had a full and fair opportunity to litigate the initial determination." (internal citation and quotation marks omitted)); *see also United States v. Watts*, 934 F. Supp. 2d 451, 464 (E.D.N.Y. 2013); *Edmonds v. Smith*, 922 F.3d 737, 740 (6th Cir. 2019) (noting that applying the law-of-the-case doctrine to a party who did not have an opportunity to litigate the issue would implicate the Due Process Clause). The Court's opinion also *sua sponte* raises the novel legal issue that Halkbank may waive arguments through the failure of its codefendant to raise them, because Halkbank funded the codefendant's defense. ECF No. 648 at 21–22. Besides having no legal or factual basis, this reasoning assumes that Mr. Atilla's counsel ignored their ethical duties of undivided loyalty to their client. *See* New York Rule of Professional Conduct 1.7 comment 13 ("A lawyer may be paid from a source other than the client . . . if . . . the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client."). The Court's opinion also erroneously ignores the entirety of unrefuted expert testimony on the basis that

some of that testimony purportedly includes legal conclusions. ECF No. 648 at 11–13; *Cosa Xentaur Corp v. Bow*, 2014 WL 1331030, at *16 (E.D.N.Y. Mar. 31, 2014) (noting that because courts are capable of parsing legal conclusions from factual assertions, striking a declaration was inappropriate).

And without repeating the arguments that have already been briefed, this case is unique in that the assigned judge has (1) given public comments endorsing a key portion of the government's theory of the case based on extrajudicial information; (2) participated in a media interview reiterating his viewpoint; (3) participated in a media interview while this case was pending before him; and (4) repeatedly relied on media articles in making judicial decisions. Leading experts in the areas of Turkish history and legal ethics have offered opinions showing that these actions, individually and taken together, create an appearance of partiality. Moreover, the Second Circuit has "long . . . taken the position that there are few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself." *In re IBM*, 618 F.2d 923, 926 (2d Cir. 1980).

At the very least, Halkbank has presented a substantial case on a serious legal question. In light of the below-described equities weighing in favor of further review, Halkbank has shown a sufficient likelihood of success on the merits.

Irreparable Harm. Section 455(a) "concerns the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted." *In re Kensington Int'l Ltd.*, 368 F.3d 289, 302 (3d Cir. 2004) (internal citation and quotation marks omitted). The irreparable-harm requirement thus is easily satisfied when a party seeks mandamus review of a denied recusal motion in a criminal case. *See Berger v. United States*, 255 U.S. 22, 36 (1921); *accord Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003)

("When the relief sought is recusal of a disqualified judicial officer, however, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable." (citing *Berger*, 255 U.S. at 36)). Halkbank therefore faces severe irreparable harm if it is forced to continue defending itself in this case before the assigned judge.

Harm to Others. A stay would not harm other parties in this case. First, because a stay would merely preserve the status quo, there would be no appreciable harm to the government. *See Citigroup Glob. Markets Inc.*, 673 F.3d at 168. Second, the government relies upon the same allegations now as it did to indict Zarrab in 2016. Having indicted Halkbank in late 2019, the government would be hard-pressed to argue now that it is in need of expeditious resolution of the case. Third, because "criminal justice is a shared responsibility" between defense lawyers, judges, and prosecutors, the government has a strong interest in ensuring that this case proceeds before a judge who is perceived to be fair. *In re Al-Nashiri*, 921 F.3d 224, 239 (D.C. Cir. 2019). Although the specific prosecutors litigating this case may not feel as such, it is nonetheless in the government's interest for the case to be stayed until the Second Circuit has determined whether an appearance of partiality exists. *See id.* (reminding the government of its interest).

Public Interest. The public has a strong interest in appellate review of § 455 motions, because such review "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988). This advances the public's interest in impartial justice. *See id.* Indeed, there may be no higher public interest than ensuring that criminal trials—where individuals are societally condemned and deprived of liberty and property—are administered by impartial judges. "An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in

the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). That interest is particularly acute when the stakes of the case are high. *In re Al-Nashiri*, 921 F.3d at 241. Although the public has an interest in the prompt resolution of criminal matters, that interest must yield to "the hefty burdens that would be shouldered by both [the defendant] and the public were [the case] to proceed under a cloud of illegitimacy." *Id.* Given that Halkbank stands accused in a case that threaten its very existence, the public's interest in removing the appearance of a "cloud of illegitimacy" is extremely high. The public also has an interest in efficient use of judicial resources. Should the Second Circuit grant mandamus, any issues decided by this Court will need to be relitigated before the new judge, leading to a waste of scarce judicial resources.

The Court has made clear that it does not believe Halkbank's mandamus petition is likely to succeed. However, in light of the unrefuted testimony from two leading experts and case law showing the thorny issues presented by judges' public comments, it is almost indisputable that Halkbank has presented a substantial case on the merits of a serious legal question. Coupled with the unquestionably irreparable harm that Halkbank faces and all parties' strong interest in ensuring the fair administration of criminal trials, these issues demonstrate that a stay is warranted pending resolution of Halkbank's mandamus petition.

CONCLUSION

For these reasons, Halkbank respectfully requests that the Court stay all proceedings, including all case deadlines, pending resolution of Halkbank's petition for a writ of mandamus from the Second Circuit, which it will file by September 3, 2020.

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Respectfully submitted,

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