No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE BRANTLEY, Applicant

v.

UNITED STATES OF AMERICA, Respondent

EMERGENCY MOTION FOR A STAY PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIAN D. POE
Texas Bar No. 24056908
The Bryce Building
909 Throckmorton Street
Fort Worth, Texas 76102
Telephone: 817-870-2022
Facsimile: 817-977-6501
Email: bpoe@bpoelaw.com
COUNSEL FOR APPLICANT
LONNIE BRANTLEY

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TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

For the reasons that follow, Applicant Lonnie Brantley requests a stay of an order of the Magistrate Court ordering the sale of his real property pending appeal of that order in the Fifth Circuit Court of Appeals.

Orders Below

The original order of the Magistrate Court is entitled *Order Partially Granting United States of America's Motion for Finding Default and/or Resentencing, Avoidance of Fraudulent Transfers, the Sale of Real Property, and Increased Payment Schedule and Denying Defendant's Motion for Extension of Time*, which was entered on May 21, 2018. *See* Attachment A. The Magistrate Court's Order denying Applicant's motion to stay that order is entitled *Order Denying Defendant's Motion for Stay or Injunction Pending Appeal of the Court's Order Docketed as ECF Document 92*. *See* Attachment B. The Fifth Circuit order denying a stay pending appeal is reproduced as Attachment C.

Jurisdictional Statement

This Court has jurisdiction under 28 U.S.C. § 1651(a).

Facts

In 2009, Brantley purchased an entity known as R.H. Lending, Inc. ("RHL"), which was a mortgage banker authorized to underwrite FHA mortgages. In March 2011, HUD initiated an audit of RHL's FHA mortgages. As a result of this audit, Brantley and RHL was assessed a civil

penalty of $295,500.00 for alleged violations, which was agreed to pursuant to a settlement agreement dated on or about June 12, 2013 and was thought to be a "full and final release" of any HUD violations.

On or about December 19, 2013, HUD alleged that RHL was in default of the previous settlement agreement based upon RHL's failure to provide monitoring reports by the previous month. RHL and Brantley vehemently denied the allegation of violation, based on confusion regarding HUD procedures, and HUD's delay in responding to RHL's inquiries regarding those procedures. HUD later alleged additional violations and ultimately assessed RHL an additional civil penalty of $300,000. The settlement agreement between HUD and RHL memorializing this penalty was entered on or about July 8, 2014, which was again believed to be a "full and final release" concerning any HUD violations.

While RHL and Brantley were in the middle of the first HUD audit, Brantley married Anna Victoria Brantley on February 9, 2012. On or about February 15, 2012, Brantley and his wife agreed to a postmarital property agreement ("the agreement") conveying the residence in question to Anna Brantley as her sole property. However, the agreement was not executed until February 15, 2015, when Brantley believed all HUD violations had been settled.

Brantley's belief that his problems were solved with HUD were short lived because on March 19, 2015 he was notified by his attorney that he was under criminal investigation by HUD. On or about June 2, 2015 the government provided Brantley with proposed plea papers to a violation pursuant to 18 U.S.C. § 1001, with restitution in the amount of $414,371.71. Brantley declined to plead to a felony offense, so the parties continued to negotiate. On or about November 4, 2015, plea papers were filed with the court, charging Brantley with the misdemeanor offense of making a false statement to HUD, in violation of 18 U.S.C. § 1012. In addition, the parties agreed

to restitution in the amount of $3,358,272.94. The Court accepted the plea agreement and sentenced Brantley to probation and ordered that he pay $1,500.00 per month until his restitution obligation has been met.

On October 6, 2017, the government filed a motion seeking to have Brantley's postmarital property agreement held as a fraudulent transfer and an order allowing the government to market and sell the Brantleys' personal residence of more than 17 years. A hearing was held on the issue on April 23, 2018 and the Court subsequently issued an order finding Brantley's postmarital property agreement was a fraudulent transfer and granted the government's motion to appoint a receiver to market and sell Anna Brantleys' house. *See* Attachment A.

On May 30, 2018, Brantley filed notices of appeal regarding the Court's order, and sought a stay or injunction pending appeal regarding the marketing and selling of the Brantleys' residence. On June 15, 2018, the Court denied Brantley's motion stating in a two-page opinion that:

> Brantley [had] not made a strong showing of likelihood of success on the merits for the reasons set forth by the Government in its response. In addition, as to the last three factors, while Brantley may suffer some irreparable harm by the forced sale of his residence, such harm is outweighed by the harm to HUD, the victim in this case, and the public interest if Brantley is allowed to continue to pay an expensive mortgage, high utility bills, and property taxes when such money should go to paying Brantley's restitution imposed as a result of Brantley pleading guilty to a misdemeanor criminal offense.

Attachment B (Doc. No. 101.)

Brantley sought emergency relief from the Fifth Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 8(a)(2). The Court of Appeals denied Brantley's request in a short order without comment. *See* Attachment C.

Legal Analysis and Authorities

A stay or injunction pending appeal is part of the "traditional equipment for the administration of justice." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 9-10 (1942). The Rules

of Federal Procedure indeed allow for this mechanism. *See* Fed. R. App. P. 8(a)(2). Generally speaking, there are four factors to consider in determining whether to say an order: 1) whether the movant has made a showing of likelihood of success on the merits; 2) whether the movant has made a showing of irreparable injury if the stay is not granted; 3) whether granting of a stay would substantially harm other parties; and 4) whether granting of a stay would serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Each of these factors favor granting a stay of the Magistrate Court's order, and the Fifth Circuit panel erred in not doing so. These factors are addressed separately below:

1. **Brantley can show that his appeal has a likelihood of success on the merits.**

In seeking a motion for a stay on injunction pending appeal, the "likelihood of success remains a prerequisite in the usual case and only if the balance of equities (i.e. consideration of the other three factors) is heavily tilted in the movant's favor will [the court] issue a stay in its absence." *United States v. Transocean Deepwater Drilling, Inc.*, 537 Fed. Appx. 358, 361 (5th Cir. 2013) *citing Ruiz v. Estelle (Ruiz II)*, 666 F.2d 854, 856-57 (5th Cir. 1982). However, "the movant need not always show 'probability' of success on the merits." *Ruiz v. Estelle (Ruiz I)*, 650 F.2d 555 (5th Cir. 1981). At the time Brantley married his wife in February 2012, he was earning approximately $1 million a year as the CEO and Director of Operations of RHL. His ownership interest in RHL and its assets were considered separate marital property in the State of Texas. In a move to provide comfort and security to his new bride, Brantley agreed to provide his wife with some assets of her own, by means of transferring ownership of the residence to her. At the time this agreement was negotiated, Brantley never envisioned that he would ultimately lose his business, be charged with a crime, and owe millions of dollars in restitution. However, Brantley was in the middle of a HUD audit and did not want to execute the agreement out of fear it would

be seen as a fraudulent transfer. Due to this fear, Brantley and his wife waited until Brantley and RHL had entered into a settlement with HUD.

The government advanced a fraudulent transfer theory, which the Magistrate accepted, requiring that the government prove "*either* (1) that the transfer was made with actual intent to hinder, delay, or defraud a creditor; *or* (2) that the transfer was made by an insolvent debtor without receiving adequate consideration." Attachment D (Government's Motion) (internal citations omitted)). The government's theory (and the magistrate court's ultimate ruling) is flawed based upon a misunderstanding of the timeline of events in this case.

Brantley neither intended to defraud a creditor nor was he made insolvent by the agreement. The Court's order presumes that the "creditor" in this scenario was HUD. However, at the time the agreement was executed, Brantley and HUD had settled the civil action HUD had against RHL and Brantley. The record is devoid of any evidence to suggest that Brantley knew that he was under criminal investigation at the time this agreement was executed. In reality, Brantley wasn't notified that he was under criminal investigation until a month following the execution of the agreement. Therefore, at the time the agreement was executed, HUD was not a creditor.

The agreement was a fair trade and did not make Brantley insolvent, nor does the government provide any financial analysis to prove this point. Instead, the government incorrectly argues Brantley *knew* he had defrauded HUD of over $3.3 million at the time the agreement was executed. This bald assertion by the government ignores the fact the government itself supported a $414,000 restitution amount in June 2015. Ignoring this crucial fact allows the government to impermissibly impute knowledge upon Brantley at the time the transfer occurred, relying on *United States v. Loftis*, 607 F.3d 173, 177-78 (5th Cir. 2010) (stating the defendant "should have reasonably believed that he was incurring debts beyond his ability to pay when he defrauded [his

victims] of millions of dollars"). In reality, however, the government obtained $595,500 in civil penalties from RHL and Brantley by the time the agreement was executed, and approximately four months after the agreement was executed, sought to obtain a plea agreement where the government-agreed restitution in this case was only approximately $414,000. When the agreement was executed, Brantley made hundreds of thousands of dollars a year,[1] solely owned RHL, owned commercial property, maintained his own retirement and bank accounts, and had various other assets. These assets were ultimately sold and the proceeds used as payment toward the restitution. The cost of defending himself in a criminal case cost him dearly and Brantley never envisioned being held jointly responsible for over $3 million in restitution.

The Magistrate employed a flawed analysis in determining that Brantley's agreement with his wife constituted a fraudulent transfer. Accordingly, Brantley's arguments on appeal have merit and he has shown more than a likelihood of success. In addition, the remaining three factors weigh heavily in his favor.

2. Failing to grant a stay will cause irreparable injury to Brantley and his family.

The residence at issue in the Magistrate's order is the separate marital property belonging to Anna Brantley, the Brantley family's primary residence, and the only home Brantley's children have ever known. As a result, there are two issues at stake. First, with regard to its status as the wife's separate property, Brantley concedes that his wife's equity in the home could, in theory, still be protected should the home be sold, as long as the proceeds are deposited into an interest-bearing account with the court. However, the second issue in this matter, though less concrete, is the fact that Brantley's children will be stripped of their home. Should the family be forced to move and then Brantley prevails on appeal, the damage will have already been done. The family

[1] It should be noted that according to Brantley's Federal Income Tax Returns, his total income for 2012 was $1,153,047. For 2013, Brantley's total income was $869,459.

will only be left with the memories of the home and the memories of the government's improper seizure and selling of the property. To allow an improper sale to be completed while Brantley is prohibited from obtaining a mortgage on this home, or on any replacement home, creates an unrepairable toll on the family.

The government has rebuffed Brantley's efforts to settle regarding his wife's home. This home means everything to Brantley's family and losing it will essentially eviscerate the entire point of the appeal. It is impossible to see how a victory on appeal (without a stay) will accomplish any of these goals. *See Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979) ("Appellants' right of appeal here will become moot unless the stay is continued pending determination of the appeals."). Further, no other relief will prevent Brantley's appeal from becoming moot. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (a case is not moot where "a court can fashion *some* form of meaningful relief") (emphasis in original). The potential for irreparable harm to the Brantleys is clear and heavily weighs in favor of granting a motion for stay or injunction pending appeal.

3. Granting a stay or injunction in this matter will not harm any other parties.

No other parties would be harmed by the granting of a stay pending appeal in this matter. Brantley has always met his $1,500 a month restitution obligation in this matter and agrees to continue to pay the recently increased amount of $2,059. Whether the home is sold now or after an adverse ruling by the appellate court will not increase the amount of money Brantley pays each month. The equity in the home will continue to be protected by the lien the government has on the property. Therefore, it is not going anywhere, nor can Brantley encumber it with any debt that devalues the government's current position.

As noted above, the Court's order stated as part of the basis for its ruling, that both HUD and the public interest would be harmed if Brantley were allowed to continue to pay "expensive mortgage, high utility bills, and property taxes". The Magistrate's conclusion about these "facts" is not only devoid of a basis in the record, it is belied by logic – the Consumer Credit Protection Act imposes a 25% cap on garnishment of a debtor's weekly disposable earnings. *See* 15 U.S.C. § 1673. Thus, the government is limited in the amount of money that it can take from Brantley's monthly income, but the Magistrate's analysis ignores this fact and assumes (wrongly) that Brantley will not be able to pay. Such a basis for any finding of harm to HUD (and the public generally) is unfounded and should not have served as a reason to reject Brantley's request for a stay.

The government half-heartedly argues that HUD will be injured by a stay in this case. This argument *might* have some validity if the equity in the Brantley home sufficiently covered the balance of the restitution owed. However, the restitution amount far exceeds the equity. In all likelihood, the government will be seeking restitution from Brantley long after his probation expires even if the home was liquidated today. So, this begs the question, of "what's the harm in making sure the Court got it right before forcing someone from their home?"

Based on the foregoing, this factor weighs heavily in favor of granting a motion for stay or injunction pending appeal.

4. Granting a stay serves the public interest.

Families should not be wrongfully kicked out of their home and forced to live somewhere else. There is a public interest in seeing that justice is accomplished through every step of the legal system. As a result, public interest is only served by waiting until the unlikely event that Brantley loses on appeal before ordering the sale of the Brantleys' residence. The government and the

magistrate court are convinced the public interest is not served "if Brantley is allowed to continue to pay an expensive mortgage, high utility bills, and property taxes when such money should go to paying Brantley's restitution imposed." Attachment B at 2. Again, as stated above, this reasoning ignores the fact that federal law imposes a 25% garnishment cap on Brantley's disposable earnings. *See* 15 U.S.C. § 1673. Regardless of how Brantley chooses to spend his disposable income, whether it be to live in a large home or not, the government is restricted to only being able to collect 25% of his disposable earnings each week. Therefore, in reality the government cannot expect to collect any additional restitution if Brantley and his family are evicted from their home. As such, this factor weighs heavily in Brantley's favor in granting a motion for stay or injunction pending appeal.

5. Brantley is not required to post a bond in order to obtain a stay.

In responding to Brantley's original motion to stay, the government incorrectly stated "Lonnie cannot get a stay without posting a bond as required." (Doc. No. 98 at 2.) Federal Rule of Criminal Procedure 38(e)(2) provides that a court *may* issue an order requiring the defendant to post a bond. Likewise, Federal Rule of Civil Procedure 62(d) provides "the court *may* suspend, modify, restore, or grant an injunction on terms for bond *or other terms that secure the opposing party's rights.*" (emphasis added). Neither rule requires that a bond be posted. The rule promulgated by the courts is simply that a stay is permitted as long as the court provides for the security of the judgment creditor. *See Peacock v. Thomas*, 516 U.S. 349, 359 n. 8 (1996).

Brantley failed to discuss the issue of bond or security for the property in his original motion simply because it is a non-issue. First, the government maintains a lien on the property, which prevents the property from being transferred or further encumbered; thereby providing the adequate security discussed in *Peacock*. Second, as a condition of his probation, Brantley is

prohibited from obtaining any new debt. To do so would violate his probation and subject him to a possible prison sentence.[2] Last, if Brantley had sufficient funds lying around to post a supersedeas bond, then the government would also be seeking to obtain those funds to satisfy the restitution order.

An appellate court is free to exercise discretion in determining whether adequate security has been provided. *See Poplar Grove Planting and Refining co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) ("if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise discretion to fashion some other arrangement…which would furnish equal protection to the judgment creditor"). Such adequate security already exists via the government's lien on the property. In fact, the Magistrate Court stated that it "disagre[ed] that such a bond is a requirement" when considering the facts in this case. Attachment B at 2 n.2.

[NOTHING FURTHER ON THIS PAGE]

[2] It should be noted that Brantley presented a proposal to the government (and the Court), which would have resulted in a complete buy out of all of the equity in the home. This proposal was ultimately rejected.

Conclusion

Brantley has appealed the Magistrate Court's forced-sale order and stands a good chance of prevailing in that appeal. Maintenance of the status quo pending that appeal would not harm the government and will prevent Brantley and his family from suffering irreparable harm from the sale of the family home. For these reasons, both the Magistrate Court and the Court of Appeals erred in refusing to grant Brantley's requested stay. Brantley therefore asks this Court to impose a stay pending his appeal in the Fifth Circuit.

Respectfully submitted,

BRIAN D. POE
Texas Bar No. 24056908
The Bryce Building
909 Throckmorton Street
Fort Worth, Texas 76102
Telephone: 817-870-2022
Facsimile: 817-977-6501
Email: bpoe@bpoelaw.com

CERTIFICATE OF SERVICE

I certify that true copies of the Emergency Motion For A Stay Pending Appeal was served by first-class mail on those listed below, on July 3, 2018.

Mark J. Tindall
Assistant United States Attorney
1100 Commerce St., Third Floor
Dallas, Texas 75242-1699

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

BRIAN D. POE