RECORD NO. 12-2178

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF , *et al.*,

Plaintiffs-Appellees,

v.

MOHAMED ALI SAMANTAR,

Defendant-Appellant.

UNITED STATES OF AMERICA

Party-in-Interest.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Judge Leonie M. Brinkema

OPENING BRIEF OF APPELLANT

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December 20, 2012

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-2178 Caption: Bashe Abdi Yousef, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Mohamed Ali Samantar
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: Joseph Peter Drennan Date: 10/24/2012

Counsel for: Mohamed Ali Samantar

CERTIFICATE OF SERVICE

****

I certify that on 10/24/2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Joseph Peter Drennan
(signature)

10/24/2012
(date)

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JURISDICTIONAL STATEMENT

The District Court purported to exercise subject matter jurisdiction over the instant matter under 28 U.S.C. § 1350, and, by Order entered on 15 February 2011, the District Court struck your Appellant's claim of common law immunity from suit (J.A. at 119[1]). Your Appellant, *viz*., Mohamed Ali Samantar (hereinafter referenced, variously, *qua* "Appellant" or "Samantar"), then interposed timely, on 15 March 2011, a Motion for Reconsideration of the said Order, denying common law immunity to Samantar, which motion was denied by the District Court on 1April 2011 (J.A. at 120). Samantar then timely interposed, on 29 April 2011, hisappeal from the order(s) striking his claim of common law immunity from suit,which appeal was docketed with this Honorable Court *qua* Record No. 11-1479 (J.A. at 22), which appeal, upon briefing to this Honorable Court, and oral argument, heard on 16 May 2012, culminated in this Honorable Court's Judgment Order of 2 November 2012, accompanied by a published, twenty-three page memorandum opinion, *Yousuf v. Samantar*, 699 F. 3d 763 (4th Cir. 2012), affirming the District Court's said Order striking your Appellant's common law immunity claim (J.A. at 248 - 249). However, whilst the District Court's aforesaid Order striking your Appellant's common law immunity claim was on appellate review by

1 All references to "J.A." denote the Joint Appendix in respect of the instant appeal, filed on even date.

this Honorable Court, the District Court purported to retain jurisdiction over the cause *sub judice*, and, upon a putative default and subsequent damages hearing, the District Court purported to enter default judgment against your Appellant and in favor of your Appellees, as per two, corresponding orders entered on 28 August 2012, *viz*., an Order (J.A. at 213 - 214) accompanying a Memorandum Opinion, *viz*., Yousuf v. Samantar, 2012 WL 3730617 (E.D. Va. August 28, 2012) (J.A. at 175 – 238), and a coeval Default Judgment Order (J.A. at 215). Samantar, thereupon interposed timely, *id est*, on 24 September 2012, a Notice of Appeal from the said 28 August 2012 orders (J.A. at 216 – 220). Accordingly, this Honorable Court has jurisdiction over the instant appeal pursuant to the provisions codified at 28 U.S.C., § 1291.

QUESTION PRESENTED

The question presented upon the instant appeal is whether, *vel non*, the District Court was divested of jurisdiction over the case *sub judice*, upon your Appellant's noting of an appeal to this Honorable Court of the District Court's Order, purporting to strike your Appellant's claim of common law immunity from suit, such that the District Court was bereft of jurisdiction to conduct a damages hearing, and, purportedly, enter a judgment on civil liability and for damages, whilst said appeal remained under consideration by this Honorable Court.

STATEMENT OF THE CASE

On 10 November 2004, your Appellees *cum* Plaintiffs, filed a Complaint in the United States District Court for the Eastern District of Virginia. The Complaint alleged that Samantar violated the human rights of residents of Somalia, giving rise to liability under the Torture Victim Protection Act of 1991 (the "TVPA"), 28 U.S.C. § 1350 note, and the Alien Tort Statute, 28 U.S.C. §1350, whilst Samantar served, variously, as Prime Minister, First Vice President, and Defense Minister of Somalia from January 1980 to September 1990.

Samantar filed a motion to dismiss the Complaint on 1 December 2004. (J.A. at 7) [Document 3][2] At a hearing on the motion on 7 January 2005, *inter alia*, the District Court stayed the proceedings, before ruling on the motion, to enable the United States Department of State ("State Department") to make its views known to the District Court on Samantar's eligibility for immunity. (J.A. at 9) [Document 25].

A little over two years later, in the face of State Department inaction, the District Court reinstated the case to the active docket. With leave of court, the Plaintiffs filed a Second Amended Complaint. (J.A. at 14; 49-86) [Document 82] On 29 March 2007, Samantar moved to dismiss the Second Amended Complaint.

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2 All references herein to "Document" denote the corresponding District Court Docket No(s). in the case *sub judice*.

(J.A. at 15) [Document 89]. Samantar argued, principally, that Samantar enjoyed immunity from Plaintiffs' claims under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq.* (hereinafter referenced *qua* "FSIA") and common law, that Plaintiffs' claims were time barred, and that Plaintiffs had improperly failed to exhaust their legal remedies in Somalia. (J.A. at 15) [Document 90, *passim*].

On 27 April 2007, at the hearing on Samantar's aforesaid motion to dismiss, the District Court, in open court, without reaching Samantar's other arguments, granted Samantar's motion, on the basis that Samantar enjoyed immunity under the FSIA from Plaintiffs' claims. (J.A. at 16) [Document 102] The District Court thereafter issued its opinion, and judgment was entered in favor of Samantar, on 1 August 2007. *Yousuf v. Samantar*, 2007 WL 2220579 (E.D. Va. 2007) (J.A. at 16) [Document 107]

Plaintiffs appealed the decision to this Honorable Court. (J.A. at 17) [Document 109] This Honorable Court reversed the decision of the District Court in a decision issued 8 January 2009. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) [Document 111]. This Honorable Court found that FSIA did not apply to individuals and that, even if the FSIA did apply to individuals, it did not shield a former official such as Samantar from suit.

The United States Supreme Court, on 30 September 2009, granted a *writ of certiorari* to Samantar. *Samantar v. Yousuf*, 130 S. Ct. 49 (2009). Following oral argument, the Court, in a decision dated 1 June 2010, sustained the decision of this Honorable Court. *Samantar v. Yousuf*, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010). The Supreme Court confirmed the conclusion of this Honorable Court that the FSIA did not codify official immunity and remanded the case to the District Court. The following excerpt of the Opinion of the Court, per Justice Stevens, emphasized the limited scope of the Court's decision, *viz.*:

> We emphasize, however, the narrowness of our holding. *Whether [Samantar] may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed by the District Court on remand.*

Id., 130 S. Ct. at 2292-3 (Emphasis added)

Alas for Samantar, on remand, the District Court did not decide his entitlement to immunity under the applicable common law. To be sure, upon remand, Samantar filed, on 29 November 2010, a Motion to Dismiss ((J.A. at 20) [Document 138]), in which, *inter alia*, he, essentially, renewed his claim of immunity from suit under common law ((J.A. at 20) [Document 139]), and your Appellees opposed said motion. (J.A. at 20) [Document 143] However, before the said motion came on for a hearing, the United States of America, on 14 February 2011, filed a Statement of Interest (J.A. at 87-100), concluding that Samantar was

not immune from suit. The Statement of Interest indicated, *ex cathedra*, that, "[b]ecause the Executive Branch is taking an express position in this case, the Court should accept and defer to the determination that [Samantar] is not immune from suit."[3] *Id.* at 92 As support for its conclusion that Samantar is not entitled to immunity, the Statement of Interest purported to rely, *inter alia*, on the following, *viz*.:

1) "In the absence of a recognized government authorized either to assert or waive [Samantar's] immunity or to opine on whether [Samantar's] alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here."

2) "That determination has taken into account the potential impact of such a decision on the foreign relations interests of the United States."

3) "The Executive's conclusion that Defendant is not immune is further supported by the fact that Defendant has been a resident of the United States since

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3 The Statement of Interest cites the Supreme Court Opinion in *Samantar*, 130 S. Ct. at 2284, and the case of *Isbrandsten Tankers, Inc. v. President of India*, 446 F. 2d 1198, 1201 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) in putative support of its proposition of absolute deference. However, as Samantar respectfully asserted in his brief in the antecedent appeal to this Honorable Court (Record No. 11-1149), neither the holdings nor the *dicta* in either of the said decisions supports such a sweeping proposition (*see*: Section 1 of the Brief of the Appellant in 11-1149, at pp. 8 -12).

June 1997." (J.A. at 95, ¶¶13 and 14)[4].

The District Court simply acquiesced in the putative determination by the Executive Branch by issuing an Order [Document 148], the following day, *viz.*, 15 February 2011, which contained, *inter alia*, the following pronouncement, *viz.*:

> "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's sovereign immunity defense is no longer before the Court . . . ." (J.A. at 101).

Samantar thereupon timely moved the District Court for a reconsideration of its Order, striking his defense of common law immunity (*Id.* at 21) [Document 150]. However, at a hearing on the said Motion for Reconsideration, held on 1 April 2011 (J.A. at 102-116), the District Court denied said Motion[5]. (J.A. at 120) [Document 158]

On, 29 April 2011, Samantar appealed to this Honorable Court from the Order denying his common law immunity from suit. (J.A. at 117-120)

Notwithstanding Samantar's appeal, the District Court did, on 3 May 2011, enter a Scheduling Order, which, *inter alia*, set 9 September 2011, as the close of discovery, with a final pretrial conference set for 15 September 2011 (J.A. at

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4 It is also noteworthy that the first page of Statement of Interest contains the following statement, at footnote #1 thereof: "The United States expresses no view on the merits of Plaintiffs' claims . . . ." (J.A. at 87).

5 At the said 1 April 2011 hearing before the District Court, that court indicated, *inter alia*, that the Executive Branch is ". . . entitled to deference in this case" and that "the government's position on sovereign immunity . . . is sound." (J.A. at 103)

22)[Document 161]. Accordingly, Samantar filed a Motion to Stay with the District Court on 13 May 2011(J.A. at 22) [Document 162], and, on 18 May 2011, the District Court entered an Order, denying the Motion to Stay and characterizing the instant appeal, *ipse dixit*, as "frivolous" (J.A. at 121-123) [Document 168] .

On 18 June 2011, Samantar filed a Motion to Stay the District Court proceedings with this Honorable Court, and, upon the filing of an Opposition thereto by your Appellees, on 27 June 2011, said motion was denied, without comment or explanation, on 8 July 2011 (J.A. at 221-222). Samantar went on to file his Brief in the subject antecedent appeal to this Honorable Court on 8 August 2011, and, on 3 October 2011, your Appellees filed their Response Brief in respect of that appeal. Thereafter, the United States was granted leave to intervene *qua amicus curiae* in the said antecedent appeal, and, on 24 October 2011, the United States filed its brief in such appeal. Meanwhile, the District Court purported to require, *inter alia*, the parties to proceed with discovery, in comportance with the Scheduling Order, albeit with certain modifications and extensions along the way, and, thence, with dispositive motions.

On 9 February 2011, upon the issuance by this Honorable Court on 8 February 2011, of a Tentative Session Assignment, Samantar renewed his motion to stay the proceedings in the District Court (J.A. at 39) [Document 311], which proceedings had been continuing apace. Then, upon a hearing on 15 February

2011, addressing, *inter alia*, said Renewed Motion to Stay (J.A. at 125-156, *passim*), the District Court, whilst ultimately denying the motion (J.A. at 124) [Document 326], initially suggesting that it would have been inclined to grant the motion but reprobated, incongruously, the renewed request for a stay because it (the District Court) had stayed the cause once before in the context of the appeal of its earlier ruling dismissing the cause on the basis of averred statutory immunity, as if there could be no reimposition of a stay, and, perforce, no divestiture of its jurisdiction, during appellate review of the District Court's order striking Samantar's common law immunity from suit defense.[6] The District Court then

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6 The District Court articulated such position by erroneously conflating the discrete claims of statutory immunity from suit and *common law* immunity from suit thus:

> THE COURT: ". . . If this were the first time in which immunity was being considered in this case, I would be inclined to grant you the stay, but as you know, the issue about immunity, at least a significant aspect of the immunity claim, has already been fully briefed, addressed by the Fourth Circuit and the United States Supreme Court." (J.A. at 147)

Verily, the District Court had utterly misconstrued the Supreme Court's holding in *Yousuf v. Samantar*, as may be readily discerned by beholding the proviso ingravidated in the coda to Justice Stevens' majority holding, *viz.*:

> "We emphasize, however, the narrowness of our holding. *Whether [Samantar] may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed by the District Court on remand.*"
>
> 130 S. Ct. at 2292-2293 (emphasis supplied).

retreated from its earlier characterization of the subject antecedent appeal as "frivolous", as articulated in the following excerpt from the District Court's pronouncements from the bench at the said hearing, *viz.*: ". . . I feel quite confident that maybe the word 'frivolous' is too strong a word but the likelihood of success, let's put it that way, the likelihood of (Samantar's) succeeding on (the antecedent) is extremely in my view slight . . .", and went on to indulge in an inapposite balancing of equities analysis for a stay, apropos to the standards to be applied, not for an appeal from a denial of a motion for a stay in the context of an appeal of a claim of common law immunity from suit, as is the case in the cause *sub judice*, but, rather, from the wholly inapposite balancing of relative harms standard to be applied in respect of judging the appropriateness of a preliminary injunction ruling, adverting, cryptically, to the Supreme Court's holding in *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2D 249 (2008) – " . . . we're now really using a sort of a *Winter* a post *Blackwelder Winter*-type of analysis as to whether a stay ought to be granted . . . ." (J.A. at 148) The District Court then went on further to articulate its efforts to justify its reaffirmed declination of a stay of proceedings pending judicial review of its earlier striking of Samantar's defense of common law immunity from suit with the following demonstrably specious apologia, *viz.*:

> "While it's unusual for an immunity issue to be under consideration with the trial going forward, because, as I've said before, immunity has already been addressed once, the difference between common law immunity that's at issue in this particular appeal and the other immunity that we addressed is not in my view that legally significant, and again, the executive branch's position, I think, will carry great weight with the Fourth Circuit . . . ." (J.A. at 148-149)

Samantar then filed, on 15 February 2012, a Renewed Emergency Motion for a Stay of the District Court proceedings with this Honorable Court, and, on 17 February 2012, this Honorable Court, without elaboration, denied said Motion (J.A. at 223-224).

Upon the denial of Samantar's renewed Emergency Motion to Stay, Samantar did, on 19 February 2012, file a Voluntary Petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C., § 301 (In re: Mohamed Ali Samantar, Case No. 12-11085, before the United States Bankruptcy Court for the Eastern District of Virginia (Alexandria Division), and, did, on even date, file with the District Court, an advisory Suggestion of Bankruptcy (J.A. at 43) [Document 347], and, on 21 February 2012, the District Court entered an Order, which, in pertinent part, stayed the trial of the case *sub judice*, then set for that date. (J.A. at 44) [Document 349].On that same date, your Appellees, *qua* putative creditors or parties in interest, moved the Bankruptcy Court, on an emergency basis, for relief from the automatic stay, and, later on that date, *id est*, on 21 February 2012, upon a hearing, the Bankruptcy Court entered an order lifting the automatic stay under 11 U.S.C.,

§362, whereupon the District Court entered a corresponding order (J.A. at 44) [Document 351], resetting the District Court trial for 23 February 2012.

On 23 February 2012, his family sapped by having been put in the unfair and beleaguering position of having to defend an aggressive prosecution of proceedings by his aggressive politically motivated adversaries in the District Court proceedings, Samantar, beggared into bankruptcy and unable to proceed further with his defense in the District Court, elected to default in the District Court, as to liability and damages (J.A. at 45) [Document 353], summing up his position, through a Somali – English language interpreter thus:

> "What I say is I want this case – this court (*sic*.) to be stopped. The reason is to continue this proceeding, it needs to have some money, and I don't have any money. Because of that, I request to accept default, but that doesn't mean that, you know, I'm guilty or (that) I commit(ed) any crime."
>
> (J.A. at 164)

Following the District Court's having accepted Samantar's concession of default, the District Court conducted an *ex parte* damages hearing over two days and took the cause of damages under advisement. (J.A. at 45) [Document Nos. 354 & 355]. Thereafter, *id est*, on 9 March 2012, this Honorable Court formally calendared for oral argument the subject antecedent appeal (Record No. 11-1479), and, on even date, your Appellees deigned to file a meritless "Motion for Sanctions", purporting to invoke 28 U.S.C. § 1927, in a canting effort to saddle

undersigned counsel, as well as Samantar's bankruptcy counsel, with sanctions (J.A. at 46) [Document 359]. Bankruptcy counsel filed a verified Opposition to the said Motion (J.A. at 46) [Document 362], as did undersigned counsel (J.A. at 47) [Document 363], and the District Court proceeded, on 20 April 2012, to deny the Motion, eschewing any argument thereon. (J.A. at 46)

[Document 365].

This Honorable Court held oral argument in respect of the subject antecedent appeal (Record No. 11-1479) on 16 May 2012, and, at such oral argument, Samantar's undersigned counsel was heard, the "default" in the District Court notwithstanding, and, on 2 November 2012, in a twenty-three (23) page published decision, this Honorable Court affirmed the District Court's striking of Samantar's common law claim of immunity from suit (J.A. at 225-247) (*Yousuf v. Samantar*, 699 F. 3d 763 (4th Cir. 2012)), and entered a corresponding Judgment (J.A. at 248-249).

Meanwhile, on 28 August 2012, the District Court issued a thirty-eight (38) page Memorandum Opinion (J.A. at 175-212) purporting to find liability against Samantar, in tandem with an Order purporting to assess damages against Samantar for a sum totaling twenty-one million dollars ($21 million) (J.A. at 213-214), as well as a corresponding formal Default Judgment Order (J.A. at 215), from which orders Samantar timely filed on 24 September 2012 a Notice of Appeal to this

Honorable Court (J.A. at 216-220) – hence the instant appeal.

STATEMENT OF FACTS

Samantar served in various senior capacities in the Government of Somalia from 1976 to 1990: First Vice President and, in the President's absence, Acting President (January 1976 to December 1986); Minister of Defense (1971 to 1980 and 1982 to 1986); Prime Minister (January 1987 to approximately September 1990). During his tenure as Vice President and Defense Minister, Samantar performed various duties as a member of Somalia's executive authority, including conducting an official state visit to the United States during which he met with then Vice President George H. W. Bush, among other high-ranking officials. As Prime Minister, he also traveled to the United States, meeting in 1989 with Vice President Dan Quayle and Secretary of State James Addison Baker III. (J.A. at 15) [Document 90] (Samantar Affidavit (Exh. 1 to Memorandum of Law in Support of Samantar Motion to Dismiss the Second Amended Complaint)).

In 1991, after the collapse of the government of President Mohamed Siad Barre[7], Samantar sought temporary asylum in Kenya and then emigrated to Italy, where he lived openly from 20 February1991, to 25 June 1997. In June 1997, Samantar moved to the United States and took up his current residence in Fairfax,

7 Somali: *Maxamed Siyaad Barre*; Arabic: محمّد زياد بري).

Virginia. (*Id.*).

SUMMARY OF ARGUMENT

In a nutshell, upon Samantar's filing on 29 April 2011, of a Notice of Appeal Samantar appealed to this Honorable Court from the Order denying his common law immunity from suit. (J.A. at 117-120), the District Court was effectively divested of jurisdiction over the case *sub judice*, such that the District Court was bereft of jurisdiction to conduct further proceedings in the matter, including, not least, the assessment of a default against Samantar, the purported taking of evidence of damages, and, perforce, the entry of a judgment on liability and damages against Samantar, thus making the subject orders appealed from nugatory and void.

ARGUMENT

THE ORDER DENYING SAMANTAR'S DEFENSE OF COMMON LAW IMMUNITY FROM SUIT WAS IMMEDIATELY APPEALABLE AND SAMANTAR'S APPEAL FROM THAT ORDER DIVESTED THE DISTRICT COURT OF JURISDICTION OVER THE CASE SUB JUDICE

A. The Order Denying Samantar's Immunity Was Immediately Appealable.

Despite the interlocutory character of the Order striking from the cause *sub judice* Samantar's claim of common law immunity from suit (J.A. At 101), there can be no gainsaying that Samantar had the prerogative of noticing said Order for immediate appeal, as said Order represented a denial of Samantar's motion to

dismiss the complaint on the grounds of foreign sovereign immunity. Indeed, the Supreme Court, in 2010, suggested, in the context of affirming this Honorable Court's reading of the FSIA, overtly, that Samantar would have the opportunity to assert common law immunity from suit on remand, and, in no way, presaged or hinted at how such defense would be decided, recognizing " that the viability of a common law immunity defense was a 'matter [] to be addressed in the first instance by the District Court'". *Yousuf v. Samantar*, 699 F. 3d 763, 765 (4th Cir. 2012), quoting from *Samantar v. Yousuf*, 130 S. Ct. 2278, 2293 (2010).

Those circuit courts that have "considered whether a denial of a motion to dismiss on grounds of foreign sovereign immunity is an appealable collateral order have unanimously held that it is." *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007); *see*, *e.g.*, *Rux v. Republic of Sudan*, 461 F.3d 461, 467 (4th Cir. 2006) (noting that the denial of a motion to dismiss for lack of subject matter jurisdiction under the FSIA, 28 U.S.C. §§ 1602-1611, raises "an issue that is subject to interlocutory review"). In such regard, it bears mention that, at oral argument in respect of the subject antecedent appeal, held on 16 May 2012, both counsel for your Appellees (reference official USCCA4th oral argument recording at 16:10 – 17:20) as well as counsel for the United States (reference official USCCA4th oral argument recording at 42:25 – 42:55) concurred that this Honorable Court had jurisdiction over the subject antecedent appeal (Record No.

11-1179), under the collateral orders doctrine.

B. The Noting by Samantar of an Appeal to this Honorable Court From the Order Denying Samantar's Immunity Divested the District Court of Jurisdiction

"As a general rule, the filing of an appeal 'confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *Levin v. Alms and Assoc., Inc.*, 634 F.3d 260, 263 (4th Cir. 2011) (*quoting Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) and applying the principle to stay further district court proceedings upon the filing of a notice of appeal of an order denying a motion to compel arbitration); *see, also*: *Stewart v. Donges*, 915 F.2d 572, 576-78 (10th Cir. 1990) (applying the principle of divestiture to an appeal of an order denying a motion to dismiss based upon qualified immunity).

When an appeal is taken, as here, from an order denying a defendant immunity from trial, the divestiture of district court authority "is virtually complete, leaving the district court with jurisdiction only over peripheral matters unrelated to the disputed right not to have [to] defend the prosecution or action at trial." *Stewart*, 915 F.2d at 576. This divestiture would irrefragably encompass any proceedings to establish liability and assess damages, and would also certainly encompass the conduct and management of discovery on the issues to be raised at a trial from which Samantar contends his status makes him immune. *See, e.g., Ray*

v. United States, 2010 WL 2813379, *2 (E.D.N.C. 2010) (denying a motion to conduct discovery as to issues involved in an appeal).

C. Samantar's Appeal Was Not Frivolous.

The sole potentially applicable exception to the divestiture principle obtains where a district court certifies an appeal to be frivolous. *Management Sci. Am. Inc. v. McMuya*, 1992 WL 42893, *2 (4th Cir. 1992). Alas, in the instant case, upon considering Samantar's Motion to Stay, which followed his appeal from the Order denying his defense of common law immunity from suit, the District Court was, essentially, invited into error by your Appellees, who successfully persuaded the District Court, per their Opposition to the said Motion to Stay, filed herein on 18 May 2011 (J.A. at 23) [Document 166], deny Samantar a stay and to certify as "frivolous" the subject antecedent appeal (*Id*.). In the course of making its erroneous "certification", the District Court acceded, essentially, to the putative diktat of the Executive Branch, as articulated in the Statement of Interest of the United States, filed herein on St. Valentine's Day, 2011 (J.A. at 87- 100) [Document 147]. For all of the efforts of your Appellees to cast the District Court's denial of the Motion to Stay as having been based upon some sort of independent analysis and assessment by the District Court, the following excerpt from the District Court's subject 18 May 2011, Order, denying a stay of proceedings pending appellate review, makes it pellucidly clear that the District Court

apparently felt obliged to yield to a putative determination by the Executive Branch on the application of the common law, *viz*.:

> "Only the Executive Branch can determine whether a former foreign government official is entitled to common law immunity. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). ***In this case the State Department has determined that Samantar is not entitled to common law immunity."***

(J.A. at 122) (emphasis supplied).

Such abdication can be said to do offense to the principle of the separation of powers contained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), but, more to the point of the instant appeal, it apparently induced the District Court togo on to state in its subject ruling that ". . . "the (District) Court certifies the this appeal as frivolous . . . ." (J.A. at 122). However, in due course, as adverted to *supra*, the District Court, subsequently, altogether backtracked from such putative "frivolous" certification, and this Honorable Court has *never* characterized as "frivolous" Samantar's appeal from the 15 February 2011 Order striking from the instant case Samantar's claim of common law immunity from suit. To be sure, this Honorable Court did deny Samantar a stay of the District Court proceedings twice, *viz.*, on 8 July 2011 (J.A. at 221 -222), and, again, on 17 February 2012 (J.A. at 223 - 224) However, in neither instance did this Honorable Court spell out the rationale for such rulings. Rather, a host of factors suggest that this Honorable Court viewed Samantar's subject appeal as being anything but frivolous, *viz*.:

this Honorable Court granted leave to the United States to intervene in the instant case; requested that the parties be heard at oral argument; granted the request of the United States to be heard at oral argument; heard spirited and vigorous argument from counsel, ***including undersigned counsel***, at oral argument; and then issued an extensive, reported opinion of this Honorable Court, all of which occurrences operate so as to dispel any notion that the subject antecedent appeal was in any way susceptible of a "frivolous" appellation, either by this Honorable Court or otherwise. . Beyond that, it may also be observed that a careful consideration the warp and woof of the colloquies at the 16 May 2012 oral argument before this Honorable Court belie any notion or supposition that this Honorable Court in any way saw the subject, antecedent appeal as "frivolous", even if the reviewing panel ultimately ruled against Samantar on the common law immunity from suit question. As it happened, the District Court, after having denied Samantar a stay of proceedings in the District Court whilst Samantar's common law immunity remained on appeal to this Honorable Court, did, on the occasion of a hearing on Samantar's renewed motion to stay, held on St. Valentine's Day, 2012, belatedly, retreat from the earlier "frivolous" certification, and, as it were, revisited the certification by stating, *inter alia*: ". . . I feel quite confident that maybe the word frivolous' is too strong a word. . . ." (J.A. At 148). In fact, such an analysis of

issues and concerns aired during the course of the 16 May 2012 oral argument before this Honorable Court, in a sense, yields a presagement of the instant appeal, ith successive concerns articulated, albeit somewhat subtly, by the panel, *passim*, at the said oral argument, as to whether, *vel non*, there existed jurisdiction in the District Court to continue to carry on proceedings in pursuit of issues relating to liability and damages.

Moreover, as referenced *supra*, it is especially noteworthy to recapitulate the fact that, in the course of ruling on Samantar's renewed motion to stay, even the District Court backpedaled from its earlier putative certification of the subject antecedent appeal as "frivolous". As stated *supra*, the District Court, on the occasion of a hearing on Samantar's renewed motion to stay, held on St. Valentine's Day, 2012, tellingly, if belatedly, retreated from that Court's earlier "frivolous"

certification, as it, as it were, revisited the certification by stating, *inter alia*: ". . . I feel quite confident that maybe the word 'frivolous' is too strong a word. . . ." (J.A. at 148).

For its part, this Honorable Court, however, has not made nary such a certification, and, respectfully, could not reasonably make any such certification here. An appeal can be considered frivolous only if "[none] of the legal points [is] arguable on their merits." *Anders v. State of Cal.*, 386 U.S. 738, 744 (1967)

(considering frivolousness for purposes of eligibility for the assistance of no-cost appellate counsel); *see, also*: *Neitzke v. Williams*, 490 U.S. 319, 322-23, 325 (1989) (An appeal is frivolous when it lacks an arguable basis in law or fact); *accord*: *Whitner v. United States*, 2012 WL 5417912, 1 (4th Cir. (E.D. Va.) November 7, 2012).

D. The District Court's Failure to Take Cognizance of its Divestment of Jurisdiction Compromises Samantar's Right of Full Appellate Review.

As Samantar's pleadings throughout the appellate process confirm, the denial of immunity to Samantar raises important issues of the separation of powers and of the scope of the right to common law immunity in the absence of any assertion by the Executive Branch of any harm to United States foreign policy interests from a recognition of that immunity. Not only are these points arguable on their merits, but Samantar earnestly believes, respectfully, that they were wrongly decided by this Honorable Court in its 2 November 2012, Memorandum Opinion (*Yousuf v. Samantar*, 699 F. 3d 763 (4th Cir. 2012)), and, accordingly, Samantar is considering the option of filing a petition for a writ of *certiorari* with the Supreme Court of the United States, in order to pursue further appellate review of the adverse determination on the common law immunity from suit issue implicated in the subject antecedent appeal. However, needless to say, the improper continuation of the proceedings in the District Court, to say nothing of

the pendancy of two ancillary, adversary proceedings involving Samantar in the Bankruptcy Court[8], all of which having been arguably wrought by the improper certification of the subject antecedent appeal by the District Court as "frivolous" and have undeniably handicapped Samantar's efforts, *inter alia*, to pursue full appellate review of the instant appeal as well as the appeal of the subject underlying Order(s), denying his claim of common law immunity from suit, a critical defense that has never been waived.

An assay of the *stare decisis* in the matter of divestiture of jurisdiction reveals that this Honorable Court has recently addressed the applicable standards to be applied in the context of the denial of a motion to compel arbitration. That case, *viz.*, *Levin v. Alms and Associates, Incorporated*, 634 F. 3d 260 (4th Cir. 2011), sets forth clearly and cogently the standards for divestiture which embrace all of the principles embodied in the other cases referenced above which deal with this area of the law. *Accord: General Electric Capital Corporation v. Union Corp. Financial*

8 On 23 August 2012, your Appellees, *qua* putative creditors, filed an Adversary Proceeding against Samantar, styled as *Yousuf, et alii, v. Samantar*, Adversary Proceeding No. 12-0156 (BFK), before the United States Bankruptcy Court for the Eastern District of Virginia, seeking to have their subject underlying tort claims against him declared non-dischargeable in bankruptcy; and, on or about 31 August 2012, the United States Trustee filed a separate adversary proceeding against Samantar, seeking to deny him a discharge, *viz.*, *McDow v. Samantar*, Adversary Proceeding No. 12-01385 (BFK), before the United States Bankruptcy Court for the Eastern District of Virginia. At this writing, upon further information and belief, both of the said adversary proceedings are now at issue and remain pending.

Group, Inc., et alii, 142 Fed. Appx. 150, 2005 WL 1703619, RICO Bus. Disp. Guide 10,916 ((4th Cir.) July 21, 2005 (D. Md.))[9]

At the risk of sounding somewhat melodramatic, such are the handicaps imposed upon Samantar by the wrongful certification as "frivolous" of his appeal of the District Court's denial of his claim of common law immunity from suit that his travails may be viewed as redolent of the recipients of *Lettres de cachet* in Eighteenth Century France, who, like Samantar, were effectively left constrained in terms of their ability, fully, to contest the matter, with one such recipient, *viz*., Voltaire, having become motivated by his unhappy experience to pursue legal reforms in France.[10]

CONCLUSION

Since the subject underlying decision appealed from, *viz*., the Order denying Samantar's common law immunity from suit was inarguably immediately appealable, and the appeal noted and pursued by Samantar was timely and not frivolous, the District Court became divested of jurisdiction upon the noting of said appeal. Accordingly, all proceedings pursued in respect of the instant appeal, including, but not limited to, Samantar's putative default and the subsequent proceedings that culminated in the subject orders appealed from are nugatory and

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9 Undersigned counsel represented the appellants in said 2005 appeal.

10 *See generally*: Hewitt, Caspar, "The Life of Voltaire", retrieved online, on 20 December 2012, from: http://thegreatdebate.org.uk/Voltaire.html

void, as the District Court was bereft of jurisdiction to conduct such proceedings whilst the subject underlying appeal remained pending. Accordingly, Samantar ever prays that the subject "Orders" of the District Court entered on 28 August 2012, be vacated by this Honorable Court and that the instant cause be remanded to the District Court for further proceedings consistent with such directive; and, Samantar further prays for such other and further relief as may be just and proper under the existent circumstanced.

Dated: 20 December 2012, at Alexandria, Virginia, U.S.A.

Respectfully submitted,

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IN PRAESENTI, FOR MOHAMED
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REQUEST FOR ORAL ARGUMENT

Upon information and belief, the case, *sub judice*, presents certain issues that have not hitherto been addressed in this Circuit, or, for that matter, any

other Circuit; therefore, Samantar respectfully submits that this Honorable Court's decisional process may be aided significantly by oral argument. Accordingly,

Samantar hereby requests to be heard at oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In re: Fourth Circuit Record No. 12-2178;

BASHE ABDI YOUSUF, et alii, versus MOHAMED ALI SAMANTAR.

This Brief of the Appellant has been prepared using:

Apache OpenOffice 3; OpenOffice.org © 2012 (Edition AOOO341m1(Build No. 9593));

Times New Roman type font, 14-point type space;

Exclusive of the Corporate Disclosure Statement, the Table of Contents, the Table of Authorities**,** the Request for Oral Argument, and the Filing, Mailing &Compliance Certificates, the word count for the instant Brief is: 6,155. I fully understand that a material misrepresentation could result in this Honorable Court's striking of the Brief and the imposition of sanctions. If this Honorable Court were so to request, the undersigned would gladly furnish this Honorable Court with an electronic version of the instant Brief and/or a word count printout of same.

Respectfully submitted,

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FILING CERTIFICATE AND CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby certify that, on this 20th day of December, 2012, I caused to be filed, electronically, with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, utilizing the CM/ECF System, the Brief of the Appellant, and the Joint Appendix, and that I caused to be dispatched by carriage of First Class Mail, through the United States Postal Service, enshrouded in suitable wrappers, the required number of copies of the said Brief and Appendix unto the following, *viz*.:

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