NO. 11-1479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF, *et al.*,

Plaintiffs-Appellees,

v.

MOHAMED ALI SAMANTAR,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Virginia,
Judge Leonie Brinkema

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANT-APPELLANT MOHAMED ALI SAMANTAR'S EMERGENCY MOTION FOR A STAY OF PROCEEDINGS IN THE DISTRICT COURT PENDING APPELLATE REVIEW

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Plaintiffs-Appellees Bashe Abdi Yousuf, Aziz Mohamed Deria, John Doe I, John Doe II, and Jane Doe ("Plaintiffs"), by and through undersigned counsel, respectfully submit this memorandum in opposition to Defendant-Appellant Mohamed Ali Samantar's ("Defendant") motion to stay proceedings in the District Court pending appellate review.

INTRODUCTION

Defendant seeks the extraordinary relief of a stay pending appeal based on the same arguments for common law immunity that have been considered and rejected by the District Court as without merit. In this case, the Executive Branch made an explicit and reasoned determination that, taking into account the foreign relations interests of United States, Defendant is not entitled to common law immunity. The District Court carefully reviewed that determination and, in accordance with established precedent, denied Defendant's motion to dismiss, specifically determined that the appeal would be "frivolous," and declined to stay proceedings.

Defendant's appeal seeks to force an entitlement to immunity that both precedent and the considered views of the Executive Branch foreclose. His argument that courts can only consider immunity determinations of the Executive Branch when the Executive Branch demonstrates that recognition of immunity would embarrass the United States or undermine its foreign policy has no basis in

the law or logic and, accordingly, he has no substantial likelihood of success on the merits. Given both the long delays already occasioned in this case and Defendant's claims of ill health, the District Court properly denied a stay of discovery pending appeal.

BACKGROUND

Almost seven years ago, Plaintiffs brought suit against Defendant in the District Court for the Eastern District of Virginia pursuant to the Torture Victim Protection Act of 1991 ("TVPA"), 106 Stat. 73, 28 U.S.C. § 1350 note, and the Alien Tort Statute, 28 U.S.C. § 1350. Plaintiffs seek damages for torture and human rights violations committed against them and their family members in Somalia as part of a brutal campaign orchestrated by Defendant in which military and security forces under Defendant's command and while Defendant was present on the ground targeted innocent Isaaq civilians. Defendant, a General and former Defense Minister and Prime Minister of Somalia, has lived in Virginia since 1997.

Defendant moved to dismiss for lack of jurisdiction on various grounds, including immunity from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602, *et seq*., and the common law. Last year, the Supreme Court unanimously affirmed this Court's decision that the FSIA does not grant Defendant immunity under the FSIA, and remanded the case for consideration of whether Defendant was entitled to common law immunity. *See*

Samantar v. Yousuf, 130 S. Ct. 2278, 2292-2293 (2010). In so holding, the Supreme Court directed that the issue of common law immunity is, in the first instance, for the Executive Branch to decide. *Id.* at 2284-2285.

In February 2011, the Department of State, through the Department of Justice, filed a Statement of Interest explaining its view that Defendant is not entitled to common law official immunity. Samantar Ex. I.[1] The District Court found that the Executive Branch's reasoned determination was entitled to deference and, after independently reviewing the question, denied Defendant's motion to dismiss on common law immunity grounds. Samantar Ex. J. Defendant's motion for reconsideration was also denied. Samantar Exs. P, Q. The District Court then held that Plaintiffs were entitled to proceed with discovery. Samantar Ex. Q at 7-8.

Nearly a month later, Defendant filed a notice of appeal on his common law immunity defense. Samantar Ex. R. Not until the District Court entered a scheduling order on May 3, 2011 setting forth a plan for discovery and other pretrial proceedings, Samantar Ex. S, did Defendant moved for a stay, Samantar Ex. U. The District Court denied the stay and certified Defendant's appeal as "frivolous," Samantar Ex. W at 2. The court explained that the State Department

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[1] Documents submitted by Defendant as exhibits to his motion for a stay pending appeal are referenced in this brief as "Samantar Ex. __."

had determined that Defendant is not entitled to immunity, and that Defendant had "not cited any statute or binding precedent that would allow this Court to ignore the State Department's finding" in this case, *id.*

Defendant waited an additional month before filing his "emergency" motion for a stay in this Court. In the meantime, Defendant failed to appear for his deposition last week, claiming to be in ill health. *See* Declaration of Jonathan P. Robell ("Robell Decl.") Exs. 1, 2.

ARGUMENT

A. The District Court Has Not Been Divested Of Jurisdiction Over This Case Because Defendant's Appeal Has Been Certified As Frivolous.

As Defendant concedes, Samantar Mot. at 8, a frivolous appeal does not divest a district court of jurisdiction. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1901 (2009) ("Appellate courts can streamline the disposition of meritless claims and even authorize the district court's retention of jurisdiction when an appeal is certified as frivolous."); *Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1966); *Management Science America Inc. v. McMuya*, Nos. 91-1188, 91-1236, 956 F.2d 1162, 1992 WL 42893, at *2 (4th Cir. March 4, 1992) (unpublished table decision) (divestiture rule "does not apply where the district court has certified the appeal to be frivolous") (listing federal appellate cases); *Apostol v. Gallion*, 870 F. 2d 1335, 1339 (7th Cir. 1989) (where a claim for immunity lacks legal merit, "the notice of appeal does not transfer jurisdiction to the court of appeals, and so does

not stop the district court in its tracks"). Rather, "if the appeal is deemed frivolous, the district court may certify that the case should proceed to trial." *Ekcert Intern., Inc. v. Government of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174 (E.D. Va. 1993); *see also Apostol*, 870 F. 2d at 1339 ("a district court may certify to the court of appeals that the appeal is frivolous and get on with the trial"). This practice "minimizes disruption of the ongoing proceedings," *Behrens*, 516 U.S. at 311, and "may be valuable in cutting short the deleterious effects of unfounded appeals," *Apostol*, 870 F. 2d at 1339.

The District Court here did exactly that, certifying Defendant's appeal on common law immunity as "frivolous" and then, with its jurisdiction still intact, declined to stay discovery and pre-trial proceedings. Samantar Ex. W.

Defendant disputes the finding of frivolousness, characterizing the District Court's decision to deny his motion to dismiss as "an abdication of the Judiciary to the Executive." Samantar Mot. at 10. That is a serious charge against the District Court's good faith execution of its duties, and one that is wholly unwarranted by the record here. Far from "simply acquiesc[ing]" in the government's determination, *id.* at 5, the District Court examined "with care" not only the Statement of Interest, but also the arguments of both parties presented through extensive briefing and oral argument. As the District Court stated to Defendant's counsel at the hearing on April 1, 2011:

> * * * I have considered with care your motion for reconsideration [of Defendant's motion to dismiss on immunity grounds], but I'm satisfied that it ought not be granted. The Executive Branch has spoken on this issue and [] they are entitled to a great deal of deference. They don't control but they are entitled to deference in this case. The rationale for finding – for the government's position on sovereign immunity, I think, is sound.

Samantar Ex. Q at 2.

Far from the unthinking rubberstamping of the government that Defendant portrays, the District Court conducted a "care[ful]" and independent analysis of the issue, affording appropriate deference to the government's "sound" position, consistent with the Supreme Court's direction in this very case last year. *Samantar*, 130 S. Ct. at 2284-2285. Because the District Court's decision was reasonable, firmly supported by law, and a proper exercise of judicial discretion, the District Court properly retained jurisdiction in this case, and there is no basis for issuance of a stay that would interrupt the orderly progress of pre-trial proceedings.

B. Defendant Is Not Entitled To A Stay Of Proceedings Pending Appeal

A stay pending appeal is "extraordinary relief." *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).[2] It is "not a

[2] *Virginia Petroleum Jobbers Association* is "[t]he leading authority" on the "legal principles by which an application for a stay of an order of a district court pending appeal is to be judged." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). The principles set forth in *Virginia Petroleum Jobbers Association* have been cited with approval by the Supreme Court, *see Permian Basin Area Rate*

matter of right," but instead "an exercise of judicial discretion," and Defendant "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 129 S. Ct. 1749, 1760-61 (2005) (quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)). Moreover, "when a party seeking a stay makes application to an appellate judge following the denial of a similar motion by a trial judge, the burden of persuasion on the moving party is *substantially greater* than it was before the trial judge" since, as here, "the motion for a stay has received full consideration" below. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) (emphasis added). "Certainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against [Defendant] both on the merits and on the need for a stay is presumptively correct." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers).

In reviewing Defendant's motion, the Court must apply a four-factor balancing test considering "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Defendant has failed

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Cases, 390 U.S. 747, 773 (1968) and *Hilton v. Braunskill*, 481 US 770, 776 (1987), and constitute "the law of this circuit," *Long*, 432 F.2d at 979.

to squarely address those factors, let alone demonstrate that they militate in his favor. Furthermore, Defendant's dilatory conduct in this case belies any need for emergency attention.

1. *Defendant Is Not Likely To Succeed On The Merits Of His Appeal*

Defendant has not made the necessary "strong showing that [he] is likely to prevail on the merits of [his] appeal." *Virginia Petroleum Jobbers Ass'n*, 259 F. 2d at 925. As confirmed by the District Court's certification of Defendant's appeal as "frivolous," Samantar Ex. W at 2, the question of Defendant's immunity from suit is now effectively closed. Defendant had ample opportunity to present his common law immunity defense to the District Court – in his motion to dismiss, motion for reconsideration, and motion for stay, as well as at the hearing on his motion for reconsideration – but his arguments could not overcome the lack of legal and factual support for his exceptional claim of immunity.[3]

Defendant's lack of success is unsurprising given both the state of the law in this area and his exceptionally weak factual claim to immunity. The Supreme Court has long made clear that courts should defer to the reasonable views of the Executive Branch in making immunity determinations. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). Indeed, in this very case, the Supreme Court

[3] Defendant also had an opportunity to make his case for common law immunity to the Executive Branch.

unanimously observed that the issue of common law immunity was historically for the Executive Branch to address in the first instance, and found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Samantar*, 130 S. Ct. at 2284-2285, 2291.

The Executive Branch has decided that Defendant has no claim to common law immunity here. *See* Samantar Ex. I. As the Department of State indicated in its submission to the District Court, the Executive Branch "reviewed this matter carefully and * * * concluded that Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case." *Id.* at Ex. 1. In reaching its conclusion, the Executive Branch "[took] into account the potential impact of such a decision on the foreign relations interests of the United States," including that Defendant "is a former official of a state with no currently recognized government to request immunity on his behalf." *Id.* at 7. Another significant consideration was the fact that Defendant has been residing in the United States for fourteen years. *Id.* at 9. "In the absence of a recognized government * * * to suggest the immunity of its former official," the Executive determined that "the interest in permitting U.S. courts to adjudicate claims by and against U.S. residents warrants a denial of immunity." *Id.*

The Statement of Interest more than suffices as a clear statement of the

government's conclusions that immunity is unwarranted and the case should move forward.[4] That statement is consistent with legal precedent and reasonably reflects the unique circumstances of Defendant's situation, as a *former* official of an unrecognized government who voluntarily chose to enter the United States and take up residence here, subject to its laws, for the last fourteen years.

Defendant's only answer is to invent a new and unfounded rule that would require the Executive Branch to articulate expressly a showing "that recognizing Samantar's immunity under the common law would undermine the foreign policy of the United States or embarrass the United States." Samantar Mot. at 8.

But that is not the law. No appellate court has ever held that a defendant is immune from suit after an explicit and well-reasoned determination to the contrary by the Executive Branch, nor have courts purported to *mandate* grants of immunity where the Executive Branch does not assert the two narrow circumstances that Defendant would find adequate. For the courts to *force* the Executive Branch to claim immunity on judicially prescribed terms would stand on its head the judiciary's longstanding deference to Executive Branch expertise in matters

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[4] The Executive Branch's conclusions regarding Defendant's status are also consistent with other potential "principles [for making immunity determinations] adopted by the executive branch, informed by customary international law" cited by the United States in its amicus brief at the Supreme Court in *Samantar*. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1444), 2010 WL 342031.

governing foreign relations.

Unsurprisingly, Defendant did not cite a single case before the District Court for hogtying the Executive Branch's foreign relations decisions in that manner, and has likewise failed to do so before this Court. "It is therefore not for the courts * * * to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico*, 324 U.S. at 35.

Under these circumstances, Defendant's appeal with respect to his claim of immunity lacks *any* indicia of merit – and certainly cannot satisfy the "strong showing" required to obtain a stay that the District Court denied. *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925 ("Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review").

2. *Defendant Failed To Demonstrate That He Would Suffer Irreparable Harm Absent A Stay*

Defendant has not shown that he will be irreparably injured absent a stay of proceedings in the District Court. Defendant claims entitlement to immediate relief on two bases: 1) "[t]hat the specter of the undersigned's having to represent Samantar in the ongoing proceedings in the District Court whilst simultaneously representing Samantar in respect of the instant appeal" would be overly burdensome on counsel; and 2) "having to proceed with extensive and protracted discovery in the District Court" would undermine Defendant's right "to be spared

from being subject to civil litigation" should he later be found immune. Samantar Mot. at 11. But neither of Defendant's alleged injuries constitutes "irreparable harm" justifying a stay.

First, Defendant's counsel's alleged "Buridan's paradox," Samantar Mot. at 10, is of no relevance here. That counsel may have difficulty managing his time and workload in representing Defendant may be unfortunate, but it is not grounds for the "extraordinary relief" of an immediate stay. The proper inquiry is harm to the *defendant*, not to his counsel.[5] To the extent Defendant suggests that burden to his counsel indirectly translates into deficient legal representation for himself, *id.* at 10, any such "harm" is hardly "irreparable." *See Virginia Petroleum Jobbers Ass'n*, 259 F. 2d at 925 ("The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough") (emphasis in original). If Defendant's counsel proves unable to comply with the District Court's or this Court's schedule, he should seek additional counsel or appropriate relief from the courts at that time, rather than ask this Court to stop the District Court proceedings

[5] Even if counsel's alleged woes, which are unsupported by any affidavit or other sworn statement, Fed. R. App. P. 8(a)(2)(B)(ii), can be properly considered in the calculus of harm here, Defendant cannot seriously argue that having to represent a client in multiple proceedings simultaneously constitutes a burdensome ordeal meriting a stay. If that were so, every litigant could easily satisfy this factor simply by employing counsel with more than one case or client.

entirely, particularly since this case has already languished for years at Defendant's behest.

With respect to the alleged harm arising from engaging in discovery, the "harm" of such pre-trial proceedings must be considered in combination with the merits, or lack thereof, of Defendant's appeal. Because Defendant stands little chance of succeeding on his immunity claim (as discussed *supra*), the risk that he will suffer unfairly or unnecessarily through discovery is greatly reduced. *Cf. Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925 ("But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits"). Moreover, Defendant could, but has not, seek expedited disposition of the appeal to minimize the amount of discovery that would elapse before final resolution of the common-law claim.

In addition, though styled as an "emergency motion" under Local Rule 27(e),[6] nothing about Defendant's motion for a stay or his conduct in this case indicates that participation in discovery while an appeal proceeds would be unduly burdensome. If it were, Defendant would have sought relief from the District Court's order earlier, rather than waiting more than four months after the District

[6] Local Rule 27(e) indicates that an emergency motion "should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time."

Court's initial decision to deny his motion to dismiss on February 15 and nearly three months after its denial of reconsideration on April 1. Even then, Defendant risked dismissal of his appeal for failure to prosecute and had to be prompted to act by the Clerk of this Court pursuant to Local Rule 45. *See* Robell Decl. Ex. 3. Defendant then waited a full month after the District Court denied his request for a stay and certified his appeal as frivolous, and almost seven weeks after the District Court's scheduling order set an aggressive timetable for discovery before seeking a stay of discovery. Defendant's delay in pursuing a stay and leisurely prosecution of his appeal belies any claim of acute necessity for this relief.

3. *Plaintiffs Will Be Substantially Harmed By A Stay Of Proceedings*

Plaintiffs will suffer substantial harm if this Court stays proceedings in the District Court. This case has been pending since 2004 and, after seven years of delay while Defendant pursued an immunity claim that was unanimously rejected by this Court and the Supreme Court, discovery has only recently commenced. Further delay will risk compromising Plaintiffs' ability to prosecute their claims as "witnesses die or move away; physical evidence is lost; [and] memories fade" with "the passage of time." *Vasquex v. Hillery*, 474 U.S. 254, 280 (1986). The identification and location of witnesses will become increasingly difficult. Even Defendant's own ability to recall events and participate in trial proceedings is in jeopardy as time progresses. Indeed, Defendant has already invoked his age and

various medical conditions as obstacles to fulfillment of his discovery obligations and refused to appear for a scheduled deposition last week. *See* Robell Decl. Exs. 1, 2.

The court in *Apostol* cautioned against the danger of lost evidence and undue delay when it noted that a stay of proceedings pending appeal "may injure the legitimate interests of other litigants and the judicial system":

> During the appeal memories fade, attorneys' meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlements may be lost or undermined. Most deferments will be unnecessary. * * * Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take * * * appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal.

870 F. 2d at 1338-39.

In short, seven years' delay is long enough. Given the exceptional weakness of Defendant's claim to immunity, the harm that a stay would occasion far outweighs the quite limited harm to Defendant of undergoing the common and routine processes of civil discovery.

4. *The Public Interest Does Not Favor A Stay*

Defendant makes no argument that a stay would promote the public interest. That is for good reason: a stay would disserve the interests of the public. The government's "interest in permitting U.S. courts to adjudicate claims by and against U.S. residents," Samantar Ex. I, is shared by the public. There is also a

strong public interest, reflected in Congress's enactment of the Torture Victim Protection Act, in preventing former foreign officials from trying to use the United States as a safe haven against liability for torture and human rights violations. *See* 137 Cong. Rec. 34785 (1991) (statement of Congressman Mazzoli) ("The TVPA puts torturers on notice that they will find no safe haven in the United States.").

CONCLUSION

For the foregoing reasons, this Court affirm the District Court's opinion denying a stay pending appeal and deny Defendant's Emergency Motion for a Stay of Proceedings in the District Court Pending Appellate Review.

Dated: June 27, 2011

Respectfully submitted,

/s/ Patricia A. Millett

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CERTIFICATE OF SERVICE

I certify that on this 27th day of June 2011, I electronically filed the foregoing, along with the accompanying Declaration of Jonathan P. Robell (with exhibits), with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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