

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

IN RE:	:	
MOHAMED ALI SAMANTAR	:	Case No. 12-11085 (BFK)
Debtor.	:	Chapter 7
BASHE ABDI YOUSUF, <u>ET AL.</u> ,	:	
Movants,	:	
v.	:	
MOHAMED ALI SAMANTAR	:	
Respondent.	:	

**EMERGENCY MOTION OF
BASHE ABDI YOUSUF, ET AL. FOR (A) RELIEF FROM THE
AUTOMATIC STAY AND (B) THE SCHEDULING OF AN EXPEDITED HEARING**

This Motion (defined below) is filed to allow a trial in an international human rights case pending for more than seven years against Mohamed Ali Samantar (the “Debtor”), the former Defense Minister of Somalia, to proceed to trial before District Court (defined below) Judge Leonie Brinkema (EDVA). The trial in this matter was scheduled to commence at 10 a.m. ET on Tuesday, February 21, 2012. The Debtor has unsuccessfully tried to stay the trial at least four times in the past year through other measures, including two such efforts in just the past week that were summarily rejected by both the District Court and the Fourth Circuit (defined below). This Sunday-night bankruptcy filing is just the latest effort for the Debtor to avoid facing his victims in court. As explained below, allowing the automatic stay to remain in place will greatly

prejudice the administration of justice and the Plaintiffs in that case, who have long awaited their day in court and are now present in this jurisdiction, each having traveled long distances. We respectfully request an immediate hearing on this motion so that the trial may proceed.

Accordingly, Bashe Abdi Yousuf, Buralle Salah Mohamoud, Ahmed Jama Gulaid and Aziz Mohamed Deria, in his capacity as the personal representatives of the estates of Mohamed Deria Ali, Mustafa Mohamed Deria, Abdullahi Salah Mohamoud (the deceased brother of Buralle Salah Mohamoud) and Cawil Salah Mohamoud (the deceased brother of Buraale Salah Mohamoud) (collectively, the “Plaintiffs”), by and through their undersigned counsel, file this motion (the “Motion”) pursuant to section 362(d)(1) of title 11 of the United States Code (the “Bankruptcy Code”), Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 4001(a)-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of Virginia (the “Local Rules”), for relief from the automatic stay provision of section 362 of the Bankruptcy Code. In support of the Motion, the Plaintiffs rely upon and incorporate by reference the Declaration of Elizabeth Tobio, attached hereto as Exhibit A (the “Tobio Declaration”). In further support of the Motion, the Plaintiffs respectfully state as follows:

PRELIMINARY STATEMENT

Prior to filing his petition, the Debtor was scheduled to face trial on February 21, 2012 in the United States District Court for the Eastern District of Virginia (the “District Court”) for human rights violations committed against the Plaintiffs and their families that were orchestrated by the Debtor, a General and former Commander of the Somali Armed Forces and the former Defense Minister and Prime Minister of Somalia. The Debtor’s bankruptcy petition is a naked eleventh-hour attempt by the Debtor to stay a trial that is more than seven years in the making,

and that was scheduled to begin less than 48 hours after the filing of the Debtor's bankruptcy petition. Leading up to the Debtor's bankruptcy filing, the Debtor made multiple, unsuccessful and "frivolous" attempts with both the District Court and the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") to stay this litigation. Meanwhile, the Plaintiffs, all survivors or relatives of victims of human right abuses, and their *pro bono* counsel have expended substantial resources and logistical planning in order to prepare for trial, only to be hamstrung by the Debtor's bad-faith attempt to stay the proceeding on the very eve of trial. This Bankruptcy Court should not allow the Debtor to abuse the bankruptcy process in this manner and should grant the Plaintiffs immediate relief from the automatic stay to allow the trial to proceed in the District Court.

This Bankruptcy Court should grant the Plaintiffs' motion to lift the automatic stay because:

- The Plaintiffs will be unfairly prejudiced if they cannot proceed with trial as scheduled. As described more fully below, the Plaintiffs have expended significant resources to prepare for trial. Two of the Plaintiffs and many of the Plaintiffs' witnesses live overseas and have traveled a great distance to participate in a trial set to commence at 10 AM on Tuesday, February 21, 2012. Some of these witnesses may not be able to travel to the District Court for trial again. In addition, requiring the Plaintiffs to litigate the Action (as defined below) in the Bankruptcy Court would deprive the Plaintiffs of the jury trial they requested;
- The Debtor will not be prejudiced by lifting the automatic stay; indeed, in response to one of the Debtor's motions for a stay pending appeal, the District Court stated that the *Debtor* may suffer from a stay because of his ailing health, which could render him unable to mount a defense;
- The litigation in the District Court relates to issues of customary international law and federal law into which the District Court has delved deeply during its seven-year duration. Accordingly, the District Court is best able to hear this case and this litigation in no way requires the expertise of the Bankruptcy Court;
- Granting the Plaintiffs immediate relief from the automatic stay will promote judicial efficiency. The trial in this litigation is set to begin immediately, and it is not believed that the trial should last longer than ten days;

- Lifting the stay will not disrupt the Debtor's bankruptcy case;
- The Plaintiffs believe that any debt arising from a judgment in the litigation in the Action is not dischargeable because their claims are based on willful, malicious conduct by Debtor; and
- As stated above, the Debtor has filed his bankruptcy petition in bad faith, which is an additional basis to grant immediate relief from the automatic stay.

For the reasons stated above, the Plaintiffs respectfully request that the Bankruptcy Court grant the Plaintiffs immediate relief from the automatic stay to allow the trial in the Action to progress.

JURISDICTION AND VENUE

1. This Bankruptcy Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334 and 157(a). This Motion is a core proceeding properly heard by this Bankruptcy Court pursuant to 28 U.S.C. § 157(b)(2)(G). Venue of this Motion is proper in this district pursuant to 28 U.S.C. § 1409(a).

RELIEF REQUESTED

2. Pursuant to section 362(d) of the Bankruptcy Code, the Plaintiffs seek relief from the automatic stay to continue the case of *Bashe Abdi Yousuf, et al. vs. Mohamed Ali Samantar*, Civil Action No. 1:04 CV 1360 (the "Action"), currently pending before the Honorable Leonie Brinkema of the District Court. As set forth in greater detail below, the trial relating to the Action was scheduled to begin on February 21, 2012. In the absence of immediate relief from the automatic stay, the Plaintiffs submit that they would suffer significant prejudice and that their ability to prosecute their claims against the Debtor would be jeopardized.

RELEVANT BACKGROUND

A. The Bankruptcy Filing and the Motion

3. On February 19, 2012 (the “Petition Date”), at 9:31 p.m. ET, the Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code (the “Bankruptcy Case”) in the United States Bankruptcy Court for the Eastern District of Virginia (the “Bankruptcy Court”).

4. That same night, the Debtor filed a Suggestion of Bankruptcy in the Action. The trial, which has been in the making for more than seven years, is scheduled to commence on Tuesday, February 21, 2012.

5. The Plaintiffs immediately began preparing this Motion, which was filed on February 21, 2012.

B. The Action

6. In 2004, more than seven years ago, the Plaintiffs brought suit against the Debtor in the District Court. The case has been litigated to the United States Supreme Court, which ruled against Debtor in 2010, and was subsequently remanded to the District Court. In the Action, *which is scheduled to begin trial on Tuesday, February 21, 2012*, the Plaintiffs seek damages for human rights violations—acts of torture, murder, crimes against humanity—committed against them and their family members as part of a systematic campaign of violence orchestrated by the Debtor, a General and former Commander of the Somali Armed Forces, Defense Minister and Prime Minister of Somalia.

7. In the complaint filed against the Debtor in connection with the Action (as amended from time to time, the “Complaint”),¹ attached hereto as Exhibit B, the Plaintiffs allege the following:

- Plaintiff Bashe Abdi Yousuf was a young business man when he was detained, tortured, and imprisoned on false charges for more than six years—almost all of which was served in solitary confinement;
- Plaintiff Aziz Mohamed Deria’s father and brother were threatened, abducted by members of the Somali Armed Forces and never seen again;
- Plaintiff Buralle Salah Mohamoud was tortured and his two brothers were summarily executed by Somali soldiers; and
- Plaintiff Ahmed Jama Gulaid was arrested on account of his clan affiliation and, without being tried, placed before a firing squad and shot along with other prisoners. He survived being shot, and was able to escape because he was covered by the dead bodies of the less fortunate prisoners.

8. Through the Action, the Plaintiffs aim to hold the Debtor accountable for the egregious human rights abuses perpetrated by subordinates acting under his authority and at his direction.

1. The Debtor’s Various Delay Tactics

9. Beginning in 2007, the Debtor has repeatedly, and in some cases frivolously, attempted to stop this trial from proceeding. Each of these attempts has failed. The bankruptcy filing is the Debtor’s last-ditch attempt to stop the trial from proceeding and give his accusers their day in court.

10. In 2007, the Debtor moved to dismiss the Action for lack of jurisdiction on various grounds, including immunity from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq.*, and the common law. The District Court granted the

¹ *Second Amended Complaint for Torture; Extrajudicial Killing; Attempted Extrajudicial Killing; Cruel, Inhuman or Degrading Treatment or Punishment; Arbitrary Detention; Crimes Against Humanity; and War Crimes.* See No. 1:04cv1360, Dkt. #303 (E.D. Va. Mar. 9, 2007).

motion, but the Fourth Circuit found against Debtor and reinstated the Action against him. The Debtor appealed the Fourth Circuit's ruling to the United States Supreme Court, which unanimously affirmed the Fourth Circuit on June 1, 2010, and remanded the Action to the District Court. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2292-2293 (2010).

11. In February 2011, the Department of State, through the Department of Justice, filed a Statement of Interest in the District Court explaining its view that the Debtor is not entitled to common law official immunity. *See* Action, Dkt. #147 (E.D. Va. Feb. 14, 2011).² After independently reviewing the question, the District Court entered an order denying the Debtor's motion to dismiss on common law immunity grounds (the "Motion to Dismiss Order"), finding that the Executive Branch's determination was reasoned and entitled to deference. *See* Action, Dkt. #158 (E.D. Va. Apr. 1, 2011); *see also* Apr. 1 Hearing Tr., Action, Dkt. #159, at 2:18-3:12 (E.D. Va. Apr. 1, 2011). The Debtor filed a motion for reconsideration of the Motion to Dismiss Order, which the District Court also denied. *See* Action, Dkt. #158 (E.D. Va. Apr. 1, 2011).

12. Six weeks later, the Debtor moved the District Court for a stay pending appeal of the Motion to Dismiss Order. *See* Action, Dkt. #160 (E.D. Va. Apr. 29, 2011); Action, Dkt. #162 (E.D. Va. May 13, 2011). The District Court not only denied the stay – it also certified the Debtor's appeal of the Motion to Dismiss Order as "frivolous." *See* Action, Dkt. #168, slip op. at 2 (E.D. Va. May 18, 2011). The Debtor waited a month and then filed an "emergency" motion for a stay pending appeal of the Motion to Dismiss Order in the Fourth Circuit. *See* Appellant Mohamed Ali Samantar's Emergency Motion for a Stay of Proceedings in the District Court Pending Appellate Review, No. 11-1479 (1:04-cv-01360-LMB-JFA), Dkt. #14-1 (4th Cir.

² Due to the voluminous nature of the pleadings related to the Action, the pleadings from the Action cited herein (with the exception of the Complaint) have not been attached as exhibits to the Motion. The Plaintiffs will provide copies of all pleadings from the Action cited herein to the Court upon request.

June 18, 2011). The Fourth Circuit summarily denied that motion. *See* No. 11-1479 (1:04-cv-01360-LMB-JFA), Dkt. #23, slip op. at 1 (4th Cir. July 8, 2011).

13. Pre-trial proceedings continued in the District Court, with discovery proceeding on three continents (the United States, Europe and Africa). At a pre-trial hearing on October 20, 2011, the District Court scheduled trial to commence on February 21, 2012.

14. On February 8, 2012, the Fourth Circuit issued a routine notice that the appeal of the Motion to Dismiss Order was *tentatively* calendared for oral argument during the court's May 15 to 18, 2012 session. *See* No. 11-1479 (1:04-cv-01360-LMB-JFA), Dkt. #54 (4th Cir. Feb. 8, 2012). The next day, less than two weeks prior to trial, the Debtor filed a "renewed" motion in the District Court for a stay of proceedings pending appeal. *See* Action, Dkt. #311 (E.D. Va. Feb. 9, 2012). The District Court yet again rejected the Debtor's request on the grounds that, among other things, the "likelihood of [the Debtor] succeeding on this appeal is extremely * * * slight," and noted the prejudice a stay would impose on two of the plaintiffs, who "have been forced to reveal their identity" as they agreed to do three weeks before trial. Feb. 14 Hearing Tr., Action, Dkt. #329 (E.D. Va. Feb. 14, 2012); *see also* Action, Dkt. #326 (E.D. Va. Feb. 14, 2012). The District Court also stated that it was "concerned, frankly, about [the Debtor's] health"; delay could mean that the Plaintiffs would never have the opportunity to confront their persecutor. *See id.*

15. On February 15, 2012, less than a week before trial was scheduled to begin on February 21, 2012, the Debtor yet again filed an emergency motion for a stay of the trial court proceedings in the Fourth Circuit. The Fourth Circuit quickly rejected this request, thereby allowing the Action to proceed to trial. *See* No. 11-1479 (1:04-cv-01360-LMB-JFA) (4th Cir. Feb. 15, 2012); No. 11-1479 (1:04-cv-01360-LMB-JFA) (4th Cir. Feb. 17, 2012). That very day,

the Debtor's litigation counsel appeared in the District Court to discuss last minute procedural issues in connection with the trial set to begin February 21, 2012. He argued one last gambit to terminate the case, requesting "terminating sanctions" related to the alleged late production of documents. The District Court summarily rejected this effort at delay. Tobio Decl. ¶ 3.

2. Status of the Action and Prejudice to the Plaintiffs in the Action

16. As indicated above, more than four months ago, on October 20, 2011, the District Court set the Action for trial for February 21, 2012. All four Plaintiffs and a number of witnesses have already traveled to Alexandria, Virginia, or have plans to arrive the coming week, to attend the trial. Two of the Plaintiffs in this suit have specific concerns related to any delay in the trial—and one Plaintiff has been threatened. Plaintiffs Buralle Salah Mohamoud and Ahmed Jama Gulaid, are Somali residents, and until January 31, 2012, due to fears for their personal safety, each proceeded in the Action as "John Doe" Plaintiffs. In November 2011, counsel for Plaintiffs agreed to demands by the Debtors' litigation counsel that the John Doe Plaintiffs reveal their identities three weeks prior to trial. *See* Tobio Decl. ¶ 13. Due to fears for their safety, the John Doe Plaintiffs were concerned that their identities not be revealed until after they had left Somalia for the United States. Plaintiffs Buralle Salah Mohamoud and Ahmed Jama Gulaid departed Somalia for Djibouti on January 30, 2012. Because it is not possible for residents of Somaliland to obtain travel documents to come to the United States, these Plaintiffs are only able to travel here because they have been "paroled" by the Department of Homeland Security; their parole papers expire in September 2012. *Id.* On January 31, 2012, after John Doe Plaintiffs had departed Somalia, were in the relative safety of Djibouti and believed that the trial was imminent, counsel for Plaintiffs filed a motion to amend the case caption, which for the first time

disclosed John Doe I as Buralle Salah Mohamoud and John Doe 2 as Ahmed Jama Gulaid. *See* No. 1:04cv1360, Dkt. #302 (E.D. Va. Jan. 31 2012).

17. Now, after his repeated efforts to stay this case and avoid trial have been rejected by every level of the federal court system, the Debtor makes a last ditch attempt to avoid trial by using this Bankruptcy Court.

ARGUMENT

18. This is an ideal case in which the Bankruptcy Court should exercise its broad discretion to lift the automatic stay: a trial is set to proceed, the movants will be greatly prejudiced, no other creditors nor the estate will suffer harm, and the context makes it clear that the filing was made solely for the purposes of delaying the administration of justice. Bankruptcy Code section 362(d) sets forth the general standard for obtaining relief from the automatic stay. In relevant part, this provision provides that “on request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section such as by terminating, annulling, modifying, or conditioning such stay . . . for cause” 11 U.S.C. § 362(d)(1). The Fourth Circuit has stated that “[b]ecause the Bankruptcy Code provides no definition of what constitutes ‘cause’ the courts must determine when discretionary relief [from the automatic stay] is appropriate on a case-by-case basis.” *Cloughton v. Mixson*, 33 F.3d 4, 5 (4th Cir. 1994) (citing *Robbins v. Robbins (In re Robbins)*, 964 F.2d 342, 345 (4th Cir. 1992)); *see also In re Robinson*, 169 B.R. 356, 359 (E.D. Va. 1994); *In re Ewald*, 298 B.R. 76, 80 (Bankr. E.D. Va. 2002). The decision of whether to lift the stay is within the discretion of the bankruptcy court. *See In re Robbins*, 964 F.2d at 345.

19. In making the determination of whether to grant relief from the automatic stay, the court “must balance potential prejudice to the bankruptcy debtor’s estate against the

hardships that will be incurred by the person seeking relief from the automatic stay if relief is denied.” *In re Ewald*, 298 B.R. at 80 (citing *In re Robbins*, 964 F.2d at 345). Other factors that may be considered include (i) whether the litigation involves state law issues, (ii) whether granting relief from the automatic stay will promote judicial economy, (iii) whether lifting the automatic stay will disrupt the bankruptcy case and (iv) whether the bankruptcy estate can be protected if the stay is lifted. See *In re Robinson*, 169 B.R. at 359.

20. Bankruptcy Code section 362(g) allocates the burden of proof for motions seeking relief from the automatic stay. In relevant part, Bankruptcy Code section 362(g) provides that “the party requesting [relief from the automatic stay] has the burden of proof on the issue of the debtor’s equity in the property,” and “the party opposing such relief has the burden of proof on all other issues.” 11 U.S.C. § 362(g). Thus, where, as here, the debtor’s equity in property is not an issue, the party opposing relief from the automatic stay—General Samantar, the Debtor—has the burden of proof on all issues.

A. The Plaintiffs Will Be Significantly Prejudiced If Immediate Relief From the Automatic Stay Is Not Granted; The Debtor Will Not Be Prejudiced By The Relief Requested

1. The Plaintiffs Will Be Significantly Prejudiced If Immediate Relief From The Automatic Stay Is Not Granted

21. The Plaintiffs, their witnesses and the Plaintiffs’ counsel have expended significant time, energy and financial resources in anticipation of this litigation. If this litigation is delayed, much of the expense of this litigation will be for naught and several of the Plaintiffs’ witnesses, and indeed some of the Plaintiffs, may not be able to testify on a delayed timeframe.

22. As described above and in the Tobio Declaration, due to fears for their personal safety, Plaintiffs Mohamoud and Gulaid did not publicly disclose their identities until after they left Somalia. Even before their identities were revealed, Plaintiff Gulaid reports that he and his

family were harassed in Somalia in what he believes was an attempt to intimidate him into not participating in this litigation. *See* Tobio Declaration, at ¶ 16. Due to fear for their personal safety, Plaintiffs Mohamoud and Gulaid would never have agreed to reveal their identities had they known that this trial would be delayed. Should they now have to return to Somalia to await trial, their safety is at further risk, given that their identities are now known. Further, Plaintiffs Mohamoud and Gulaid's parole to travel to the United States from the Department of Homeland Security expires in September 2012. Plaintiffs Mohamoud and Gulaid would be significantly prejudiced should their parole expire while this litigation is stayed.

23. Further, as described in more detail in the Tobio Declaration, Plaintiff Deria is a single father of five children who has gone to great pains to make child care arrangements for this week so that he might testify at trial. *See* Tobio Declaration, at ¶ 19. Plaintiff Yousuf, the sole provider for his family, who was scheduled to testify no later than the morning of Wednesday, February 22, has utilized limited vacation time to travel here from Georgia to testify at trial. A delay in this trial would be extremely burdensome to both Plaintiffs. *See* Tobio Declaration, at ¶ 22.

24. Further, key fact witnesses for the Plaintiffs have traveled from all over the world to testify at the trial in the Action. Such travel may not be possible in the future should the trial be delayed.

25. Plaintiff Deria's sister, Nimo Dirie, an eyewitness to the abduction of their father and brother by the Somali Armed Forces has traveled here from Kuwait to testify. She is a stay-at-home mother to six children who cannot be away from for an extended period of time. *See* Tobio Declaration, at ¶ 20. In addition, she suffers from Type 2 diabetes and is scheduled to see her former physician in Toronto on her way home from this trial on February 27. *Id.* As such,

Ms. Dirie cannot stay in Virginia awaiting trial if it would require her to miss this scheduled appointment in Toronto. Further, her willingness to return to the United States for a new trial date, causing her once more to leave her young children, may be diminished where she would reasonably anticipate that the Debtor would employ yet another delaying tactic. *See* Tobio Declaration, at ¶ 21. As such, a postponement in this trial would be highly prejudicial to Plaintiff Deria as it may leave him with no available eyewitness to the abductions of his father and brother.

26. In addition, a key fact witness for the Plaintiffs, a former Somali military pilot, is scheduled to travel here from London on Saturday, February 25. *See* Tobio Declaration, at ¶ 23. However, he cannot stay in Virginia past Tuesday, February 28, 2012, as he must return to London at that time to complete necessary paperwork to attend his son's wedding in Saudi Arabia. *Id.*

27. As described in the Tobio Declaration, some of the Plaintiffs suffer from, *inter alia*, anxiety and insomnia as a result of the abuses inflicted upon them by the Somali Armed Forces under the command or control of the Debtor. *See* Tobio Declaration, at ¶ 24. Any delay in this trial, which they have now waited more than seven years in which to participate, would only cause them further anxiety. *Id.*

28. Finally, as described in greater detail in the Tobio Declaration, the Plaintiffs' counsel has expended significant financial resources in preparation for this trial, which it could not hope to recoup should this trial be stayed. These costs include travel and accommodations for the Plaintiffs, witnesses, interpreters and counsel, interpreters for Plaintiffs and witnesses and supplies and equipment for trial. *See* Tobio Declaration, at ¶ 26-31. The Plaintiffs' counsel represents the Plaintiffs on a pro bono basis, and every day that the trial in the Action is delayed,

the Plaintiffs' counsel will continue to accrue significant costs. Should this matter be delayed for a significant amount of time, the Plaintiffs' counsel will have expended these resources for naught and will have to incur additional expenses at the time this case does proceed to trial. *Id.*

29. Given the difficulty coordinating travel for witnesses and the Plaintiffs located around the world, and the burdens such additional travel would put on the Plaintiffs and witnesses alike, not to mention the significant resources invested in this trial by the Plaintiffs' counsel, failure to lift the stay would significantly prejudice the Plaintiffs.

2. The Debtor's Estate Will Not Be Prejudiced By The Relief Requested

30. The Debtor's estate will not be prejudiced if the stay is lifted. First, permitting the Action to proceed will not harm the Debtor's estate or its creditors because the Plaintiffs' claims against the Debtor's estate must be resolved, and the Bankruptcy Court will retain control over the claims allowance process in the Bankruptcy Case. *See In re Robbins*, 964 F.2d at 346-47 (concluding that lifting the automatic stay would not harm the debtor's estate because the bankruptcy court would control matters relating to allowance of claims); *In re Mid-Atlantic Handling Systems*, 304 B.R. at 131; see also, *In re Wheeler Group, Inc.*, 75 B.R. 200 (Bankr. S.D. Ohio 1987) ("The liquidation of claims is a necessary step in bringing any bankruptcy case to a conclusion.").

31. Second, even if the Debtor will incur litigation costs in connection with the Action, the cost of defending the Action is not a sufficient basis for denying relief from the stay. *See Walker v. Wilde (In re Walker)*, 927 F.2d 1138, 1143 (10th Cir. 1991); *In re Santa Clara County Fair Association, Inc.*, 180 B.R. 564, 566 (9th Cir. BAP 1995). Notably, it is unclear whether the Debtor is in any event incurring any of the costs of his defense in the Action—he did not list his trial counsel, Joseph P. Drennan, as a creditor in his Petition.

32. Finally, the Plaintiffs note that the Debtor could also be prejudiced by delay in the Action. By all reports, the Debtor is in increasingly poor health. On February 14, in denying the Debtor's motion for a stay of the Action pending appeal, the District Court noted that given the Debtor's failing health, granting a stay may prevent the Debtor from adequately presenting his case to the jury as he may not be able to testify. *See* Tobio Declaration, at ¶ 25.

B. Other Factors Weigh In Favor Of Granting The Plaintiffs Immediate Relief From The Automatic Stay

1. The Action Relates To Torts Committed In Violation Of Domestic And International Law

33. As noted above, in considering whether to grant relief from the automatic stay, courts generally consider whether the issues in the litigation involve issues of state law such that the expertise of the bankruptcy court is unnecessary. *See In re Robbins*, 964 F.2d at 345.

34. In the Action, the Plaintiffs allege that, in violation of international and domestic law, the Debtor was responsible for (i) the torture and unlawful imprisonment of Plaintiff Bashe Abdi Yousuf, (ii) the abduction and extrajudicial killing of Plaintiff Aziz Mohamed Deria's father and brother, (iii) the torture of Plaintiff Buralle Salah Mohamoud and the extrajudicial killing of Plaintiff Mohamoud's two brothers, (iv) the attempted extrajudicial killing, torture and arbitrary detention of Plaintiff Ahmed Jama Gulaid, and (v) crimes against humanity and war crimes in connection with some of these human rights violations. The Plaintiffs allege that Debtor was responsible for these wrongful acts for several reasons, including that he exercised effective command over the Somali Armed Forces who perpetrated these abuses. *See* Complaint at ¶¶ 1–2, Exhibit B.

35. The Debtor is liable for these acts of torture, extrajudicial killing and attempted extrajudicial killing under customary international law and the Torture Victim Protection Act,

Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note). *See* Complaint, at ¶ 3, Exhibit B. In addition, with respect to alien Plaintiffs, the Debtor is liable for torture, extrajudicial killing, attempted extrajudicial killing, crimes against humanity, war crimes, cruel, inhuman and degrading treatment or punishment, and arbitrary detention under the Alien Tort Statute, 28 U.S.C. § 1350, in that these acts were in violation of customary international law. *See id.*

36. While the issues involved in the Action are not issues of state law, the Plaintiffs nevertheless submit that the factual and legal issues involved in the Action fall outside of the scope of matters that are typically considered by bankruptcy courts, and that the Action would be more appropriately tried before the District Court, which has gained substantial familiarity with the facts and law relating to the Action while it has been pending for more than seven years.

2. Granting The Plaintiffs Immediate Relief From The Automatic Stay Will Promote Judicial Efficiency

37. Considerations of judicial economy support this Bankruptcy Court exercising its discretion to lift the stay. Under Bankruptcy Code section 362(d)(1), cause may exist to modify the automatic stay in order to allow a creditor to continue litigating a pending non-bankruptcy action against a debtor for the purpose of liquidating its claims against the debtor. The legislative history to Bankruptcy Code section 362(d)(1) is clear on this point:

[I]t will often be more appropriate to permit proceedings to continue in their place of origin, where no great prejudice to the bankruptcy estate would result, in order to leave the parties in their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 341 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 50 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5836, 6297.

38. Relief from the bankruptcy stay is “commonly granted in situations in which the debt may be non-dischargeable. . . and trial proceedings are already well advanced (for example, discovery has been completed and a trial date has been set) in the non-bankruptcy forum.” *Gibbons v. Knefel (In re Knefel)*, 2007 WL 2416535, at *1–2 (Bankr.E.D.Va. Aug. 17, 2007); *In re Mid-Atlantic Handling Systems LLC*, 304 B.R. 111, 130-31 (Bankr. D. N.J. 2003) (explaining that relief from the stay may be granted ... particularly if the non-bankruptcy suit involves multiple parties or is ready for trial).

39. Here, the facts and circumstances weigh conclusively in favor of granting the Plaintiffs relief from the automatic stay. The Plaintiffs filed the suit in 2004, more than seven years ago. Since that time discovery has been completed, and the Plaintiffs and their *pro bono* counsel have expended significant time, effort and financial resources in connection with the Action and in preparation of trial. This Action is now on the eve of that trial, and the Plaintiffs and the District Court are prepared to commence trial, which is anticipated to take no more than ten days.

40. In addition, as noted above, the determination of the issues in the litigation will not require bankruptcy expertise. All issues in the case involve customary international law and United States federal law. The District Court, having overseen this case for the last seven years, is in the best position to hear this case.

41. Further, no savings to the estate of the Debtor will be realized if the Plaintiffs are prohibited from proceeding in the litigation. The Plaintiffs’ claims against the Debtor’s estate must be litigated, regardless of forum. The burden on the Debtor of litigating these claims in the District Court is no greater than in this Bankruptcy Court—and in fact should be less of a burden given Judge Brinkema’s intimate familiarity with the claims.

42. Finally, the Plaintiffs requested a jury trial in the Action. The Bankruptcy Court cannot conduct a jury trial unless all parties consent, which is unlikely. Allowing the Debtor to deprive the Plaintiffs of a jury trial would open the door for similar actions of forum shopping.

43. Vacating the stay under these circumstances increases judicial efficiency and minimizes the time and expense associated with litigating the dispute. *Int'l Business Machines v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 737 (7th Cir. 1991) (explaining that where the non-bankruptcy litigation has reached an advanced stage, courts have shown a willingness to lift the stay to allow the litigation to proceed); *Brodsky v. Philadelphia Athletic Club, Inc. (In re Philadelphia Athletic Club, Inc.)*, 9 B.R. 280, 282 (Bankr. E.D. Pa. 1981) (finding that because the state court action is almost at an end, the most expeditious way to liquidate the claim of the plaintiff is to permit the state court action to be concluded).

3. Lifting The Automatic Stay Will Not Disrupt The Debtor's Bankruptcy Case

44. Where litigation has been pending in another forum for a considerable period of time, courts have found that lifting the automatic stay will not be disruptive to a debtor's bankruptcy case. *See In re Ewald*, 298 B.R. at 81 ("Modifying the stay . . . will not interfere with the debtor's bankruptcy case as the state court is familiar with the facts and circumstances of the claims asserted as they have been pending there for almost three years."). Indeed, courts have recognized that allowing litigation to continue to proceed in another forum may assist in the administration of a debtor's estate by resolving issues relating to the amount, validity and priority of a creditor's claims. *See id.* (finding that the resolution of the amount, validity and priority of a creditor's claim in state court would assist with the administration of the debtor's bankruptcy case and granting relief from the automatic stay).

45. Over the substantial period of time during which the Action has been pending before it, the District Court has become familiar with the facts and circumstances surrounding the Plaintiffs' claims. Moreover, substantial work has been performed by the parties in connection with preparing for trial before the District Court, and the District Court's ruling will help to resolve issues regarding the amount and validity of the Plaintiffs' claims against the Debtor's bankruptcy estate. In this context, declining to grant relief from the automatic stay and requiring the claims to be litigated before the Bankruptcy Court would result in substantial disruption, expense and delay to the judicial system while lifting the stay to allow the continued prosecution of the Action in the District Court would aid in the administration of the Bankruptcy Case by permitting the timely and efficient resolution of the Plaintiffs' claims against the Debtor's estate.

4. The Bankruptcy Estate Will Be Protected Even If the Automatic Stay Is Lifted

46. In determining whether to grant relief from the automatic stay, courts have found that the debtor's bankruptcy estate is protected where the plaintiffs are required to seek enforcement of any judgment obtained through litigation in another forum in the bankruptcy court. *See In re Robbins*, 964 F.2d at 346-47 (finding that bankruptcy court correctly determined that lifting stay would not harm the bankruptcy estate where the bankruptcy court retained jurisdiction to determine allowance of claims against the estate); *In re Ewald*, 298 B.R. at 81 ("The bankruptcy estate will be protected as [the plaintiff] must seek enforcement of any judgment through [the bankruptcy court]."). Here, the Plaintiffs are seeking only to continue to prosecute the Action in the District Court to obtain a judgment on their claims. The Plaintiffs agree that they will be entitled to enforce any judgment obtained in the Action through the Bankruptcy Court and in the Bankruptcy Case.

C. Any Debt Arising From A Judgment In The Action Is Non-Dischargeable

47. Bankruptcy Code section 523(a)(6) provides that a discharge under chapter 7 of the Bankruptcy Code does not discharge an individual debtor for any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. § 523(a)(6). In order to obtain a determination that a debt is nondischargeable under Bankruptcy Code section 523(a)(6), the party seeking such a determination must establish the following elements: (i) the debtor caused an injury; (ii) the debtor’s actions were willful; and (iii) that the debtor’s actions were malicious. *See Reed v. Owens (In re Owens)*, 449 B.R. 239, 254 (Bankr. E.D. Va. 2011). In the context of Bankruptcy Code section 523(a)(6), a debtor’s actions will be found to be willful if they were “deliberate and intentional.” *First Nat’l Bank of Maryland v. Stanley (In re Stanley)*, 66 F.3d 664, 667 (4th Cir. 1995). A debtor’s actions will be found to be malicious if they were “done deliberately, intentionally and with knowing disregard for the [creditor’s] rights.” *In re Owens*, 449 B.R. at 254. While it does not appear that any court has considered the nondischargeability of international human rights violations under Bankruptcy Code section 523(a)(6), courts have found that claims arising from injuries resulting from violations of state civil rights laws may be nondischargeable. *See, e.g., DeAngelis v. Antonelli (In re Antonelli)*, No. 09-1013, 2010 WL 2044552 (Bankr. D.R.I. May 19, 2010) (finding that sexual harassment claim was nondischargeable based on ruling issued by Rhode Island Commission for Human Rights); *Merriex v. Beale (In re Merriex)*, 253 B.R. 644 (Bankr. D. Md. 2000) (ruling that hostile work environment claims brought under District of Columbia Human Rights Act were nondischargeable).

48. Here, the Plaintiffs believe that the standard for determining that their claims against the Debtor are nondischargeable under Bankruptcy Code section 523(a)(6) is satisfied,

and to the extent necessary, the Plaintiffs intend to commence an adversary proceeding seeking such a determination at an appropriate time in the Bankruptcy Case. Thus, there is no basis for delaying the continued prosecution of the Action.

D. The Plaintiffs Believe That The Debtor Filed His Bankruptcy Petition In Bad Faith, Which Is An Additional Basis To Grant Immediate Relief From The Automatic Stay

49. Good faith is a requirement for every petition filed under the Bankruptcy Code. *See Carolin Corp. v. Miller*, 886 F.2d 693, 698 (4th Cir. 1989) (finding that a good faith requirement to filing a bankruptcy petition is implicit in the Bankruptcy Code); *McDow v. Smith*, 295 B.R. 69, 75 (E.D. Va. 2003) (finding that a debtor's bad faith acts or omissions may, in the totality of the circumstances, constitute cause for dismissal). The strategic filing of a bankruptcy petition to frustrate an action pending in a non-bankruptcy forum constitutes a bad faith filing. *See In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1999) (“[T]he Bankruptcy Code, both in general structure and in specific provisions, authorizes bankruptcy court to prevent the use of the bankruptcy process to achieve illicit objections.”); *Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.)*, 235 F.3d 375, 379-80 (8th Cir. 2000) (debtor did not file bankruptcy to effectuate a valid reorganization, but rather to prevent a creditor from pursuing their claims in state court); *In re SGL Carbon Corp.*, 200 F.3d 154, 159 n.8 (3d Cir. 1999) (same).

50. As described above, the Debtor's conduct demonstrates its bad faith in filing the Bankruptcy Case. The Debtor filed its Petition less than 48 hours before trial in the Action was scheduled to commence. Indeed, the Bankruptcy Case was filed only after several attempts by the Debtor to stay the Action were rebuffed by both the District Court and the Fourth Circuit—one such attempt was even certified as “frivolous” by the District Court. In his latest attempt to stay the Action before the District Court, the Debtor filed a motion for terminating sanctions against all of the Plaintiffs, which motion was based on a delay by one Plaintiff in producing

documents that were in the Debtor's possession before the hearing on his motion for terminating sanctions. On February 17, 2012, the District Court denied the Debtor's motion for terminating sanctions, and on the same day, the Fourth Circuit denied Debtor's motion for a stay pending appeal. Following rejection of these motions, the Bankruptcy Court was the only judicial venue that had not already rejected his efforts to stay the trial. The Debtor was therefore left with no other course of action to attempt to delay this trial but to file a petition for bankruptcy.

51. The timing of the Bankruptcy Case's filing demonstrates that the purpose of the Debtor's filing is to abuse the bankruptcy process and to obstruct Plaintiffs' efforts to have their day in court. Quite simply, the Debtor's conduct could well become the new textbook example of bad faith. Just two days before filing for bankruptcy, on the same day as both the Fourth Circuit rejected the Debtor's motion for a stay pending appeal and the District Court rejected his motion for terminating sanctions, the Debtor's counsel participated in hearings before the District Court and gave no hint that the Debtor intended to file for bankruptcy in just two days.³

RESERVATION OF RIGHTS

52. The Plaintiffs expressly reserve any and all of their rights in connection with the Action. Nothing contained herein shall operate as a waiver of any of the Plaintiffs' claims, rights or remedies.

WAIVER OF MEMORANDUM OF LAW

53. Pursuant to Local Rule 9013-1(G), and because there are no novel issues of law presented in the Motion, the Plaintiffs request that the requirement that all motions be accompanied by a written memorandum of law be waived.

³ On February 15, 2012 the Debtor participated in mandatory credit counseling as required by the Bankruptcy Code. *See Certificate of Credit Counseling* [E.C.F. No. 3]. As such, the facts demonstrate that at the time of the afore-mentioned hearing before the District Court, the Debtor was contemplating a bankruptcy filing.

NO PRIOR REQUEST

54. No previous request for the relief sought herein has been made to this Bankruptcy Court or any other court.

REQUEST FOR AN EXPEDITED HEARING

55. The Plaintiffs request that the Bankruptcy Court (a) schedule the hearing on Motion for February 21, 2012, at a time to be determined, or a later date at the Bankruptcy Court's earliest convenience (the "Hearing Date") and (b) establish the Hearing Date as the deadline by which any and all objections to the Motion must be made. Bankruptcy Rule 9014, which governs contested matters not otherwise governed by the Bankruptcy Rules, requires only that "reasonable notice and opportunity for hearing" be afforded to the party against whom the relief is sought. *See* Bankruptcy Rule 9014. As discussed in detail above, and in light of the suspect timing of the Debtors' bankruptcy filing—on the veritable eve of the Action's trial—the Plaintiffs submit that it is appropriate to grant a hearing on the Motion on an expedited basis, as requested herein.

56. The trial in the Action is scheduled to begin the morning of Tuesday, February 21, 2012. The parties to the Action, including the Debtors, have known for more than four months that the trial was scheduled to begin on February 21, 2012. The Debtor will not suffer any prejudice by this Bankruptcy Court allowing the Action to continue and given the exigent circumstances described above, the Plaintiffs respectfully submit that a shortened notice period and expedited hearing on the Motion is appropriate. Accordingly, the Plaintiffs request that the Motion be heard on or before the close of business on February 21, 2012 or at such later date at the Bankruptcy Court's earliest convenience.

NOTICE

57. Notice of this Motion will be given to (i) counsel to the Debtor, (ii) the Office of the United States Trustee for the Eastern District of Virginia, Alexandria Division, and (iii) the chapter 7 trustee appointed in the Bankruptcy Case. The Plaintiffs submit that no other or further notice of this Motion is required.

CONCLUSION

WHEREFORE, the Plaintiffs request that the Bankruptcy Court: (a) enter an order, in substantially the form attached hereto as Exhibit C, modifying the automatic stay to permit the Plaintiffs to continue the prosecution of the Action and (b) grant such other and further relief as the Bankruptcy Court deems appropriate.

Dated: February 21, 2012

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

By: /s/ Catherine E. Creely
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Counsel for Bashe Abdi Yousuf, et al.

EXHIBIT A

2. Debtor Mohamed Ali Samantar (“Samantar”) is the defendant in *Yousuf*, which was scheduled to go to trial beginning February 21, 2012 at 10:00 a.m. ET, before the Honorable Leonie M. Brinkema.

3. On February 19, 2012, at 9:31 p.m., less than 48 hours before the *Yousuf* trial was scheduled to begin, Samantar filed a petition for relief (the “Petition”) in the United States Bankruptcy Court for the Eastern District of Virginia (the “Court”) thereby automatically staying the *Yousuf* trial pursuant to Bankruptcy Code section 362.¹ The Petition was filed only after Debtor’s motions for a stay were denied by the District Court on February 14, 2012 (*Yousuf* Dkt. 326),² and by the United States Court of Appeals for the Fourth Circuit (Case No. 11-1479) on February 17, 2012 (*Yousuf* Dkt. 345). That same day, the District Court denied the Debtor’s motion for terminating sanctions against all Plaintiffs (*Yousuf* Dkt. 344), a motion based on an unintentional delay by one Plaintiff in producing documents that were in Debtor’s possession before the hearing on his motion for sanctions.

4. The Debtor had previously tried and failed to obtain a stay of the District Court proceedings. The Debtor first sought a stay in the District Court on May 13, 2011, ten days after that court entered a scheduling order and six weeks after the denial of his motion to dismiss, upon the District Court’s holding that the Debtor was not entitled to common-law immunity. The Debtor sought a stay in the District Court pending his not-yet filed appeal to the Fourth Circuit. On May 18, 2011, the District Court denied the Debtor’s motion, and certified his appeal as “frivolous.” A true and correct copy of the District Court’s May 18, 2011 order, which

¹ Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Motion.

² Unless otherwise indicated, the orders and court filings referenced in this declaration are public filings, and because of their voluminous nature, they are not attached hereto as exhibits. Copies will promptly be provided to the Court upon request.

was entered before *Yousuf* switched from paper filing to ECF filing, is attached hereto as Exhibit

1.

5. The next day, May 19, 2011, Plaintiffs served Debtor with written discovery requests.

6. On June 18, 2011, one month after the District Court denied his May 13, 2011 motion to stay, the Debtor filed what he styled an “emergency” appellate motion to stay the District Court proceedings pending appeal. A true and correct copy of Debtor’s motion is attached hereto as Exhibit 2. That motion was denied on July 8, 2011 (Yousuf Dkt. 198). Pre-trial proceedings in *Yousuf* continued in the District Court. The Debtor was deposed over the course of three days in late July 2011. Plaintiffs timely made their expert disclosures on July 29, 2011. The same day, the Debtor’s counsel in the District Court proceedings deposed Plaintiff Yousuf.

7. At around the same time, Plaintiffs identified several Somaliland natives who they wished to depose in order to present their testimony at trial. Because residents of Somaliland, a country not formally recognized by the government of the United States, cannot easily travel to the United States, Plaintiffs arranged to fly to the Republic of Djibouti, whose government is recognized by the United States, to conduct the desired depositions. However the trip could to Djibouti could not be made until September, because the month of Ramadan fell in August last year, and rendered unavailable the potential witnesses, all of whom are observant Muslims.

8. In September, Plaintiffs’ counsel traveled to Djibouti to conduct the aforementioned depositions, and to obtain the declarations of three other witnesses. Four witnesses were deposed, and three witnesses provided sworn declarations over the course of nine days. Akin Gump financed the trip to Djibouti, which included airfare and accommodations for two of its attorneys, a legal assistant who handled logistics, Debtor’s counsel Joseph Drennan, a court stenographer and a videographer, both of whom traveled to Djibouti from Washington, D.C., and

two interpreters who traveled to Djibouti from Kenya. Akin Gump also flew the witnesses and declarants from Somaliland to Djibouti, along with two interpreters who also served as escorts, and paid for their accommodations. The hotel bill alone for the trip to Djibouti was 33,914.71 USD.

9. Written discovery and depositions continued throughout September. On September 29, 2011, Plaintiff Deria was deposed. All four of the Debtor's experts, were deposed, including his proposed Italian law expert, who was deposed in Milan, Italy. The Plaintiffs' Italian expert also was deposed in Milan.

10. On October 14, 2011, Plaintiffs Buralle Salah Mohamoud and Ahmed Jama Gulaid traveled to the United States from Somaliland to be deposed. Mr. Gulaid was deposed on October 17 and Mr. Mohamoud on October 19. At that time, and from the outset of the *Yousuf* matter, Plaintiffs Mohamoud and Gulaid had proceeded as John Doe I and John Doe II, respectively, because of fears for their personal safety stemming from their pursuit of claims against Debtor, a former high-ranking official in the regime of President Siad Barre of Somalia. Akin Gump bore the costs of bringing Messrs. Mohamoud and Gulaid to the United States, along with an interpreter hired to escort them, as neither speaks English or had extensive travel experience. The cost of bringing Messrs. Mohamoud and Gulaid to the United States to be deposed was over \$10,000.

11. Plaintiffs Mohamoud and Gulaid are able to travel to the United States only because they have been "paroled" by the Department of Homeland Security. Their current parole, which allowed them to travel to the United States to be deposed and again for trial, will expire in September 2012. Should the Debtor's bankruptcy filing delay the *Yousuf* trial, Plaintiffs

Mohamoud and Gulaid will be severely prejudiced because they may be unable to return to the United States for the trial.

12. While Plaintiffs Mohamoud and Gulaid were in the United States for their depositions, my colleague, L. Kathy Roberts of CJA asked them if they were prepared to disclose their identities. They were not willing to do so at that time because they feared potential harassment and retaliation when they returned home to Somaliland. *See* No. 1:04cv1360, Declaration of L. Kathy Roberts at ¶ 7, Dkt. #321-1 (E.D. Va. Feb. 13, 2012), a true and correct copy of which is attached hereto as Exhibit 3. Messrs. Mohamoud and Gulaid were advised that they eventually would have to disclose their identities, and indeed, on October 20, 2011, at the final pretrial conference the District Court ordered that they do so before trial, which was set for February 21, 2012. It was determined that because of their safety concerns, Plaintiffs Mohamoud and Gulaid would be flown out of Somaliland before their identities were revealed. *Id.*

13. In November 2011, the parties in *Yousuf* agreed that the identities of Plaintiffs Mohamoud and Gulaid would be revealed to the public three weeks prior to the start of trial on February 21, 2012.

14. In keeping with the desire of Messrs. Mohamoud and Gulaid to be out of Somaliland when their names were publicly disclosed, they were flown from Somaliland to Djibouti on January 30, 2012, where they stayed for several days. They arrived in the United States on February 8, 2012.

15. Consistent with the agreement publicly disclose the names of Messrs. Mohamoud and Gulaid three weeks before trial, the Plaintiffs in *Yousuf* filed a consent motion to amend the case caption on January 31, 2012, and thereby revealed for the first time the true identities of the John Doe Plaintiffs on January 31, 2012. The motion was granted on February 1, 2012.

16. After Messrs. Mohamoud and Gulaid arrived in the United States for the upcoming trial, Mr. Gulaid informed Ms. Roberts that members of the Debtor's tribe had been harassing him and his family in what he believed to be an attempt to intimidate him so that he would not participate in the upcoming trial. *See* Exhibit 3 at ¶ 14.

17. Apart from the prejudice that Messrs. Mohamoud and Gulaid would suffer if their parole were to expire while the *Yousuf* trial is stayed pending the Debtor's bankruptcy case, they would be further prejudiced by being forced to return to Somaliland prior to the resolution of their claims. Based on the events occurring before they left Somaliland, Messrs. Mohamoud and Gulaid have a genuine fear that they will be subject to acts of intimidation, harassment, and even violence as they await the rescheduled trial. *See* Exhibit 3 at ¶ 15.

18. Messrs. Mohamoud and Gulaid never would have agreed to reveal their identities on January 30, 2012 if they had known that the trial would be delayed.

19. Plaintiff Aziz Mohamed Deria also would suffer severe prejudice if the trial were delayed. He arrived from his home near Seattle on February 18, and his return flight is booked for this Friday, February 24. Mr. Deria is a single father of five children, four of whom live at home, and for whom he had to make child care arrangements for the week. It would be extremely burdensome to make additional arrangements for next week, particularly while he is in Alexandria and his children are home in Washington State.

20. Mr. Deria's sister, Nimo Dirie, traveled here from Kuwait, arriving in Alexandria on February 18, 2012. She is a key witness who is slated to testify about Mr. Deria's claims on behalf of their father and brother, as Ms. Dirie is an eyewitness to their abductions by members of the Somali Armed Forces. Ms. Dirie suffers from Type 2 diabetes, and is traveling to Toronto on Monday, February 27, 2012 to see her former physician, whom she knows and trusts.

Additionally, Ms. Dirie is the stay-at-home mother of six children, and being forced to be away from her children longer than anticipated would be incredibly burdensome and highly stressful.

21. Furthermore, if the trial is delayed for an extended period, there is no guarantee that Ms. Dirie would be willing to return to the United States to testify, as she would reasonably fear that the Debtor would cause a further delay of the trial after her arrival. Without Ms. Dirie's testimony, Mr. Deria would be left with no eyewitness willing to testify regarding the abductions of his father and brother, as he was in the United States when those events occurred. As I understand from my colleagues at CJA, Mr. Deria's mother, the only other eyewitness, becomes extremely distraught when she speaks of the abduction of her late husband and son, and consequently was unwilling to testify. As a resident of Canada, she is beyond the subpoena power of the District Court.

22. Plaintiff Bashe Abdi Yousuf was expected to be the Plaintiffs' first witness at trial, and arrived in Alexandria on February 18, 2012, in anticipation of testifying no later than the morning of Wednesday, February 22, 2012. He is scheduled to fly home to Georgia that afternoon. Mr. Yousuf is the sole provider for his family and because he has limited vacation time, he cannot be away from work indefinitely.

23. Another one of Plaintiffs' key fact witnesses, Muhamed Ahmed, is scheduled to travel from London to Virginia on Saturday, February 25, 2012. He must return to London on Tuesday, February 28 to complete the necessary paperwork to attend his son's upcoming wedding in Saudi Arabia.

24. Several of the Plaintiffs in *Yousuf* suffer from insomnia and anxiety because of the abuses they suffered, as the Second Amended Complaint alleges, at the hands of Somali armed forces under the Debtor's command and/or control. These conditions have been exacerbated as they

prepare to testify at trial. For example, Plaintiff Deria has been unable to get more than a few hours' sleep each night since arriving in Virginia. Any delay in the trial would cause further anxiety, which would begin anew prior to the rescheduled trial.

25. The Debtor would also be prejudiced by a delay in the *Yousuf* trial, as noted by the District Court in denying his motion for a stay on February 14, 2012. At the hearing on that motion, the District Court expressed concern for the Debtor's health, which is reported to be fragile, and observed that if the case were stayed, it might never be resolved with all parties present. The court further noted that the Debtor would "suffer" if there were a delay of several months and the Debtor became less able to testify and present his position to the jury.

26. Plaintiffs' counsel, both from Akin Gump and CJA, have expended significant resources to be ready for trial on February 21. CJA, a non-profit organization, has spent approximately \$1,050 on airfare for Ms. Roberts and her colleagues, Andrea Evans and Natasha Fain, plus a combined \$56 per day for two rental cars. Ms. Roberts arrived in Virginia on February 13, 2012 and her hotel room costs \$189 per night. Ms. Fain has spent \$100 per night for her hotel since arriving in Alexandria on February 17, 2012 a rate that increased to \$139 per night on February 20, 2012.

27. Akin Gump, which represents the *Yousuf* plaintiffs *pro bono publico*, has expended extraordinary resources over the past several weeks to prepare for trial, in addition to those it has already expended to get to this point. The cost of getting Messrs. Mohamoud and Gulaid to the United States, along with the interpreter hired to escort them, was over \$7,000, which includes hotel accommodations during their stay in Djibouti. Upon their arrival in the United States on February 8, 2012, Akin Gump has paid for their accommodations, which, at \$189 per night, stands at well over \$7,000. That number will continue to grow, as will the cost of the interpreter

who travels with them and assists them while they are in the United States. That interpreter's contractual rate is \$200 per day.

28. Akin Gump is also paying for accommodations for Plaintiffs Deria and Yousuf, and also for Ms. Dirie. All arrived in Alexandria on February 18, 2012 and as of February 21, 2012 their hotel bill stands at a combined \$1,701. Akin Gump also paid for the airfare for all three, and will pay for roundtrip airfare from London and accommodations of Plaintiffs' witness Muhamed Ahmed, for a total of over \$6,000 in airfare alone.

29. Akin Gump has also set up a temporary office near the District Court building in Alexandria, at a cost of \$538 per night. Further expenses were incurred in hiring a vehicle large enough to transfer the necessary computer equipment and other supplies needed to set up the temporary office, and in flying in Akin Gump's trial support specialist from Houston and paying for his accommodations and other reasonable expenses.

30. Because the District Court required simultaneous translation for the witnesses who speak only Somali, Akin Gump retained the two interpreters required for simultaneous interpretation at a cost of \$11,500 for one week. That does not include airfare, accommodations and reasonable expenses, for which Akin Gump is contractually obligated to reimburse them.

31. If the trial in this matter is delayed for any significant amount of time, Akin Gump, which again is representing Plaintiffs *pro bono publico* in a case that does not provide for an award of attorneys' fees will have expended these significant resources for nothing, and will incur further similar and significant expenses when the *Yousuf* matter finally goes to trial, if this unnecessary delay caused by Debtor's filing continues.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 21st day of February 2012, at Chevy Chase, MD.



Elizabeth Tobio

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division

BASHE ABDI YOUSUF, et al.,
Plaintiffs,
v.
MOHAMED ALI SAMANTAR,
Defendant.
1:04cv1360 (LMB/JFA)

ORDER

Before the Court is defendant's Mohamed Ali Samantar's ("Samantar") Motion to Stay [Dkt. No. 162]. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before us and argument would not aid the decisional process. For the reasons stated below, the motion will be denied.

On November 29, 2010, Samantar filed a Motion to Dismiss this civil action claiming, inter alia, that he is entitled to common law sovereign immunity. On February 14, 2011, the Executive Branch informed the Court that Samantar does not have foreign official immunity. Accordingly, on February 15, 2011, the Court denied Samantar's common law immunity claim. On March 15, 2011, Samantar filed a Motion to Reconsider the denial of common law immunity. On April 1, 2011, the Court denied both the remainder of Samantar's motion to dismiss and Samantar's motion

to reconsider. On April 29, 2011, Samantar filed a Notice of Appeal of the denial of the claim of common law immunity and the denial of the motion for reconsideration.

On May 13, 2011, Samantar filed a Motion to Stay the scheduling order in this case pending resolution of the interlocutory appeal. Samantar argues that the appeal divests this court of jurisdiction; however, Samantar concedes that divestiture does not apply if the district court certifies the interlocutory as frivolous. Samantar argues that "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." Mot. to Stay at 4.

Plaintiffs correctly argue that Samantar's appeal is frivolous. 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 determined that Samantar is not entitled to common law immunity. Samantar has not cited any statute or binding precedent that would allow this Court to ignore the State Department's finding. Therefore, the Court certifies this appeal as frivolous, and it is hereby

EXHIBIT 2

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Record No. 11-1479

**(Civil Action No. 04-1360)
(On Appeal from the United States District Court for
the Eastern District of Virginia – Alexandria Division)**

In re:

BASHE ABDI YOUSUF, *et alii*,

Plaintiffs-Appellees,

versus

MOHAMED ALI SAMANTAR,

Defendant – Appellant.

***APPELLANT MOHAMED ALI SAMANTAR'S EMERGENCY MOTION
FOR A STAY OF PROCEEDINGS IN THE DISTRICT COURT
PENDING APPELLATE REVIEW***

COMES NOW, before this Honorable Court, your Appellant in the above-
encaptioned matter, *viz.*, MOHAMED ALI SAMANTAR, by and through his
undersigned attorney and counsellor at bar, *in praesenti*, *viz.*, Joseph Peter
Drennan, and pursuant to, *inter alia*, the provisions of Federal Rules of Appellate
Procedure 8 (a) (2), Local Rule 8 and Local Rule 27 (e), respectfully, to move
this Honorable Court, on an expedited basis, to enter an appropriate Order to stay

discovery in the District Court, pending the resolution of the instant appeal, and, in support whereof, your Appellant would direct the attention of this Honorable Court to the following considerations, *viz.*:

I. Background and Preliminary Statement

From 1980 to 1986, your Appellant, *viz.*, Mohamed Ali Samantar (hereinafter referenced *qua* “Samantar”), was the First Vice President and Minister of Defense of Somalia, and, from 1987 to 1990, he served as its Prime Minister. Your Appellees are natives of Somalia who allege that they, or members of their families, were the victims of torture and extrajudicial killings, in Somalia, during those years, and are seeking damages against Samantar upon allegations that Samantar supposedly authorized those acts. Your Appellees brought suit, in 2004, in the District Court, pursuant to the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U. S. C. §1350, and the Alien Tort Statute, 28 U. S. C. §1350, and Samantar promptly moved to dismiss, raising a number of grounds for dismissal including, *inter alia*, a contention that the Foreign Sovereign Immunities Act of 1976 (hereinafter referenced *qua* “FSIA”), 28 U. S. C. §§1330, 1602 *et seq.*, as well as the common law, provided Samantar with immunity from suit based on actions taken in his official capacity.

The District Court thereupon stayed the matter, awaiting a statement of interest from the State Department, and, in 2007, having received no response from the State Department, the District Court concluded that, under the FSIA, it was bereft of subject-matter jurisdiction over the matter and granted Samantar's motion to dismiss. On appeal, however, this Honorable Court reversed the District Court, finding that the FSIA did not confer official immunity and applied only to governments. *Yousuf v. Samantar*, 552 F. 3d 371 (4th Cir. 2009). The Supreme Court of the United States subsequently granted Samantar's petition for a *writ of certiorari*, 130 S. Ct. 39 (U.S. Sept. 30, 2009), and ultimately determined, consistent with this Honorable Court's said decision, that the FSIA did not codify official immunity and remanded the case to the District Court. *Yousuf v. Samantar*, 130 S. Ct. 2278 (June 1, 2010). However, the Supreme Court took pains to spotlight that its holding was strictly delimited to the question of official immunity and the FSIA, as may be readily discerned from the following excerpt from the concluding paragraph of the Opinion of the Court by Justice Stevens, *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 in the first instance by the District Court on remand.*

Id. (Slip Opinion at 20) (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, in which, *inter alia*, he, essentially, renewed his claim of immunity from suit under common law, and your Appellees opposed said motion. However, before the said motion came on for a hearing, the United States of America did, on 14 February 2011, file a Statement of Interest [Document 147¹], purporting to instruct the District Court to deny, *ex cathedra*, Samantar's claim of immunity under the common law, by making the following assertions, *inter alia*, viz.:

- 1.) That, in the absence of any government recognized by the United States in Somalia, to confirm or waive Samantar's claim of immunity, his claim of immunity should not be recognized (Statement of Interest at 9);
- 2.) That the putative determination of the Executive Branch, denying immunity to Samantar “. . . has taken into account the potential impact of such a decision on the foreign relations interests of the United States” (*Id.*);

¹ Unless otherwise noted, all references to “Document” denote the corresponding docket entry in the District Court.

3.) That, since Samantar has lived in the United States since 1997, he should, therefore, be subject to the jurisdiction of the District Court (*Id.* at 7); &

4.) 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.”² (*Id.* At 6).

As adverted to above, 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” (15 February 2011 Order)

Samantar thereupon moved the District Court for a Reconsideration of its Order, striking his defense of common law immunity [Document 150]. However, at a hearing on the said Motion for Reconsideration, held on 1 April 2011, the District Court denied said Motion³.

² The Statement of Interest cites the Supreme Court Opinion in *Samantar, supra* (130 S. Ct. at 2284), and the case of *Isbrandsten Tankers, Inc. v. President of India*, 446 F. 2d 1198, 1201 (2d Cir. 1971), in putative support of such proposition. However, Samantar respectfully submits that neither the holdings nor the *dicta* in either of the said decisions supports such a sweeping proposition.

³ At the said 1 April 2011 hearing before the District Court, that court indicated,

On, 29 April 2011, Samantar appealed to this Honorable Court from the Order denying his common law immunity from suit defense. 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 [Document 161]. Accordingly, Samantar filed a Motion to Stay with the District Court on 13 May 2011, 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” [Document 168] – hence the instant motion.

II. Samantar is Entitled to Have Discovery in the District Court Stayed Pending Appellate Review of the District Court Decision Denying Him Immunity From Suit

Despite the interlocutory character of the Order of the District Court denying Samantar's defense of immunity from suit under common law, Samantar had authority to notice them for immediate appeal. 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*,

inter alia, that the Executive Branch is “. . . entitled to deference in this case” and that “the government's position on sovereign immunity . . . is sound.” (TR. at 2) (Please note that an unexpurgated copy of the Official Transcript of the said Motions Hearing, compiled by Anneliese J. Thompson, RDR, CRR, is submitted herewith *qua* “Exhibit P”).

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 Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, raises “an issue that is subject to interlocutory review”).

“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 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).

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), and 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).

As Samantar’s Brief accompanying his Motion for Reconsideration [Document 151] and his subsequent Reply Brief [Document 157] amply demonstrate, 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 that might be envisaged from a recognition of that immunity. Tellingly, the Statement of Interest, which was treated as dispositive by the District Court, makes absolutely no contention, whatsoever, or even a suggestion, or, for that matter, a hint of a suggestion, that recognizing Samantar's immunity under the common law would undermine the foreign policy of the United States or embarrass the United States in any way. To the extent that the

Statement of Interest purports to convey “. . . the Executive's assessment that it is appropriate in the circumstances here (to deny immunity to Samantar) to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents[,]” (Statement of Interest at ¶9, p.7), the Executive clearly is exceeding its constitutional bounds as regards the foreign policy of the United States and invading the province of the Judiciary. *See: Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, a perusal of the Statement of Interest, as well as the accompanying 11 February 2011 letter from Harold Hongju Koh, the Legal Advisor to the Department of State⁴, yield the observation that neither document contains any finding that the alleged conduct involving Samantar either was or was not undertaken in an official capacity. *Au contraire*, the Statement of Interest declares that “[t]he United States express no views on the merits of Plaintiffs' claims” Statement of Interest at p.1, fn.1. At base, the Statement of Interest appears to be an exercise in obscurantism, wherein the Executive's purpose in deigning to deny Samantar immunity is never clearly stated much less couched in any cognizable findings that would constitute an appropriate Executive function. As such, Samantar's appeal from the subject

⁴ The State Department letter is attached, as “Exhibit 1”, to the Statement of Interest.

decision of the District Court, which decision, essentially, constituted an abdication of the Judiciary to the Executive, could hardly be susceptible of the appellation “frivolous”. Indeed, such factors indicate that the Statement of Interest was not entitled to deference by the District Court.

III. Samantar is Entitled to a Stay on an Expedited Basis

Samantar respectfully urges that, having thus demonstrated that the instant appeal is not frivolous, he is entitled, for the reasons stated above, to an expedited consideration of the instant Motion to Stay, and that, perforce, the following further factors conflate to accentuate the need for immediate relief, *viz.*:

1. That 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, creates a veritable Buridan's paradox⁵, in that the press of time and the limitations of available resources confront him with the choice of either complying with the not insignificant burdens of discovery imposed by the District Court's Scheduling Order, of preparing a defense to complex

⁵ Taken from discussions of free will and determinism, Buridan's paradox refers to, *inter alia*, the inability to make a choice between two equally desirable alternatives. The paradox is named after French medieval philosopher Jean Buridan (1300 – 58), who studied under the legendary minimalist William of Occam, at the University of Paris. Julio Segura, and Carlos Rodriguez Braun, *An Eponymous Dictionary of Economics*, at p. 35 (“Buridan's Ass” entry by Victoriano Martin Martin).

litigation, which will likely entail, *inter alia*, taking and defending numerous depositions on three continents⁶ over the next two and one half months, with the deposition of Samantar presently set to commence, in Washington, D.C., on 23 June 2011, versus compliance with this Honorable Court's Briefing Order⁷ [Docket No. 10]; to the extent to which he is compelled to participate, on veritable tenterhooks, in intensive discovery the District Court whilst simultaneously prosecuting the instant appeal; and,

2. That, having to proceed with extensive and protracted discovery in the District Court before he can obtain judicial review of the subject Order denying his defense of immunity from suit perversely erodes and undermines precisely that which Samantar asserts to be his right under common law, *viz.*, to be spared from being subject to civil litigation.

Immunity creates “an entitlement not to stand trial or face the burdens of litigation.” *Saucier v. Katz*, 533 U.S. 194, 200 (2001). “It is therefore

⁶ Europe, North America and Africa.

⁷ It bears mention that, in accordance with the 9 June 2011 Notice of Scheduled Mediation, from Frank C. Laney, Mediator for this Honorable Court, issued pursuant to Local Rule 33 [Docket No. 11], the due date for Samantar's Opening Brief and the filing of the Joint Appendix is being extended to 25 July 2011. However, such extension is of small comfort to the undersigned given the magnitude of the mandate of the District Court's Scheduling Order.

incumbent on the courts to review the immunity defense critically at an early stage of the proceedings” in order to determine whether the defendant is entitled to be spared the burdens of pretrial proceedings.

McVey v. Stacy, 157 F.3d 271, 275 (4th Cir. 1998).

IV. Samantar Has Complied With All of the Conditions Precedent for Moving This Honorable Court for a Stay of Proceedings in the District Court Pending the Resolution of the Instant Appeal

The conditions precedent for seeking a stay in this Honorable Court are contained within the provisions of F. R. App. 8 (a), which provisions are set forth, *haec verba*, below, *viz.*:

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) Initial Motion in the District Court.

A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a supersedeas bond; or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in the Court of Appeals; Conditions on Relief.

A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting the relief requested and the facts relied on;

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under this Rule 8(a)(2) must be filed with the circuit clerk and normally will be considered by a panel of the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

Samantar respectfully submits that he has complied with all of the foregoing requirements to bring on the instant Motion to Stay that are applicable to him in the case *sub judice*, viz.:

- 1.) As referenced *supra*, upon the filing of his Notice of Appeal in respect of the instant appeal, and the subsequent issuance by the District Court of the discovery Scheduling Order, Samantar did, on 13 May 2011, file a Motion to Stay with the District Court [Document 162] in comportance with the requirements of Federal Rules of Appellate Procedure 8 (a) (1) (A), and, on 18 May 2011, the District Court entered an Order [Document 168], denying the Motion to Stay and characterizing the instant appeal as “frivolous”, which denial fulfilled the condition precedent to bring on the instant motion contained in Federal Rules of Appellate Procedure 8 (a) (2) (A) (ii);
- 2.) Samantar has complied with the requirements of Federal Rules of Appellate Procedure 8 (a) (2) (B) (i), in that the reasons advanced by Samantar for granting the relief requested herein and the facts relied on are set forth, *passim*, hereinbefore;
- 3.) Samantar now effects full compliance with the requirement spelt out in Federal Rules of Appellate Procedure 8 (a) (2) (B) (iii), *viz.*, that he include in the instant Motion all of the relevant portions of the record in the case *sub judice*, needed to decide the instant motion by submitted herewith unexpurgated copies of the following documents *qua* Exhibits, *viz.*:

- a. District Court Docket Sheet (“Exhibit 'A'”, annexed hereunto);
- b. “SECOND AMENDED COMPLAINT FOR TORTURE;
EXTRAJUDICIAL KILLING; ATTEMPTED
EXTRAJUDICIAL KILLING; CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT;
ARBITRARY DETENTION; CRIMES AGAINST
HUMANITY; AND WAR CRIMES” [Document 76]⁸
 (“Exhibit 'B'”, annexed hereunto);
- c. “DEFENDANT'S MOTION TO DISMISS”
 [Document 138] (“Exhibit 'C'”, annexed hereunto);
- d. “BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S
MOTION TO DISMISS SECOND AMENDED
COMPLAINT” [Document 139] (“Exhibit 'D'”, annexed
hereunto);
- e. “PRAECIPE AND NOTICE OF FILING OF TABLE
OF AUTHORITIES IN RE BRIEF IN SUPPORT OF
DEFENDANT SAMANTAR'S MOTION TO DISMISS
SECOND AMENDED COMPLAINT”
 [Document 140] (“Exhibit 'E'”, annexed hereunto);
- f. “PRAECIPE AND NOTICE OF ERRATA IN RE DEFENDANT
SAMANTAR'S BRIEF IN SUPPORT OF MOTION TO
DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT”
 [Document 141] (“Exhibit 'F'”, annexed hereunto);

⁸ It bears mention that, on 22 February 2007, your plaintiffs filed and served their Motion for Leave to File the Second Amended Complaint [Document 76], including, *qua* “Exhibit 1” to their said motion their proposed Second Amended Complaint specimen. Thereafter, on 9 March 2007, the District Court granted said motion [Document 82]. However, for whatever reason, the Second Amended Complaint was not assigned a discrete docket entry by the Clerk of the District Court.

- g. "PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT" [Document 143] ("Exhibit 'G'", annexed hereunto);
- h. "REPLY IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION TO DISMISS SECOND AMENDED COMPLAINT" [Document 144] ("Exhibit 'H'", annexed hereunto);
- i. "STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA" [Document 147] ("Exhibit 'I'", annexed hereunto);
- j. "ORDER" of District Court, entered on 15 February 2011 [Document 148] ("Exhibit 'J'", annexed hereunto);
- k. "MOTION TO RECONSIDER" [Document 150] ("Exhibit 'K'", annexed hereunto);
- l. "BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S" MOTION TO RECONSIDER" [Document 151] ("Exhibit 'L'", annexed hereunto);
- m. "PRAECIPE AND NOTICE OF ERRATA IN RE BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION FOR RECONSIDERATION" [Document 154] ("Exhibit 'M'", annexed hereunto);
- n. "PLAINTIFFS' OPPOSITION TO MOTION TO RECONSIDER" [Document 156] ("Exhibit 'N'", annexed hereunto);
- o. "REPLY IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION TO RECONSIDER" [Document 157] ("Exhibit 'O'", annexed hereunto);
- p. "ORDER" of District Court, entered on 1 April 2011 [Document 158] ("Exhibit 'P'", annexed hereunto);
- q. Transcript of Motions Hearing on 1 April 2011 [Document 159] ("Exhibit 'Q'", annexed hereunto);

- r. "NOTICE OF APPEAL" [Document 160]
("Exhibit 'R'", annexed hereunto);
- s. "(Scheduling) ORDER" [Document 161]
("Exhibit 'S'", annexed hereunto);
- t. "MOTION TO STAY" [Document 162]
("Exhibit 'T'", annexed hereunto);
- u. "BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S
MOTION TO STAY SCHEDULING ORDER "[Document
163] ("Exhibit 'U'", annexed hereunto);
- v. "PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION
TO STAY SCHEDULING ORDER " [Document 166]
("Exhibit 'V'", annexed hereunto);
- w. "ORDER" of District Court, entered on 18 May 2011
[Document 168] ("Exhibit 'W'", annexed hereunto); &
- x. "DEFENDANT SAMANTAR'S ANSWER TO PLAINTIFFS'
SECOND AMENDED COMPLAINT" [Document 171]
("Exhibit 'W'", annexed hereunto); and

4.) Samantar has effected compliance with the notice requirements set forth in Federal Rules of Appellate Procedure 8 (a) (2) (C), and coeval Local Rule 27 (a), in that, on 7 June 2011, the undersigned contacted counsel for your Appellees, by means of electronic mail, seeking Appellees' consent to the instant Motion; however, your Appellees, though their counsel, responded by indicated that Appellees intend to file a response in Opposition to the instant Motion.

V. Conclusion

Since the Scheduling Order supposes continued control by the District Court over aspects of the instant case that are involved in the appeal, and, since the appeal is not frivolous, further prosecution of this case in the District Court, pursuant to the Scheduling Order, or otherwise, would be improper; in addition, because of the burden of Samantar's adhering, simultaneously, to the Scheduling Order and this Honorable Court's Briefing Order, Samantar needs immediate relief from the Scheduling Order. Accordingly, the operation of the Scheduling Order should be stayed, forthwith, pending the outcome of the instant appeal.

WHEREFORE, and, upon the foregoing premises considered, your Appellant, *viz.*, MOHAMED ALI SAMANTAR, respectfully prays that the relief requested herein, *viz.*, a stay of proceedings in the District Court, be granted unto him, and that he be afforded such other and further relief as may be just and fitting upon the existent circumstances.

Respectfully submitted,

Dated: 17 June 2011, at Alexandria, Virginia

/s/ Joseph Peter Drennan
JOSEPH PETER DRENNAN
218 North Lee Street
Third Floor
Alexandria, Virginia 22314
Telephone: (703) 519-3773
Telecopier: (703) 548-4399
E-mail: joseph@josephpeterdrennan.com
Virginia State Bar No. 023894

ATTORNEY AND COUNSELOR,
IN PRAESENTI, FOR
MOHAMED ALI SAMANTAR

VI. Certificate of Service

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on 17 June 2011, I caused a true, cyclostyled facsimile of the foregoing to be despatched by carriage of First Class Post, through the United States Postal Service, with adequate postage prepaid thereon, enshrouded in a suitable wrapper, unto each of the following, *viz.*:

Joseph L. Decker, Esq.
Jonathan P. Robell, Esq.
Elizabeth Tobio, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036; &

Lauren A. Wetzler, Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314.

Respectfully submitted,

Dated: 17 June 2011, at Alexandria, Virginia

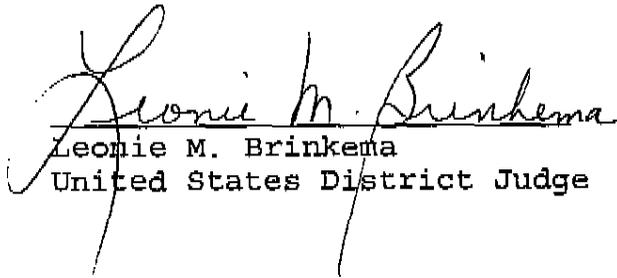
/s/ Joseph Peter Drennan
JOSEPH PETER DRENNAN
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Telephone: (703) 519-3773
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E-mail: joseph@josephpeterdrennan.com
Virginia State Bar No. 023894

ATTORNEY AND COUNSELOR,
IN PRAESENTI, FOR
MOHAMED ALI SAMANTAR

ORDERED that defendant's Motion to Stay [Dkt. No. 162] be and is DENIED.

The Clerk is directed to remove the hearing on this motion from the May 20, 2011 docket and forward copies of this Order to counsel of record.

Entered this th18 day of May, 2011.


Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

BASHE ABDI YOUSUF,)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate) Civil Action No. 1:04 CV 1360 (LMB/JFA)
of Mohamed Deria Ali,)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate)
of Mustafa Mohamed Deria,)
)
BURALLE SALAH MOHAMOUD,)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate)
of Abdullahi Salah Mahamoud)
(the deceased brother of)
Buralle Salah Mohamoud),)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate)
of Cawil Salah Mahamoud)
(the deceased brother of)
Buralle Salah Mohamoud),)
)
and AHMED JAMA GULOID,)
)
Plaintiffs,)
)
v.)
)
MOHAMED ALI SAMANTAR,)
)
Defendant.)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S
RENEWED MOTION TO STAY**

Plaintiffs Bashe Abdi Yousuf, Aziz Mohamed Deria, Buralle Salah Mohamoud and Ahmed Jama Gulaid (collectively “Plaintiffs”), by and through undersigned counsel, respectfully submit this memorandum in opposition to Defendant Mohamed Ali Samantar’s “Renewed Motion to Stay” proceedings pending appellate review.

INTRODUCTION

Defendant brought a motion to stay pending appeal just nine months ago. This Court denied that motion because his grounds for appeal are frivolous, and the United States Court of Appeals for the Fourth Circuit reached the exact same conclusion. Defendant’s “renewed” motion, brought virtually on the eve of the trial set to begin next week, makes the exact same arguments and seeks the exact same relief as his failed initial motion. It must accordingly be denied, for two independent reasons: *first*, Defendant’s appeal remains frivolous and his “renewed” motion should be denied for the same reason this Court and the Fourth Circuit denied Defendant’s identical motions months ago; and *second*, Defendant’s “renewed” motion is procedurally improper because it is a barely disguised end-run around Federal Rules of Civil Procedure 59 and 60, which govern motions for reconsideration.

BACKGROUND

Almost eight years ago, Plaintiffs brought suit against Defendant in the District Court for the Eastern District of Virginia. Plaintiffs seek damages for human rights violations committed against them and their family members in Somalia as part of a campaign orchestrated by Defendant, a General and former Commander of the Armed Forces, Defense Minister, and Prime Minister of Somalia who 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. On

June 1, 2010, the U.S. Supreme Court unanimously ruled that the FSIA does not grant Defendant immunity, and remanded the case for consideration of whether Defendant was entitled to common law immunity. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2292-93 (2010). In so holding, the U.S. Supreme Court explained that the issue of common law immunity is, in the first instance, for the Executive Branch to decide. *Id.* at 2284-85.

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. *See* Dkt. #147 (Feb. 14, 2011). This 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. *See* Dkt. #158 (Apr. 1, 2011); *see also Hearing Tr.*, Dkt. #159, at 2:18-3:12 (Apr. 1, 2011). The Court denied Defendant's motion for reconsideration. *See* Dkt. #158.

Nearly a month later, Defendant filed a notice of appeal on his common law immunity defense. *See* Dkt. #160 (Apr. 29, 2011). Not until a week after the Court entered a scheduling order on May 4, 2011, did Defendant move for a stay, *see* Dkt. #162 (May 13, 2011). The Court denied the stay and certified Defendant's appeal as "frivolous." *See* Dkt. #168, slip op. at 2 (May 18, 2011). The Court explained that the Department of State 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, then filed an "emergency" motion for a stay in the Court of Appeals. *See Appellant Mohamed Ali Samantar's Emergency Motion for a Stay of Proceedings in the District Court Pending Appellate Review*, No. 11-1479, Dkt. #14-1 (June 18,

2011). The Court of Appeals denied that motion. *See* No. 11-1479, Dkt. #23, slip op. at 1 (4th Cir. July 8, 2011).

Pre-trial proceedings continued in this Court and appellate briefing proceeded. *See* No. 11-1479, Dkts. ##25 (Aug. 8, 2011) (Defendant's Opening Brief), 36 (Oct. 3, 2011) (Plaintiffs' Response Brief), 43 (Oct. 24, 2011) (Amicus Curiae/Intervenor Brief of the United States). Defendant moved for two extensions of time to file a reply brief, *see* No. 11-1479, Dkts. ## 44 (Oct. 31, 2011) and 47 (Nov. 10, 2011), both of which the Court of Appeals granted the same day as Defendant's motions, *see id.* at Dkts. ##45, 48. Defendant, however, never filed a reply brief.

On February 8, 2012, the Court of Appeals issued a notice that the appeal is tentatively calendared for oral argument during its May 15, 2012 to May 18, 2012 argument session. *See* No. 11-1479, Dkt. #54 (Feb. 8, 2012). With trial set to begin next week, Defendant now has filed the instant "renewed" motion to stay.

ARGUMENT

Defendant's motion is procedurally barred. But even putting that aside, his supposition that the tentative calendaring of his case for oral argument implies merit or any likelihood of success at all on appeal is wrong and misunderstands the significance of the Fourth Circuit's order.

A. The Appeal Remains Frivolous on the Merits

Putting aside the multiple procedural barriers to Defendant's last-minute renewal of his motion to stay, absolutely nothing has changed to alter the bottom-line conclusion made by both this Court and the court of appeals within the last nine months that the asserted merits of this appeal do not warrant a stay of proceedings.

First, as this Court previously noted, Defendant’s appeal of the denial of common law immunity does not divest this Court of jurisdiction if the appeal lacks merit. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 310-11 (1996) (explaining that district courts may certify interlocutory appeals from the denial of immunity as frivolous as a tool to retain jurisdiction pending disposition of the appeal “and thereby minimize[] disruption of the ongoing proceedings”).

This Court properly certified Defendant’s appeal as frivolous because: (1) the U.S. Supreme Court held that the question of whether Defendant can claim common law immunity is for the Executive Branch to decide in the first instance; (2) the Department of State decided that Defendant cannot claim common law immunity and filed a Statement of Interest so stating; and (3) Defendant presented no meritorious authority or argument providing any basis for this Court to overrule the determination of the Executive Branch in this case. *See* Dkt. #168, slip op. at 2 (Mar. 18, 2011).

Absolutely nothing has changed with respect to any of those considerations to disturb this Court’s conclusion. To the contrary, the merits of the appeal have gotten even worse for Defendant. The Executive Branch has reconfirmed in no uncertain terms its decision that Defendant is not entitled to common law immunity in an amicus brief filed with the Fourth Circuit:

We file this amicus curiae brief to reaffirm the formally stated position of the United States that, under the specific circumstances of this case, defendant-appellant Mohamed Samantar is not entitled to immunity from suit as a former Somali government official. The district court properly recognized that the State Department’s immunity determination is binding and thus correctly denied Samantar’s motion to dismiss based on his flawed claim of immunity.

Brief for the United States as Amicus Curiae Supporting Appellees, No. 11-147, Dkt. #43, at 6 (Oct. 24, 2011).

Defendant has provided the Fourth Circuit no answer to the United States' brief or to the answering brief filed by Plaintiffs. He instead declined, after obtaining two extensions, to file any reply brief at all.

Second, since this Court denied a stay on the grounds of frivolousness, the Fourth Circuit has weighed in and it joined this Court's judgment, summarily denying Defendant's request for a stay pending appeal. *See* No. 11-1479, Dkt. #23 (4th Cir. July 8, 2011).

Defendant cites no new authority that might call into question the Fourth Circuit's decision. Instead he argues that the tentative calendaring of the appeal for oral argument could permit one to "*infer*[]" that the appellate court has determined that the subject appeal is not frivolous, thereby abnegating this Honorable Court's jurisdiction over the instant case at this time." Dkt. #312, at 6 (Feb. 9, 2012) (emphasis added). That is mistaken.

To begin with, the calendaring notice is, as its name plainly says, "tentative." It means only that the case has passed an initial screening for oral argument. The panel assigned to the case could still remove it from the oral argument calendar, finding oral argument unnecessary on the merits, any time between now and May.

Beyond that, such initial and tentative calendaring can be the byproduct of other factors that have nothing to do with the merits of the appeal. Such factors as: (i) this is a return appeal to the Fourth Circuit, and the prior appeal was argued; (ii) the case is on remand from the U.S. Supreme Court; (iii) the uncommonness of an amicus brief filing by the United States government; and (iv) the unusualness of a suggestion of *no* immunity by the United States, could easily alone or certainly together explain the court of appeals' judgment to tentatively calendar this case for oral argument pending review by the assigned panel. *See* 4th Cir. Local Rule 34(a) (allowing a panel to summarily dispose of a matter "[i]n the interest of docket control and to

expedite the final disposition of pending case . . . *at any time before argument*") (emphasis added); 4th Cir. Local Rule 27(f) ("The Court may also *sua sponte* summarily dispose of any appeal at any time.").

What is relevant here is that not one of those factors suggests that the Fourth Circuit has retreated from its own decision to deny a stay pending appeal on the grounds of frivolousness.

Third, Defendant has not demonstrated any justification for a stay pending appeal, let alone the last-minute, eve-of-trial reversal of a stay denial previously issued. Courts typically consider four factors when considering whether to issue a stay: "(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); *see Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). Defendant's renewed motion fails to address these factors, and for good reason, as each weighs heavily against the issuance of a stay.

As noted, Defendant's appeal remains frivolous on the merits. Nothing has changed that would even suggest a sound basis for this Court or the Fourth Circuit to override the Executive Branch's determination that immunity is *not* warranted in this case, let alone to disregard the Supreme Court's admonition to accord appropriate deference to that Executive Branch judgment, *Samantar*, 130 S. Ct. 2278, 2291 (2010) ("We have been given 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.").

The balance of harms also conclusively tips against a stay. On the one hand, Defendant's renewed motion does not articulate *any* injury he will suffer if a stay is not issued. He will

remain free to seek immunity from any court judgment on appeal. Plaintiffs, on the other hand, could suffer great injury if next week's trial is stayed and this case – which commenced eight years ago and seeks relief for injuries inflicted more than twenty years ago – is further delayed. The delay pending appeal could be substantial because it would require not only waiting for oral argument (if it actually takes place), but also waiting for the Fourth Circuit's decision and then – and only then—commencing the process of re-calendaring and re-preparing the case for trial. In the meantime, trial witnesses to the alleged actions – including Defendant – might become ill, move away, or die, or their ability to accurately testify might erode with age and the still-longer passage of time since the events that are the subject of their testimony.

In particular, Plaintiffs Mohamoud and Gulaid are only able to travel to the United States because they have been “paroled” in by the Department of Homeland Security for purposes of participating in next week's trial. *See* Exhibit A, Declaration of L. Kathy Roberts, at ¶ 3. That “parole” status will expire in September 2012, so a delay would not only require more travel and more time away from their families and livelihoods, but it could also affect their ability to return to the United States for trial. *Id.*

More importantly, due to fears for their personal safety, these plaintiffs had, until very recently, proceeded as John Does. *Id.* at ¶ 2. Because of concerns regarding potential security issues, *see generally* Exhibit A, the parties agreed to reveal the Doe identities only when trial was within three weeks of commencing and *after* the Does had left Somaliland for trial. *Id.* at ¶¶ 9-12. Even that precaution did not adequately insulate the Doe plaintiffs, however, as Plaintiff Gulaid and his family have been harassed at home by members of the Defendant's tribe,

including as recently as the past two weeks. *Id.* at ¶¶ 13-14.¹ If the trial is delayed, Plaintiffs Gulaid and Mohamoud will be forced to return to Somaliland before the matter is resolved, where they fear that they will be subjected to acts of intimidation, harassment and violence as they await the rescheduled trial. *Id.* at ¶ 15. They would not have voluntarily agreed to reveal their identities a few weeks ago if they had known that the trial was not imminent. *Id.* at ¶ 16. A baseless delay of this trial for an appeal that lacks any substantive merit or prospect of success is all the more unjustifiable where it puts those who have already suffered at significant risk of personal harm. For that same reason, the public interest weighs against a stay.

B. The Motion Is Procedurally Barred

The merits of Defendant’s “renewed” motion are not the only problem with it; his motion is also barred under both Federal Rule of Civil Procedure 59(e) and 60(b). *See Gayle v. Dvoskin*, No. 5:11cv00078, 2011 WL 4903195, at *1 (W.D. Va. Oct. 14, 2011) (slip copy) (courts should construe post-judgment motions that seek reconsideration relief as Rule 59(e) motions if they are filed within 28 days of the entry of judgment, and as Rule 60(b) motions if they are filed later).

Defendant filed this “renewed” motion too late to invoke Rule 59(e), which requires a request for reconsideration to be filed within twenty-eight days from the operative order or judgment. FED. R. CIV. PROC. 59(e). This Court denied Defendant’s first motion to stay by order entered March 18, 2011. *See* Dkt. #168 (Mar. 18, 2011). Defendant filed the instant motion on February 9, 2012, almost a full year later and far outside Rule 59(e)’s 28-day window.

¹ These security concerns are not confined to the Doe plaintiffs. The other named plaintiffs, U.S. citizens Deria and Yousuf, have reported receiving harassing phone calls about this case in the months approaching trial. *See* Exhibit A, at ¶ 8.

The motion cannot proceed under Rule 60(b) either. That Rule empowers district courts to grant relief for five enumerated reasons – none of which Defendant even suggests could apply here – or for “any other reason that justifies relief.” FED. R. CIV. PROC. 60(b)(6). But “only truly extraordinary circumstances will permit a party successfully to invoke the ‘any other reason’ clause of [Rule] 60(b).” *Aikens v. Ingram*, 652 F.3d 496, 501-02 (4th Cir. 2011) (internal quotations omitted). “This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved.” *Id.* Far from providing such “extraordinary circumstances,” Defendant’s renewed motion “merely requests relief based upon legal arguments that the Court has rejected already.” *Winston v. Stansberry*, No. 3:08cv553, 2010 WL 98692, at *2 (E.D. Va. Jan. 11, 2010) (citation omitted). That is insufficient.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant’s renewed motion to stay.

Dated: February 13, 2012

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2012, I caused a copy of the foregoing Memorandum in Support of Plaintiffs' Opposition to Defendant's Renewed Motion to Stay to be filed with the Clerk of Court using the CM/ECF system, which will then send a notification of electronic filing to the following:

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Exhibit A

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

BASHE ABDI YOUSUF,)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate) Civil Action No. 1:04 CV 1360 (LMB/JFA)
of Mohamed Deria Ali,)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate)
of Mustafa Mohamed Deria,)
)
BURALLE SALAH MOHAMOUD,)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate)
of Abdullahi Salah Mahamoud)
(the deceased brother of)
Buralle Salah Mohamoud),)
)
AZIZ MOHAMED DERIA,)
in his capacity as the personal)
representative of the estate)
of Cawil Salah Mahamoud)
(the deceased brother of)
Buralle Salah Mohamoud),)
)
and AHMED JAMA GULOID,)
)
Plaintiffs,)
)
v.)
)
MOHAMED ALI SAMANTAR,)
)
Defendant.)

**DECLARATION OF L. KATHY ROBERTS IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO MOTION TO STAY PROCEEDINGS**

I, L. Kathy Roberts, declare as follows:

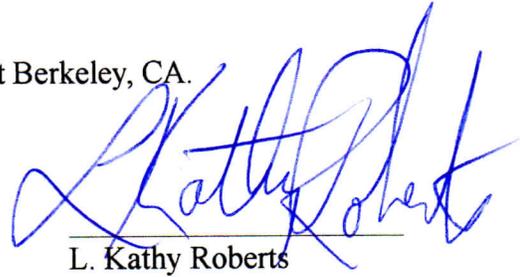
1. I am an attorney admitted *pro hac vice* in the above-captioned matter. I am a staff attorney with the Center for Justice & Accountability. I have personal knowledge of the facts set forth below.
2. Due to fears for their personal safety, two of the plaintiffs in this matter had, until very recently, elected to proceed as John Does.
3. These John Doe plaintiffs are only able to travel to the United States because they have been “paroled” in by the Department of Homeland Security. Their parole papers will expire in September 2012. Thus, in addition to requiring more travel and more time away from their families, a delay in the proceedings could affect their ability to return to the United States for trial at all. More importantly, these plaintiffs continue to have serious security concerns.
4. In October 2011, the John Does traveled to the United States, for the first time in their lives, to sit for depositions. Their depositions were taken pursuant to a stipulated protective order, which provides that their identities could be revealed only to the attorneys in this case.
5. Because this case has provoked a strong reaction in the Somali diaspora as well as in Somalia, I have continued to monitor the security situation in Somalia and Somaliland for the last several months, both through review of press coverage and internet discussion boards and through consultation with security experts in Somaliland and southern Somalia.

6. Somali diaspora supporters have attended nearly every hearing in this case, and it is my information and belief that these demonstrations have been reflected in larger demonstrations in Somalia, in particular in Puntland, the semi-independent province of Somalia bordering Somaliland, where both of these plaintiffs live.
7. During their trip to the United States, I asked each of the John Doe plaintiffs whether they were prepared to disclose their identities. They both stated that they would not be willing to do so because they remained fearful of potential retaliation and harassment when they returned home to Somaliland. I advised them that at some point before trial, they would eventually have to disclose their identities. They said that they understood, but further advised me that because of their safety concerns, they did not want to be in Somaliland when their identities were disclosed.
8. Both of the named plaintiffs in this case, U.S. citizens Aziz Deria and Bashe Yousuf, have reported receiving harassing phone calls about this case in the months approaching trial.
9. In December 2011, Plaintiffs' counsel and counsel for Defendant reached an agreement that the identities of the John Does would be revealed three weeks prior to trial.
10. In keeping with the Does' desire to be out of Somaliland when their identities were disclosed, we began making arrangements for them to leave Somaliland before the end of January.
11. On January 30, 2012, the John Does left Somaliland for Djibouti.

12. On January 31, 2012, after they had safely departed Somaliland, we disclosed their identities by filing an amended caption, which, for the first time, revealed that John Doe #1 is Buralle Salah Mohamoud and John Doe #2 is Ahmed Jama Gulaid.
13. On February 8, 2012 Mr. Gulaid and Mr. Mahamoud traveled to Virginia from Djibouti.
14. After they arrived in Virginia, Mr. Gulaid informed me that members of the Defendant's tribe had been harassing him and his family at his home. Mr. Gulaid and his family understood them to be threatening him and trying to scare him out of participating in the trial. This happened multiple times, the first time in October while he was away in the United States for his deposition. It happened again in December, and once more in February 2012.
15. If the trial is delayed, Mr. Mohamoud and Mr. Gulaid will be forced to return to Somaliland before the matter is resolved. Mr. Mahamoud and Mr. Gulaid have a genuine fear that they will be subjected to acts of intimidation, harassment, and violence as they await the rescheduled trial.
16. These plaintiffs would not have voluntarily agreed to reveal their identities a few weeks ago if they had known that the trial might not be imminent.

I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct.

Executed this 11th day of February 2012, at Berkeley, CA.



L. Kathy Roberts

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

BASHE ABDI YOUSUF,)	
AZIZ MOHAMED DERIA,	)	Civil Action No. 1:04
in his capacity as the	)	CV 1360 (LMB/BRP)
personal representatives)	
of the estate of)	
Mohamed Deria Ali,	)	SECOND AMENDED
AZIZ MOHAMED DERIA,	)	COMPLAINT FOR
in his capacity as the	)	TORTURE;
personal representative of	)	EXTRAJUDICIAL
the estate of Mustafa	)	KILLING;
Mohamed Deria,	)	ATTEMPTED
JOHN DOE I,	)	EXTRAJUDICIAL
AZIZ MOHAMED DERIA,	)	KILLING; CRUEL,
in his capacity as the	)	INHUMAN OR
personal representative of	)	DEGRADING
the estate of James Doe I	)	TREATMENT OR
(the deceased brother of	)	PUNISHMENT;
John Doe I),	)	ARBITRARY
AZIZ MOHAMED DERIA,	)	DETENTION;
in his capacity as the	)	CRIMES AGAINST
personal representative of	)	HUMANITY; AND
the estate of James Doe II	)	WAR CRIMES
(the deceased brother of)	
John Doe I),	)	JURY TRIAL
JANE DOE,	)	DEMANDED
and JOHN DOE II,)	
Plaintiffs,)	

v.)
MOHAMED ALI)
SAMANTAR,)
Defendant.)

For their complaint against the Defendant Mohamed Ali Samantar, Plaintiffs allege as follows:

PRELIMINARY STATEMENT

1. This is a civil action for compensatory and punitive damages for torts in violation of international and domestic law. Plaintiffs institute this action against Defendant Mohamed Ali Samantar ("Samantar") for his responsibility for the torture of Plaintiff Bashe Abdi Yousuf; for the extrajudicial killing of Decedents Mohamed Deria Ali and Mustafa Mohamed Deria; for the torture, arbitrary detention and cruel, inhuman or degrading treatment of Plaintiff John Doe I; for the extrajudicial killing of Decedents James Doe I and James Doe II, the brothers of Plaintiff John Doe I; for the torture, rape, arbitrary detention and cruel, inhuman or degrading treatment or punishment of Plaintiff Jane Doe; and for the attempted extrajudicial killing, torture, arbitrary detention and cruel, inhuman or degrading treatment or punishment of Plaintiff John Doe II. Plaintiffs also bring claims for crimes against humanity and war crimes based upon those wrongful acts.

2. Plaintiffs allege that Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces of Somalia, or persons or groups acting in coordination with the Armed Forces or under their

control, to commit acts of extrajudicial killing; attempted extrajudicial killing; torture; crimes against humanity; war crimes; and arbitrary detention and cruel, inhuman, or degrading treatment or punishment and to cover up those abuses. Accordingly, Plaintiffs assert that Defendant Samantar is liable under domestic and international law for their injuries, pain and suffering.

JURISDICTION AND VENUE

3. Plaintiffs allege that Defendant Samantar is liable for acts of torture, extrajudicial killing and attempted extrajudicial killing as defined by customary international law and the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note). Alien plaintiffs further allege that Defendant Samantar is liable for torture; extrajudicial killing; attempted extrajudicial killing; crimes against humanity; war crimes; cruel, inhuman and degrading treatment or punishment; and arbitrary detention under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law. Accordingly, this Court has jurisdiction over this action based on 28 U.S.C. § 1350 (Alien Tort Statute) and 28 U.S.C. § 1331.

4. On information and belief, Defendant Samantar is a citizen of Somalia and resides in Fairfax, Virginia. Therefore venue is proper in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. §§ 1391(b) or (d).

PARTIES

Defendant

5. On information and belief, Defendant Mohamed Ali Samantar is a native and citizen of Somalia and currently resides in Fairfax, Virginia.

6. From about January 1980 to December 1986, Defendant Samantar served as First Vice President and Minister of Defense of the Democratic Republic of Somalia (“Somalia”).

7. In or about January 1987, Defendant Samantar was appointed Prime Minister of Somalia, a position he held until approximately September 1990.

Plaintiffs

8. Bashe Abdi Yousuf is a native of Somalia, a naturalized U.S. citizen and a resident of Georgia. He is a member of the Isaaq clan. He brings this action for the torture he suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control.

9. Aziz Mohamed Deria is a native of Somalia, a naturalized U.S. citizen. He is a member of the Isaaq clan. He brings this action in his capacity as personal representative of decedents’ estates for the extrajudicial killing of Mohamed Deria Ali and Mustafa Mohamed Deria, during the indiscriminate attack on the city of Hargeisa by the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, in or about mid-June 1988. Mohamed Deria Ali and Mustafa Mohamed Deria were citizens and residents of Somalia at the time of their death. Aziz Mohamed

Deria also brings this action in his capacity as personal representative of decedents' estates for the extrajudicial killing of James Doe I and James Doe II (the brothers of plaintiff John Doe I), at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control.

10. John Doe I is a native, citizen and resident of Somalia. He is a member of the Isaaq clan. He brings this action for the torture, arbitrary detention and cruel, inhuman, or degrading treatment or punishment he suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control. Plaintiff John Doe I seeks to proceed under a pseudonym because he fears reprisals against himself or his family as a result of his participation in this lawsuit.

11. Jane Doe is a native and citizen of Somalia. She currently resides in the United Kingdom. She is a member of the Isaaq clan. She brings this action for the torture, rape, arbitrary detention and cruel, inhuman or degrading treatment or punishment she suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control. Plaintiff Jane Doe seeks to proceed under a pseudonym because she fears reprisals against herself or her family as a result of her participation in this lawsuit.

12. John Doe II is a native, citizen and resident of Somalia. He is a member of the Isaaq clan. He brings this action for the attempted extrajudicial killing, torture, cruel, inhuman or degrading treatment or punishment, and arbitrary detention

that he suffered at the hands of the Somali Armed Forces, or persons or groups acting in coordination with or under their control, when he survived a mass execution of Isaaq officers and soldiers in the Somali Armed Forces in or about June 1988. Plaintiff John Doe II seeks to proceed under a pseudonym because he fears reprisals against himself or his family as a result of his participation in this lawsuit.

STATEMENT OF FACTS

13. Throughout the 1980s, the Somali Armed Forces committed gross human rights abuses against the civilian population of Somalia, including the widespread and systematic use of torture, rape, arbitrary detention, and mass executions. This deliberate reign of state terror occurred during the period Defendant Samantar served first as Minister of Defense, from about January 1980 to December 1986, and then as Prime Minister, from about January 1987 to about September 1990. These human rights abuses were the hallmark of the military government that came to power in 1969 and brutally ruled Somalia until the government was toppled in 1991.

14. In October 1969, a coup led by Major General Mohamed Siad Barre overthrew the first and only democratic government of the new nation of Somalia. Power was assumed by the Supreme Revolutionary Council (SRC), which consisted primarily of the Army officers who had supported and participated in the coup, including Defendant Samantar. The SRC suspended the existing Constitution, closed the National Assembly, abolished the Supreme Court and declared all political parties illegal. To further strengthen its grip on power, the SRC declared all

groups not sponsored by the government, including civic or religious groups, to be illegal.

15. To further strengthen its grip on power, the military leadership systematically favored its own clans and oppressed other clans. Even before Somalia became an independent nation, the clan system served as the fundamental building block of Somali society. Clan affiliation had long attracted great emotional allegiance and had often been the sole avenue to jobs and other scarce resources.

16. The military leadership built upon and exploited the clan system. It appointed members of favored clans to top positions in the Armed Forces, the bureaucracy, and Somali state industries, while it ruthlessly oppressed and targeted other clans, including in particular the Isaaq clan in the Northern regions. The military leadership systematically excluded disfavored clans from positions of power within the government and military and pursued draconian policies intended to weaken them politically and harm them economically. This oppression led some disfavored clans to oppose the military government.

17. Somalia's defeat in the Ogaden War with Ethiopia from 1977 to 1978 significantly weakened support for the military government. As a result, the government took increasingly fierce measures against perceived opponents, including civilians from disfavored clans. Beginning in the early 1980s and escalating over the course of the decade, the Armed Forces committed numerous atrocities against ordinary citizens including businessmen, teachers, high school students, and nomads simply tending their herds. These measures were intended to

terrorize the civilian population and to deter it from supporting the growing opposition movements.

18. The National Security Service (“NSS”), the Red Berets and the military police known as Hangash were the government’s principal intelligence gathering agencies. These security forces frequently acted in coordination with or under the control of the Armed Forces, often conducted joint operations with members of the Armed Forces, and operated with the tacit approval and permission of the Armed Forces and their commander, Defendant Samantar. Security forces acting in coordination with or under the control of the Armed Forces were together responsible for the widespread and systematic use of torture, arbitrary and prolonged detention, and extrajudicial killing against the civilian population of Somalia.

19. The Isaaq clan, located primarily in the northwestern region of Somalia, was a special target of the government. The Isaaq were among the best educated and most prosperous Somalis and were therefore perceived from the outset as potential opponents. In the 1970s, the military government relied primarily upon discriminatory economic measures to weaken the Isaaq clan: it limited economic development in the north and restricted the clan’s lucrative livestock trade. When the Ogaden War ended in 1978 and Ethiopian refugees flooded northern Somalia, the Somali government even implemented economic policies favoring those refugees over the Isaaq. During the 1980s, when Defendant Samantar was Minister of Defense and then Prime Minister, the government changed its

approach and unleashed the Armed Forces in a violent campaign to eliminate Isaaq clan opposition.

20. The government's extreme oppression led some members of the Isaaq clan to establish the Somali National Movement ("SNM") in 1981. The SNM articulated Isaaq grievances ranging from inadequate political representation and economic neglect of the north to the torture and detention of Isaaq citizens. In 1983 and 1984, some members of the SNM began a campaign of violent resistance and, operating from bases in Ethiopia, SNM commandos attacked military posts near the northern cities of Hargeisa, Burao, and Berbera.

21. In response, human rights abuses and war crimes by the Somali Armed Forces dramatically increased. The Somali National Army initiated a brutal counterinsurgency campaign that intentionally disregarded the distinction between civilians and SNM fighters. It killed and looted livestock, blew up water reservoirs, destroyed homes, tortured and detained alleged SNM supporters, and indiscriminately killed civilians as collective punishment for SNM activities. Such acts were intended to, and did, spread terror among the Isaaq clan in order to deter them from assisting the SNM.

22. This violent confrontation between the SNM and the Armed Forces of Somalia from 1983 to 1990 constituted an armed conflict not of an international character.

23. This pattern of crimes against humanity, including war crimes, committed against the Isaaq clan continued in 1988 during the period Defendant Samantar served as Prime Minister. In June and July 1988, following SNM attacks on military targets,

the Somali Armed Forces launched an indiscriminate aerial and ground attack on cities and towns in northwest Somalia, including Hargeisa, the second largest city in the country. A 1989 U.S. General Accounting Office study, conducted at the request of Congress, found that the attack destroyed most of Hargeisa, with the most extensive damage in the residential areas, the marketplace and in public buildings in the downtown areas. A State Department report found that the Somali Armed Forces engaged in systematic assaults on unarmed civilians, killing more than 5,000 people. As a result of the fighting, approximately 400,000 Somalis fled to Ethiopia, a country itself racked by drought and internal conflict, where they remained in refugee camps for many years. More than a million people were displaced internally.

24. Throughout 1989 and 1990 the crimes of oppression and armed resistance continued, gradually leading to the reduced effective territorial control of the Barre regime and withdrawal of American and international support. By the end of 1990, the Barre regime was in the final stages of complete state collapse. In early December 1990, President Barre declared a state of emergency, and in January 1991, armed opposition factions finally drove Barre out of power, resulting in the complete collapse of the central government. When Barre and his supporters were ousted from power, they fled the country. Defendant Samantar fled first to Italy, then, in 1997, arrived to the United States.

Plaintiff Bashe Abdi Yousuf

25. At the time of the events at issue, Plaintiff Bashe Abdi Yousuf was a young businessman in

Hargeisa, the main city in the northwest region of Somalia. He operated a wholesale business selling goods imported from London and Saudi Arabia.

26. In early 1981, he joined with some friends to form a volunteer group to improve living conditions in Hargeisa, especially the local public schools and hospital. The group took the name of UFFO, which referred to the refreshing whirlwind that precedes the desert rains. UFFO's first project was to clean the sewage system of the Hargeisa General Hospital and to raise money for the purchase of badly-needed items such as bandages and medicine.

27. On or about November 19, 1981, in the late morning, Bashe Abdi Yousuf was working in the warehouse of his business. Three NSS agents entered the warehouse, forced him into a Land Cruiser and took him to the building that had housed the Somali immigration services, but was now reserved for the detention and interrogation of members of UFFO. He was searched, put in a room and left there for two days without food or water.

28. One night in early December 1981, two military policemen and an NSS officer came to Bashe Abdi Yousuf's cell. He was blindfolded, handcuffed, and forced into the back of a Land Cruiser. One of the interrogators put his boot on Bashe Abdi Yousuf's neck, forcing him to lean forward and keep his head down.

29. When the Land Cruiser stopped, Bashe Abdi Yousuf was pushed out of the car and forced face down on the ground. The interrogators tightly tied his hands and feet together behind his back so that his body was arched backward in a slightly-tilted U shape, with his arms and legs high in the air. Bashe

Abdi Yousuf's interrogators slowly placed a heavy rock on his back, causing him excruciating pain. This form of torture was called the "Mig," because it placed the prisoner's body in a shape that resembled the Somali Air Force's MIG aircraft, with its swept-back wings. They also tightened the ropes causing deep cuts to his arms and legs. They then turned him over and put the rock on his back again. They questioned him about the members and activities of UFFO and told him they would stop the torture if he confessed to anti-government crimes.

30. The interrogators also subjected him to torture by water. They held his nose closed, forced his mouth open and poured water into it, making him feel like he was suffocating. They repeated this several times until he lost consciousness.

31. Bashe Abdi Yousuf was tortured in this manner eight times in the three months after he was arrested. He also twice endured electric shocks to his armpits.

32. On or about February 19, 1982, Bashe Abdi Yousuf was served with official indictment papers. He was charged with high treason, a crime that carried a mandatory death sentence by hanging. He also met with his court-appointed attorney that day. The meeting lasted five to ten minutes. Bashe Abdi Yousuf's attorney admitted there was no redress available to him.

33. In the early morning of February 28, 1982, Bashe Abdi Yousuf, and the twenty-seven other detained members of UFFO, were taken before the National Security Court, a special military court with jurisdiction over civilians accused of national security crimes, including political offenses. The courthouse

was entirely surrounded by Army tanks and soldiers with machine guns.

34. The trial, which considered evidence against all twenty-eight men, lasted only two days. Neither Bashe Abdi Yousuf, nor any other UFFO member, was allowed to speak other than to answer preliminary questions such as "How do you plead?" He pleaded not guilty.

35. On or about March 3, 1982, Bashe Abdi Yousuf was again taken before the National Security Court. He was sentenced to twenty years in prison. He and the other twenty-seven members of UFFO were immediately taken to Hargeisa Central Prison. They were all placed together in a small cell. Bashe Abdi Yousuf remained in Hargeisa Central Prison for eight months.

36. On or about October 24, 1982, Bashe Abdi Yousuf was transferred to Labaatan Jirow prison, a notorious maximum security prison for political prisoners. He was placed in a small, windowless cell approximately 6 feet by 6 feet. The cell had an outer door that, when closed, put the cell in total darkness. The outer door was closed every day at 4 p.m. and not opened again until 7 a.m. He was fed millet gruel twice a day. He remained there in solitary confinement for approximately six and a half years.

37. Bashe Abdi Yousuf was released from prison in or about May 1989 and fled Somalia. He arrived in the United States in 1991.

***Plaintiff Aziz Mohamed Deria, in his capacity
as personal representative of the estates
of Mohamed Deria Ali and
Mustafa Mohamed Deria***

38. In 1988, Aziz Mohamed Deria was living in California. Five years earlier he had fled Somalia where he had been persecuted because of his political activities on behalf of the Isaaq clan. His family, including his father, Mohamed Deria Ali, and his younger brother, Mustafa Mohamed Deria, remained in Somalia. Mohamed Deria Ali was a highly successful businessman who operated a large import-export business in Hargeisa. Like his father, Mustafa Mohamed Deria, then approximately 22 years old, was also in the import-export business.

39. In or about June of 1988, the Somali Armed Forces launched an indiscriminate aerial and ground attack on Hargeisa. The Somali Armed Forces dropped bombs on downtown Hargeisa as well as the surrounding residential areas and shelled Hargeisa with heavy artillery from the hills surrounding the city. The Somali tanks and other armored vehicles also entered the city. Groups of soldiers shot, tortured, and detained civilians throughout Hargeisa.

40. In or about June of 1988, Aziz Mohamed Deria's family members were trapped in their home by the Armed Forces' attack on the city. From the window of their home, the family could see the bombs dropping on the city and Army vehicles taking civilians away to be executed. Several buildings owned by the family were completely destroyed during the bombing.

41. On a morning in mid-June 1988, during the indiscriminate bombing of the city, a group of

approximately twenty members of the Somali Armed Forces came to the family's home. They kicked down the door and entered the house. They asked the family about the clan to which they belonged. The soldiers replied that they were going to kill all the members of the Isaaq clan that day. The soldiers then grabbed Mohamed Deria Ali and dragged him out of the house. The family never saw him again.

42. Later that afternoon, the same group of soldiers returned to the family's home. The soldiers told the family that their father, Mohamed Deria Ali, had been killed. They then grabbed Mustafa Mohamed Deria and dragged him out of the house. The family never saw Mustafa Mohamed Deria again.

***Plaintiffs John Doe I and Aziz Mohamed Deria,
in his capacity as personal representative
of the estates of James Doe I and James Doe II***

43. In or about December 1984, John Doe I, along with two of his brothers, Decedents James Doe I and James Doe II, and a young nephew were tending the family's camels in the rural areas around Burao, a small city in the north of Somalia. A large group of soldiers from the Somali Armed Forces, followed by military vehicles, approached them. The soldiers interrogated them about SNM activity in the area the previous evening. When they denied having any knowledge of SNM activities, they were forced into one of the military truck and taken to the military installation in the village of Magaaloyar.

44. That night, John Doe I and his brothers, James Doe I and James Doe II, were ordered into a small hut made of thorns in the middle of the military base. He and his brothers were ordered to lie down on their chests. They were then tied into

the “Mig” position, their bodies arched backward in a slightly-tilted U shape, causing them excruciating pain. The soldiers also beat them with guns and kicked them. When the soldiers were tired, the soldiers threw John Doe I and his brothers, still tied in the “Mig” position, into the back of an army truck. They were transported to the military base in the city of Burao.

45. At Burao, the soldiers untied John Doe I and his brothers, James Doe I and James Doe II, and ordered them out of the truck. They were directed to enter an office, one by one, where they were questioned by military officers. John Doe I was asked his name, age, and place of arrest. He was also interrogated at length about SNM activities in the Burao area. His answers were recorded in a register. He was then ordered to wait outside the office. His two brothers were similarly interrogated.

46. There were taken to a very small cell that already contained eleven prisoners. John Doe I was handcuffed to one prisoner already in the cell, and his two brothers, James Doe I and James Doe II, were handcuffed together. The cell had no windows or toilet, and the men were forced to urinate and defecate on the floor where they slept. They received one small meal of cooked rice in mid-afternoon.

47. The next day, John Doe I, his brothers, James Doe I and James Doe II, and ten other prisoners were ordered out of the cell, loaded onto a military truck and taken, with armored vehicles as escorts, to the military court in Burao. Two of the soldiers who had detained John Doe I and his brothers testified that the brothers had hidden SNM fighters and probably were themselves members of the SNM. The brothers’

attorney, whom they had met for the first time only at the start of the trial, argued that the brothers were innocent. The presiding judge closed the hearing, and the thirteen men, including John Doe I and his brothers were returned to their small cell in the military base.

48. Four days later, all the prisoners detained at the military base, approximately eighty men, including John Doe I and his brothers, James Doe I and James Doe II, were ordered out of their cells and taken to the courthouse. The road to the courthouse was heavily guarded by military vehicles. The presiding judge called the names of the first forty-five prisoners, including John Doe I and his brothers, and sentenced each to death, with the sentence to be executed immediately.

49. The prisoners to be executed were then directed out of the courthouse into army trucks waiting at the courthouse. A commander was standing at the truck, monitoring the count of prisoners. As John Doe I and his brothers James Doe I and James Doe II entered the truck, the commander asked John Doe I whether the three men were brothers. When John Doe I answered yes, the commander untied John Doe I from his brothers, led him to the front of the gate around the courthouse, and ordered the guard at the gate to let him escape.

50. As John Doe I ran down the road away from the courthouse, he was passed by the truck carrying the condemned prisoners, including his two brothers. The truck was heading for the road to the Burao airport, a well-known execution site. As he reached his brother's house, he heard the sound of gunshots and saw many people running toward the airport.

His two brothers, James Doe I and James Doe II, were among the men executed.

51. Later that night, John Doe I was told that the paramilitary forces were searching for him because he had been illegally released. He therefore fled Burao on foot to the remote village of Shanshacade, and then headed to the rural settlement area of Urruraha where his extended family, including the families of his two dead brothers, lived. He subsequently moved the extended family for safety to a refugee camp in Ethiopia. John Doe I remained in northern Somalia.

Plaintiff Jane Doe

52. One night in or around July 1985, Jane Doe, a student at Farah Omar Secondary School, was at home with her family in Hargeisa. Several NSS agents arrived at her house, banged on the door and then kicked in the door. She and other members of her family were taken to NSS headquarters. They were detained there for one week. She was accused of being a “subversive leader” for her alleged support of the Somali National Movement.

53. A few days later, Jane Doe was taken to the headquarters of the 26th Military Sector, the headquarters for all military and security forces in the northern region of Somali. She was held in a very small cell with one other woman. Her arms were tied behind her back with wire and then chained to the wall. Her left leg was chained to the floor. She was given food only once a day at 7:00 p.m. The cell was always completely dark. She was detained at the 26th Military Sector headquarters in this manner for three months.

54. Jane Doe was regularly interrogated during her detention at the Military Sector headquarters. Each time, she was taken to a small room not far from her cell. She was subjected to continuing torture as the soldiers attached very tight clips to her nipples.

55. During her detention at the 26th Military Sector headquarters, Jane Doe was also raped at least fifteen times. On each occasion, she was taken from her cell and locked in a room. Although the room was dark, she could see that her rapist was wearing a camouflage uniform. Like other girls in Somalia, Jane Doe had been subject to the practice of infibulation, a procedure whereby her vagina had been sewn closed except for a very tiny hole through which urine and menstrual blood could flow. Her rapist opened her vagina by cutting through her skin with the part of a fingernail clipper used for cleaning under the fingernails. Throughout this period, and after, Jane Doe suffered constant and severe physical pain. She never received medical attention for her injuries.

56. Months later, Jane Doe, along with the six other high school students who had been detained at the same time, was taken from her cell, loaded into an open Army truck with a net across the top and taken to the National Security Court. The courthouse was entirely surrounded by Army tanks and soldiers with machine guns.

57. At her trial, Jane Doe was not permitted defense counsel nor was evidence presented against her. The following day, the National Security Court sentenced her to life in prison. She was immediately taken by Army soldiers to a truck waiting outside the

courthouse, where the soldiers severely beat her. Because of this beating, she could not stand or walk for months.

58. She was then taken to Hargeisa Central prison. She was held alone in a very small cell measuring approximately 3½ feet by 5½ feet. Her hands were tied together in front of her at all times. She remained in solitary confinement for the next three and a half years.

59. In November 1989, Jane Doe and three other women prisoners were taken to Mogadishu in an Army airplane. On the sixth night after their arrival, they were taken by Army soldiers to the presidential villa to see Major General Siad Barre. Barre asked Jane Doe why she supported the SNM. Barre then told Jane Doe to stay away from the SNM and released her from prison, but he ordered her not to leave the country.

60. After her release, Jane Doe fled Somalia. She remained with her family in a refugee camp in Ethiopia for two years. She returned to Somalia in 1991, and later immigrated to the United Kingdom.

Plaintiff John Doe II

61. During the Spring of 1988, John Doe II, a non-commissioned Isaaq officer in the Somali National Army, was assigned to the Hargeisa Department of Public Works to help with the repair of the Hargeisa airport.

62. In or around June 1988, John Doe II was arrested by an Army officer and three Red Berets while working near a small town about 50 kilometers from Hargeisa. He was immediately taken to the headquarters of the 26th Military Sector. There, he

saw many other Isaaq Army officers with whom he had served in the nearby towns of Gebiley and Dararweine. He realized that they were being detained by the Somali Army for fear that they would desert and join the opposition Somali National Movement.

63. The next day, around 4:00 p.m., Army soldiers began taking prisoners in groups of four from the 26th Military Sector headquarters. They were taken and executed near the banks of the river that runs through the center of Hargeisa, just a mile away from the military headquarters. This well-known execution site was known as Malko Dur-Duro.

64. Around 6:30 p.m., Army soldiers took John Doe II and three other Isaaq officers from their cell and drove them to Malko Dur-Duro. A group of Army officers, Army soldiers and Red Berets were waiting at the execution site. John Doe II and the other Isaaq officers were told to stand between two poles located at the edge of the river. An Army officer ordered the Red Beret soldiers to shoot the prisoners. The Red Berets shot at the men and they all fell backward into the riverbed. John Doe II received only flesh wounds and briefly fell unconscious. When he awoke, he found himself lying among the dead bodies. He remained there, covered by dead bodies, until the mass execution was completed and the soldiers had left the area. He subsequently fled Hargeisa and did not return until 1991.

GENERAL ALLEGATIONS

65. The acts described herein were carried out under actual or apparent authority or color of law of the government of Somalia. The acts of torture, extrajudicial killings, attempted extrajudicial killings,

rape, arbitrary detention, and cruel, inhuman or degrading punishment or treatment inflicted upon Plaintiffs and Decedents were part of a pattern and practice of widespread or systematic human rights violations committed against the civilian population in Somalia from 1980 to 1990, and contrary to customary international law and the laws and customs of war, for which Defendant Samantar, acting as Minister of Defense, and later as Prime Minister, bears responsibility.

66. At all relevant times between 1980 and 1987, Defendant Samantar, as Minister of Defense, possessed and exercised command and effective control over the Armed Forces of Somalia. He also acquiesced in and permitted persons or groups acting in coordination with the Armed Forces, or under their control, to commit human rights abuses. Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit extrajudicial killings; attempted extrajudicial killings; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment; or arbitrary detentions.

67. At all relevant times between 1980 and 1987, Defendant Samantar, as Minister of Defense, had the legal authority and practical ability to exert control over subordinates in the Armed Forces, or persons or groups acting in coordination with the Armed Forces, or under their control, who participated in the extrajudicial killings of Decedents James Doe I and James Doe II, and the abuses against Plaintiffs Bashe Abdi Yousuf, John Doe I, and Jane Doe. Defendant Samantar's command over such forces included the authority and responsibility to give

orders to, set policy for, and manage the affairs of, the forces under his control, and to appoint, remove and discipline personnel of such forces. Furthermore, Defendant Samantar had the actual authority and practical ability to investigate abuses, prevent their commission, and punish those responsible.

68. At all relevant times between 1980 and 1987, as Minister of Defense, Defendant Samantar had a duty under customary international law and multilateral treaties to ensure the protection of civilians, to prevent violations of international law by the Armed Forces, and to ensure that all persons under his command were trained in, and complied with, the laws of warfare and international law, including the prohibitions against torture, extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity. Furthermore, Defendant Samantar was under a duty to investigate, prevent and punish violations of international law committed by the members of the Armed Forces under his command.

69. At all relevant times between 1980 and 1987, Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

70. At all relevant times between 1980 and 1987, Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses. Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to

commit extrajudicial killings; attempted extrajudicial killings; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment; or arbitrary detentions.

71. At certain relevant times between 1987 and 1990, Defendant Samantar, as Prime Minister, possessed and exercised command and effective control over the Armed Forces of Somalia. At times he also acquiesced in and permitted persons or groups acting in coordination with the Armed Forces, or under their control, to commit human rights abuses. In particular, he was in Hargeisa in May and June of 1988 and had command of the Somali Armed Forces that were engaged in the indiscriminate attack upon the civilian population of the city of Hargeisa. Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit extrajudicial killings; attempted extrajudicial killings; torture; crimes against humanity; war crimes; cruel, inhuman, or degrading treatment; or arbitrary detentions.

72. At certain relevant times between 1987 and 1990, Defendant Samantar, as Prime Minister of Somalia, had the legal authority and practical ability to exert control over subordinates in the Armed Forces, or person or groups acting in coordination with the Armed Forces or under their control, who participated in the extrajudicial killings of Decedents Mohamed Deria Ali and Mustafa Deria and the abuses against Plaintiffs Bashe Abdi Yousuf, John Doe I, Jane Doe, and John Doe II. In particular, he was in Hargeisa in May and June of 1988 and had command of the Somali Armed Forces that were engaged in the indiscriminate attack upon the

civilian population of the city of Hargeisa. Furthermore, Defendant Samantar had the actual authority and practical ability to investigate abuses, prevent their commission, and punish those responsible.

73. At all relevant times between 1987 and 1990, as Prime Minister of Somalia, Defendant Samantar had a duty under customary international law and multilateral treaties to ensure the protection of civilians, to prevent violations of international law by the Armed Forces, and to ensure that all persons under his command were trained in, and complied with, the laws of warfare and international law, including the prohibitions against torture, extrajudicial killing, attempted extrajudicial killing, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity. Furthermore, Defendant Samantar was under a duty to investigate, prevent and punish violations of international law committed by the members of the Armed Forces under his authority.

74. At all relevant times between 1987 and 1990, Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

75. The acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, and cruel, inhuman or degrading treatment or punishment inflicted upon Plaintiffs and Decedents between 1980 and 1990 were part of a pattern and practice of widespread or systematic human rights violations against the civilian

population of Somalia and contrary to the law and customs of war. At all relevant times, the persons who carried out these acts knew or reasonably should have known that the acts were part of a widespread or systematic attack against a civilian population. At all relevant times, Defendant Samantar knew or reasonably should have known of the pattern or practice of gross human rights abuses perpetrated against the civilian population by subordinates under his command.

76. Defendant Samantar failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

77. Defendant Samantar, both as Minister of Defense and as Prime Minister, conspired with, or aided and abetted members of the Armed Forces or persons or groups acting in coordination with the Armed Forces or under their control to commit acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity, and to cover up these abuses.

78. The attempted acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity described herein were a part of an organized system of repression and ill-treatment against members of the Isaaq clan.

79. Defendant Samantar had knowledge of and was an active participant in the enforcement of this

system of-repression and ill-treatment against members of the Isaaq clan.

80. Moreover, it was the intent of Defendant Samantar while he was the Minister of Defense and while he was the Prime Minister to further this system of repression and ill-treatment.

81. Additionally, the acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity described herein were natural and foreseeable consequences of a common, shared design on the part of the leaders of the Barre regime and the Armed Forces of Somalia to rid the northern region of Somalia of members of the Isaaq clan, and to engage in a systematic attack against civilian populations.

82. The civilian populations targeted by this joint criminal enterprise included, but were not limited to, members of the Isaaq clan.

83. Defendant Samantar intended to participate in this common design and was reckless or indifferent to the risk that acts of torture, extrajudicial killing, attempted extrajudicial killing, rape, arbitrary detention, cruel, inhuman or degrading treatment or punishment, war crimes and crimes against humanity would occur during the effecting of that common purpose.

Equitable Tolling of the Statute of Limitations

84. Defendant Samantar has resided in the United States only since 1997. Before that time, neither this court, nor any other United States court, could exercise jurisdiction over Samantar for claims relating to the actions described herein. For this

reason, the statute of limitations for these claims was tolled until 1997.

85. Also, prior to 1997, Isaaq victims of human rights abuses committed in the 1980s by the Somali Armed Forces, or persons or groups acting in coordination with the Somali Armed Forces or under their control, could not have been expected to pursue a cause of action in the United States. Until approximately 1997, victims' reasonable fear of reprisals against themselves or members of their families still residing in Somalia served as an insurmountable deterrent to such action. Also, until approximately 1997, it would not have been possible to conduct safely investigation and discovery in Somalia in support of such a case.

86. Throughout the 1990s, Somalia fell into increasing chaos. Following the violent defeat of the military government in 1991, Somalia's central government collapsed. Fighting among rival clan leaders resulted in the killing, displacement, and mass starvation of tens of thousands of Somali citizens. The ensuing chaos led the United Nations to intervene militarily in 1992, though it proved incapable of restoring even a minimum level of order. Somalia's clan-based civil war and anarchic violence proved to be so brutal that it drove the United Nations from the country in 1994. Rival clan militias continued to commit gross and systematic human rights abuses in the years after the United Nations' departure, including the deliberate killing and kidnapping of civilians because of their clan membership.

87. During these years, conditions in Somalia precluded human rights cases against former

commanders of the Somali Armed Forces from being brought either in Somalia or the United States or elsewhere. Throughout the time period alleged in the complaint, and up to the present, each of the Plaintiffs either lived in Somalia or had immediate family still residing there. No national government existed in Somalia to protect them from the continuing clan-based violence. Gross and systematic human rights violations openly committed by rival clans had a further chilling effect. Pursuit of human rights claims, even in the United States, would have exposed victims and their families to acts of retribution that discouraged them from pursuing such a course. Witnesses also reasonably feared acts of reprisal for assisting in such cases.

88. The return of stability sufficient to permit victims of Barre-era human rights abuses to come forward has been a slow and uneven process. Stable conditions still do not exist in most regions of the country. It took until approximately 1997 for even one region to establish the conditions that permitted victims to consider bringing their claims.

89. This region, the former British protectorate of Somaliland, is dominated by the Isaaq clan. In 1991, it declared its independence, reclaimed its previous name, and seceded from Somalia. A rudimentary civil administration was established there in 1993, but major armed conflicts in 1994 and 1996 plunged the region back into turmoil. Since about 1997, Somaliland's government has exercised a modicum of authority over its territory. Nonetheless, conditions remain dangerous and unstable throughout the country. Clan allegiances are still very strong, violence is still a daily possibility, and fear of clan-

based repercussions is still of paramount concern to the anonymous plaintiffs of this case.

Absence of Remedies in Somalia

90. Somalia remains without a functioning national government and national judicial system in which victims of Barre-era human rights abuses could bring their claims. Shari'a courts operate in some regions of the country, filling the vacuum created by the absence of governmental authority, but such courts impose religious and local customary law often in conflict with universal human rights conventions. Somalia still does not have a functioning national government with a court system capable of reviewing human rights abuses committed by the military government in the 1980s. The country remains under the de facto control of competing clan leaders, warlords and criminal gangs, many of whom commit or countenance the commission of serious human rights abuses.

91. Somaliland does not offer a forum in which victims of human rights abuses can bring their claims. Although civil order has prevailed there since 1997, it remains impossible to seek judicial remedies in its courts for such claims. The Somaliland government's human rights record is weak, and human rights activists are frequently arrested and detained. The judicial system remains very tied to religious and political elites and lacks properly trained judges and other legal personnel. Furthermore, no former members of the Barre government reside within Isaaq-dominated Somaliland. Thus the people who should be held accountable reside beyond the jurisdictional reach of the Somaliland courts. Accordingly, there were and

are no adequate and available remedies for Plaintiffs to exhaust in Somalia.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Extrajudicial Killing—Plaintiff Aziz Deria, in his capacity as the personal representative of the estates of the decedents)

92. Plaintiff Aziz Deria realleges and incorporates by reference the allegations set forth in paragraphs 1 through 85 as if fully set forth herein.

93. The extrajudicial killings of Decedents Mohamed Deria Ali and Mustafa Mohamed Deria (father and brother of Plaintiff Aziz Mohamed Deria) and of Decedents James Doe I and James Doe II (brothers of Plaintiff John Doe I) constitute extrajudicial killings as defined by the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Additionally, the extrajudicial killing of Decedents Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II constitute “tort[s] . . . committed in violation of the law of nations or a treaty of the United States” under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting extrajudicial killing as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

94. The extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria; James Doe I and James Doe II were not authorized by a judgment pronounced by a regularly constituted court affording

all the judicial guarantees which are recognized as indispensable by civilized peoples.

95. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to murder Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

96. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the murders of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II.

97. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II, and caused family members of the decedents to suffer.

98. Defendant Samantar's acts or omission described above and the acts committed by his subordinates against Decedents Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

99. As a result of the extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II, Plaintiff Aziz Deria, in his

capacity as personal representatives of the estates of the decedents, is entitled to damages in an amount to be determined at trial.

100. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

SECOND CLAIM FOR RELIEF

(Attempted Extrajudicial Killing—Plaintiff John Doe II)

101. Plaintiff John Doe II realleges and incorporates by reference the allegations set forth in paragraphs 1 through 93 as if fully set forth herein.

102. The attempted extrajudicial killing of Plaintiff John Doe II constitutes an attempt to commit an extrajudicial killing as defined by the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Additionally, the attempted extrajudicial killing of Plaintiffs John Doe II constitutes a "tort . . . committed in violation of the law of nations or a treaty of the United States" under the Alien Tort Statute, 28 U.S.C. § 1350, in that it was in violation of customary international law prohibiting extrajudicial killings as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

103. The attempted extrajudicial killing of John Doe II was not authorized by a judgment pronounced by a regularly constituted court affording all the

judicial guarantees which are recognized as indispensable by civilized peoples.

104. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, in their attempts to extrajudicially kill John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

105. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the attempted extrajudicial killing of Plaintiff John Doe II.

106. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against Plaintiff John Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

107. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the attempted extrajudicial killing of John Doe II, and caused him to suffer.

108. As a result of these attempts to kill him extrajudicially, John Doe II is entitled to damages in an amount to be determined at trial.

109. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of

punitive damages in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(Torture—Plaintiffs Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II)

110. Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 109 as if fully set forth herein.

111. The acts described herein constitute torture as defined by the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 Note). Additionally, these acts constitute “tort[s] . . . committed in violation of the law of nations or a treaty of the United States” under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting torture as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

112. The acts described herein were inflicted deliberately and intentionally upon Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II for purposes that include, among others, intimidating or coercing them, discriminating against them for their presumed political beliefs, or discriminating against them for their membership in a specific ethnic group.

113. The torture of Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II did not arise from, and was not inherent in or incidental to, lawful sanctions.

114. Defendant Samantar exercised command responsibility over, conspired with, or aided and

abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to torture Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

115. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the torture of Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II.

116. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

117. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the torture of Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II and caused them to suffer severe physical and mental pain and suffering.

118. As a result of their torture, Bashe Abdi Yousuf, John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

119. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF
(Cruel, Inhuman or Degrading Treatment or
Punishment—Plaintiffs John Doe I,
Jane Doe and John Doe II)

120. John Doe I, Jane Doe and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 119 as if fully set forth herein.

121. The acts described herein constitute “tort[s] . . . committed in violation of the law of nations or a treaty of the United States” under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting cruel, inhuman or degrading punishment or treatment as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

122. The acts of cruel, inhuman or degrading treatment or punishment described herein had the intent and effect of inflicting severe or serious physical or mental pain or suffering upon John Doe I, Jane Doe and John Doe II. As an intended result of these acts, John Doe I, Jane Doe and John Doe II suffered severe or serious physical or mental pain or suffering.

123. The cruel, inhuman, or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II did not arise from, and was not inherent in or incidental to, lawful sanctions.

124. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted subordinates in the Armed Forces, or persons

or groups acting in coordination with the Armed Forces or under their control, to inflict cruel, inhuman or degrading treatment or punishment upon John Doe I, Jane Doe and John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

125. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the cruel, inhuman or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II.

126. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against John Doe I, Jane Doe and John Doe II, were committed under actual or apparent authority, or color of law, of the government of Somalia.

127. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates, caused the cruel, inhuman or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II and caused them to suffer severe or serious physical or mental pain or suffering.

128. As a result of the cruel, inhuman or degrading treatment or punishment described above, John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

129. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of

punitive damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF

(Arbitrary Detention—Plaintiffs John Doe I, Jane Doe and John Doe II)

130. Plaintiffs John Doe I, Jane Doe and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 129 as if fully set forth herein.

131. The arbitrary detentions of Plaintiffs John Doe I, Jane Doe and John Doe II described herein constitute “tort[s] . . . committed in violation of the law of nations or a treaty of the United States” under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting arbitrary detention as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

132. John Doe II was detained without warrant, probable cause, or articulable suspicion and was never provided due process protections.

133. John Doe I and Jane Doe were detained without warrant, probable cause, or articulable suspicion and were sentenced by courts that failed to accord them due process protections.

134. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to arbitrarily detain John Doe I, Jane Doe and John Doe II. Furthermore,

Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

135. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the arbitrary detentions of John Doe I, Jane Doe and John Doe II.

136. Defendant Samantar's acts or omissions described above and the acts committed by his subordinates against John Doe I, Jane Doe and John Doe II were committed under actual or apparent authority, or color of law, of the government of Somalia.

137. As a result of their arbitrary detention as described above, John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

138. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF

(Crimes Against Humanity—Plaintiffs Aziz Mohamed Deria, (in his capacity as personal representative of the estates of the decedents) John Doe I, Jane Doe and John Doe II)

139. Plaintiffs Aziz Mohamed Deria, in his capacity as personal representative of the decedents, John Doe I, Jane Doe and John Doe II reallege and incorporate

by reference the allegations set forth in paragraphs 1 through 138 as if fully set forth herein.

140. The extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II; the torture of John Doe I, Jane Doe and John Doe II; the rape of Jane Doe; the cruel, inhuman, or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II; and the arbitrary detentions of John Doe I, Jane Doe and John Doe II described herein constitute “tort[s] . . . committed in violation of the law of nations or a treaty of the United States” under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting crimes against humanity as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

141. These acts were committed as part of a widespread or systematic attack against a civilian population.

142. These acts were committed by members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control. The persons who carried out these acts knew or reasonably should have known that the acts were part of a widespread or systematic attack against a civilian population. Defendant Samantar knew or reasonably should have known of the pattern or practice of gross human rights abuses perpetrated against the civilian population by the subordinates under his command.

143. Defendant Samantar exercised command responsibility over, conspired with, or aided and

abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to commit crimes against humanity, including the extrajudicial killings of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II; the torture of John Doe I, Jane Doe and John Doe II; the attempted extrajudicial killings of John Doe II, the rape of Jane Doe; the cruel, inhuman, or degrading treatment or punishment of John Doe I, Jane Doe and John Doe II; and the arbitrary detentions of John Doe I, Jane Doe and John Doe II. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses and that they were being committed as part of a widespread or systematic attack on civilians, and he failed to prevent the abuses or to punish those responsible.

144. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the crimes against humanity described herein.

145. Defendant Samantar's acts or omissions described above, and the acts committed by his subordinates, were committed under actual or apparent authority, or color of law, of the government of Somalia.

146. As a result, Plaintiffs Aziz Mohamed Deria (in his capacity as the personal representative of the estates of the decedents), John Doe I, Jane Doe and John Doe II are entitled to damages in an amount to be determined at trial.

147. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and

oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

SEVENTH CLAIM FOR RELIEF

(War Crimes—Plaintiffs Aziz Mohamed Deria, (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe and John Doe II)

148. Plaintiffs Aziz Mohamed Deria, (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe, and John Doe II reallege and incorporate by reference the allegations set forth in paragraphs 1 through 147 as if fully set forth herein.

149. The attempted extrajudicial killing; extrajudicial killings, torture; rape, cruel, inhuman, or degrading treatments or punishments; and arbitrary detentions described herein constitute “tort[s] . . . committed in violation of the law of nations or a treaty of the United States” under the Alien Tort Statute, 28 U.S.C. § 1350, in that they were in violation of customary international law prohibiting war crimes as reflected, expressed, defined, and codified in multilateral treaties and other international instruments, international and domestic judicial decisions and other authorities.

150. These acts were committed during the armed conflict between the SNM and the Armed Forces of Somalia.

151. This armed conflict bound Defendant Samantar to follow the obligations of Common Article 3 of Geneva Conventions of 1949 and the customary norms of internal armed conflict.

152. Defendant Samantar exercised command responsibility over, conspired with, or aided and abetted members of the Armed Forces, or persons or groups acting in coordination with the Armed Forces or under their control, to commit war crimes, including the attempted extrajudicial killings; extrajudicial killings, torture; rape, cruel, inhuman or degrading treatments or punishments; and arbitrary detention, suffered by Plaintiffs and decedents during the armed conflict in northern Somalia. Furthermore, Defendant Samantar knew or should have known that his subordinates had committed, were committing, or were about to commit human rights abuses, and he failed to prevent the abuses or to punish those responsible.

153. As a result of these acts, Plaintiffs Aziz Mohamed Deria (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe, and John Doe II are entitled to damages in an amount to be determined at trial.

154. Moreover, defendant Samantar was an active participant in the joint criminal enterprise that resulted in the war crimes described herein.

155. Defendant Samantar's acts were deliberate, willful, intentional, wanton, malicious, and oppressive and should be punished by an award of punitive damages in an amount to be determined at trial.

156. As a result of these acts, Plaintiffs Aziz Mohamed Deria (in his capacity as personal representative of the estates of the decedents), John Doe I, Jane Doe, and John Doe II are entitled to damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendant as follows:

1. For compensatory damages according to proof;
2. For punitive and exemplary damages according to proof;
3. For prejudgment interest as allowed by law;
4. For attorneys' fees and costs of suit according to proof;
5. For any such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

The plaintiffs hereby demand a trial by jury.

Dated: February 22, 2007

BASHE ABDI
YOUSUF,
AZIZ MOHAMED
DERIA,
in his capacity as the
personal
representatives of the
estate of Mohamed
Deria Ali,
AZIZ MOHAMED
DERIA, in his
capacity as the
personal
representative of the
estate of Mustafa
Mohamed Deria,
JOHN DOE I,
AZIZ MOHAMED

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DERIA, in his
capacity as the
personal
representative of the
estate of James Doe I
(the deceased brother
of John Doe I),

AZIZ MOHAMED

DERIA, in his
capacity as the
personal
representative of the
estate of James Doe II
(the deceased brother
of John Doe I),

JANE DOE,
and JOHN DOE II,

By Counsel

By:

s/

Robert R. Vieth (VSB
#24304)

Tara M. Lee (VSB
#71594)

Sherron N. Thomas
(VSB #72285)

Cooley Godward LLP
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101

Matthew Eisenbrandt
Maira Feeney
Center for Justice &
Accountability
870 Market Street,
Suite 684
San Francisco,
California 94102
(415) 544-0444

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CERTIFICATE OF SERVICE

I hereby certify, this 22nd day of February, 2007, that a true copy of the foregoing was sent by overnight delivery to the following counsel of record:

Harvey J. Volzer, Esq.
216 South Patrick Street
Alexandria, VA 22314

Julian Henry Spierer, Esq.
Fred B. Goldberg, Esq.
Spierer & Goldberg, P.C.
7101 Wisconsin Avenue, Suite 1201
Bethesda, MD 20814

s/ _____

EXHIBIT C

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

IN RE:	:	
	:	
MOHAMED ALI SAMANTAR	:	Case No. 12-11085 (BFK)
Debtor.	:	Chapter 7
	:	
BASHE ABDI YOUSUF, <u>ET AL.</u> ,	:	
Movants,	:	
v.	:	
MOHAMED ALI SAMANTAR	:	
Respondent.	:	
	:	

**ORDER GRANTING EMERGENCY MOTION OF
BASHE ABDI YOUSUF, ET AL. FOR (A) RELIEF FROM THE
AUTOMATIC STAY AND (B) THE SCHEDULING OF AN EXPEDITED HEARING**

Upon consideration of the motion (the “Motion”)¹ of Bashe Abdi Yousuf, Buralle Salah Mohamoud, Ahmed Jama Gulaid and Aziz Mohamed Deria, in his capacity as the personal representative of the estates of Mohamed Deria Ali, Mustafa Mohamed Deria, Abdullahi Salah Mahamoud (the deceased brother of Buralle Salah Mohamoud) and Cawil Salah Mahamoud (the deceased brother of Buraale Salah Mohamoud) (collectively, the “Plaintiffs”), pursuant to section 362(d)(1) of title 11 of the United States Code (the “Bankruptcy Code”), Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure, and Rule 4001(a)-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of Virginia, for relief from

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

the automatic stay provision of Bankruptcy Code section 362, and any other responses filed thereto; and this Court, finding that good and sufficient cause exists to grant the relief requested in the Motion and that a good and sufficient basis existed for the Motion to be heard on an expedited basis; it is hereby

ORDERED, ADJUDGED, and DECREED that

1. The Motion is GRANTED;
2. The Automatic Stay shall be, and hereby, is VACATED and MODIFIED to permit the Plaintiffs to continue to prosecute the Action before the District Court and to pursue any appeals arising out of the Action.
3. This Order shall be effective immediately upon entry.

DONE at Alexandria, Virginia, this ____ day of February, 2012.

BRIAN F. KENNEY
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

/s/ Catherine E. Creely
Catherine E. Creely, Esq. (VSB No. 74796)
Steven H. Schulman, Esq. (*pro hac* pending)
Joanna F. Newdeck, Esq. (*pro hac* pending)
Kevin Eide, Esq. (*pro hac* pending)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 887-4000

Counsel to the Bashe Abdi Yousuf, et al.

LOCAL RULE 9022-1 CERTIFICATION AND CERTIFICATE OF SERVICE

Pursuant to LBR 9022-1, I hereby certify that on the twenty-first day of February 2012 a true copy of the foregoing Motion and its exhibits (including the proposed order) were served by via hand delivery, electronic mail and/or facsimile on the following necessary parties:

Christopher S. Moffitt
218 North Lee St. 3rd Floor
Alexandria, VA 22314-2631
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Janet M. Meiburger
The Meiburger Law Firm, P.C.
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Joseph Guzinski, Assistant U.S. Trustee
115 S. Union Street, Room 210
Alexandria, VA 22314
Fax: 703-557-7279

/s/ Catherine E. Creely
Counsel

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

IN RE:	:	
	:	
MOHAMED ALI SAMANTAR	:	Case No. 12-11085 (BFK)
	:	Chapter 7
Debtor.	:	

BASHE ABDI YOUSUF, <u>ET AL.</u> ,	:	
	:	
Movants,	:	
	:	
v.	:	
	:	
MOHAMED ALI SAMANTAR	:	
	:	
Respondent.	:	

**NOTICE OF EMERGENCY MOTION OF
BASHE ABDI YOUSUF, ET AL. FOR (A) RELIEF FROM THE
AUTOMATIC STAY AND (B) THE SCHEDULING OF AN EXPEDITED HEARING**

PLEASE TAKE NOTICE that on February 21, 2012, Bashe Abdi Yousuf, Buralle Salah Mohamoud, Ahmed Jama Gulaid and Aziz Mohamed Deria, in his capacity as the personal representative of the estates of Mohamed Deria Ali, Mustafa Mohamed Deria, Abdullahi Salah Mahamoud (the deceased brother of Buralle Salah Mohamoud) and Cawil Salah Mahamoud (the deceased brother of Buraale Salah Mohamoud) (collectively, the "Plaintiffs"), creditors and parties in interest in this Chapter 7 case, filed a motion (the "Motion"), pursuant to section 362(d)(1) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure, and Rule 4001(a)-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Eastern District of Virginia (the "Court"), for relief from the automatic stay provision of Bankruptcy Code section 362. Pursuant to the Motion, the Plaintiffs request that the Court grant the Plaintiffs relief from the automatic stay to permit the Plaintiffs to continue the prosecution of litigation against the Debtor that is currently pending before the United States District Court for the Eastern District of Virginia. The Plaintiffs also seek the scheduling of an expedited hearing on this requested relief.

PLEASE TAKE FURTHER NOTICE that by the Motion, the Plaintiffs request that the Court (a) schedule the hearing on the Motion for February 21, 2012, at a time to be determined, or such later date at the Court's earliest convenience (the "Requested Hearing Date") and (b)

