No. 12-2178
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF, *et al.*,

Plaintiffs-Appellees,

v.

MOHAMED ALI SAMANTAR,

Defendant-Appellant.

UNITED STATES OF AMERICA,
Party-in-Interest.

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

APPELLEES' RESPONSE BRIEF

Kathy Roberts
CENTER FOR JUSTICE & ACCOUNTABILITY
870 Market Street, Suite 680
San Francisco, CA 94102
(415) 544-0444 (telephone)
(415) 544-0456 (fax)

Anya J. Freedman
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
(310) 229-1062 (telephone)
(310) 229-1001 (fax)

James E. Tysse
Patricia A. Millett
Steven H. Schulman
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000 (telephone)
(202) 887-4288 (fax)
pmillett@akingump.com

Counsel for Plaintiffs-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 and 28 U.S.C. § 1331. The district court entered a default judgment against appellant on August 28, 2012. JA47 (Dkts. ##366-368); JA175-215.

Appellant filed a timely notice of appeal on September 24, 2012. JA47 (Dkt. #369); JA216-217. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the only legal error asserted in this appeal was rendered harmless or otherwise mooted when the district court order that was the subject of the interlocutory appeal was affirmed in its entirety and final judgment was entered in the case.

2. Whether appellant's interlocutory immunity appeal divested the district court of jurisdiction even though the district court certified that appeal as frivolous, this Court twice denied appellant's motion for a stay pending appeal, and this Court ultimately affirmed the district court's denial of immunity.

STATEMENT OF THE CASE

This case arises out of a suit brought under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350 note, by appellees

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, and Cawil Salah Mahamoud) (collectively, "Yousuf"), against appellant, Mohamed Ali Samantar, a high-level official of the former government of Somalia. In earlier proceedings, this Court held that Samantar is not entitled to immunity from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, *et seq.*, *see Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009), and the Supreme Court affirmed, *see Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). In district court on remand, the United States of America filed a Statement of Interest expressing the views of the Department of State that Samantar is not entitled to common law immunity, either head-of-state or official-act immunity. The district court subsequently denied appellant's motion to dismiss on common law immunity grounds.

Samantar filed an interlocutory appeal of that ruling to this Court, and moved to stay district court proceedings pending the resolution of his appeal. The district court denied the stay and certified the appeal as frivolous. Samantar then filed three additional requests for a stay pending appeal—two emergency motions for stay of the district court proceedings in this Court and an additional one in the district court. All of those requests were denied. In a published decision, this

Court affirmed the district court's determination that Samantar was not entitled to common law immunity. JA225-247.

On the day trial was set to begin, Samantar appeared in court and elected to default. Following a bench trial on damages, the district court entered a default judgment in favor of Yousuf.

STATEMENT OF FACTS

1. This is a suit under the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), and the Alien Tort Statute, 28 U.S.C. § 1350. The Torture Victim Protection Act provides that "'[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation *** subjects an individual to torture' or 'subjects an individual to extrajudicial killing,' is liable in a civil action for damages to the victim or the victim's legal representative." *Yousuf v. Samantar*, 552 F.3d 371, 375 (4th Cir. 2009), *affirmed*, 130 S. Ct. 2278 (2010) (quoting § 2(a), 106 Stat. 73). The Torture Victim Protection Act "'creates a cause of action for official torture'" that may be pursued in the federal courts under the general federal jurisdiction of 28 U.S.C. § 1331. *Yousuf*, 552 F.3d at 375 (citation omitted).

The Alien Tort Statute "was enacted as part of the Judiciary Act of 1789 and has been on the books, in essentially its current form, ever since." *Yousuf*, 552 F.3d at 374 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-713 & n.10

(2004)). The Statute grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Essentially, the Alien Tort Statute "'is a jurisdictional statute [that] creat[ed] no new causes of action'; rather, it was 'enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.'" *Yousuf*, 552 F.3d at 374-375 (quoting *Sosa*, 542 U.S. at 724).

2. The Republic of Somalia was formed in 1960 when the former colonies of British Somaliland (in the north) and Italian Somaliland (in the south) combined to form an independent nation. U.S. Dep't of State, *U.S. Relations with Somalia, Fact Sheet* (2012), http://www.state.gov/r/pa/ei/bgn/2863.htm. In October 1969, Major General Mohamed Siad Barre overthrew Somalia's democratic government, declared himself President, and held that position by force until he was driven from power in January 1991. *Id*.

During those times, "government intelligence agencies including the National Security Service ('NSS') and the military police, engaged in 'the widespread and systematic use of torture, arbitrary detention and extrajudicial killing against the civilian population of Somalia.'" *Yousuf*, 552 F.3d at 374 (citation omitted). In particular, the Barre regime "brutally oppressed the generally

prosperous and well-educated Isaaq clan, which the government viewed as a threat, and imposed measures intended to harm the clan politically and economically." *Id.* at 373.

3. From January 1980 to December 1986, Samantar served as Somalia's First Vice President and Minister of Defense, and from January 1987 to September 1990, he served as Prime Minister under Barre's Presidency. *See Yousuf*, 552 F.3d at 374; JA51. The district court found that, while in those positions, "Samantar was the leader of the Somali Armed Forces and was the primary military figure in Barre's military regime," and "he remained the leader of Somalia's military apparatus and a close confidante of Barre until 1991." JA202. In addition, "Samantar was in command during" a bombing of Hargeisa in 1988 that killed many civilians, and admitted he "was himself in Hargeisa in June of 1988 when the major crimes against the civilian population occurred." JA202. The court also found that "Samantar's subordinates in the Somali Armed Forces and affiliated intelligence and security agencies were committing human rights abuses; Samantar not only knew about this conduct and failed to take necessary and reasonable measures to prevent it, but he in fact ordered and affirmatively permitted such violations." JA205-206.

In January 1991, following the collapse of the Barre regime, Samantar fled Somalia for the United States. JA227-228. He now resides in Fairfax, Virginia as a permanent legal resident. *See id.*; JA51.

4. Appellees Bashe Abdi Yousuf, Aziz Mohamed Deria, Buralle Salah Mohamoud, and Ahmed Jama Gulaid are two United States citizens and two United States residents, all natives of Somalia and members of the Isaaq clan, who were either themselves the victims of Samantar's widespread use of torture or are representatives of the estates of his torture and murder victims. JA51-53.

Yousuf is a United States citizen who has resided in the United States since 1991. JA188-189. He was born in Hargeisa, Somalia, where he ran a successful family business until 1981, when he was arrested for participating in a charitable group, UFFO, which provided education and healthcare in the city. JA189. Yousuf was arrested by National Security Services agents and taken to a government building used for interrogating Isaaq UFFO members. JA189. During approximately three months of detention, Yousuf was tortured—deprived of food and water, painfully bound and electrocuted, and his interrogators "forc[ed] water into his mouth while cutting off air passageways until he lost consciousness," JA190. After being convicted of treason at a summary trial, Yousuf spent seven years in solitary confinement "in a small, windowless cell infested with rodents and insects," JA190. In 1989, he was released without explanation. JA192. He

fled Somalia, applied for political asylum in the United States, and relocated to this country in 1991.

Deria is a United States citizen currently living in Seattle, Washington. JA197. He was raised in Hargeisa, Somalia, where his father, decedent Mohamed, was a businessman. JA197. In 1981, Deria was a student, and attended political protests that were violently crushed by military forces led by General Gaani, of the Somali Armed Forces, and by Samantar. JA197. Fearing for his life, Deria fled Somalia in 1983, but his family remained in Hargeisa. JA197. In June 1988, the Somali Armed Forces "'launched an indiscriminate *** aerial and ground attack on Hargeisa.'" JA198 (quoting Second Amended Complaint, ¶39). On June 13, 1988, twelve soldiers forcibly took Mohamed from the Deria home. JA198. Later that day, the soldiers returned and took decedent Mustafa, Deria's brother. JA198. The family fled Hargeisa in July 1988; when they left, Deria's sister Nimo "saw blood covering the ground and 50-60 dead bodies, and she smelled a pervasive bad odor." JA199. The family never saw either Mohamed or Mustafa again. JA60. While living in the United States, Deria learned that his father and brother had been killed. JA197.

Mohamoud is a United States resident who is a native of the Burao region of Somalia. JA192. In 1984, Mohamoud and his brothers were seized by soldiers from the Somali Armed Forces and taken to a military installation where they were

beaten, tortured, and, after a summary trial, sentenced to death along with forty other prisoners. JA193-194. Mohamoud was inexplicably separated from the rest of the sentenced prisoners by a local commander, but his brothers were loaded onto a military truck. JA194. After the truck drove away, Mohamoud heard the sound of gun shots, and saw the truck return without the prisoners. JA194. Mohamoud fled on foot, and never saw his brothers again. JA194.

Gulaid is a United States resident who was born in Hargeisa and served as a non-commissioned officer in the Somali National Army from 1968 to 1988. JA195, 65. In June 1988, Gulaid was arrested along with other Isaaq officers by the military police. JA195-196. He was tied to three other Isaaq officers with rope, loaded into a truck with other groups of four men, and taken to a site called Malko Dur-Duro. JA196. "They were there forced to stand between two poles where six groups, each group consisting of four men tied together, had already been made to stand before officers with guns." JA196. An officer ordered Gulaid's group to be shot, and the men on each side of him fell. JA196. Gulaid lost consciousness. JA196. When "he awoke, he was covered by the bodies of his now-deceased colleagues." JA196.

5. More than eight years ago, in November 2004, these plaintiffs filed suit against Samantar under the Torture Victim Protection Act, and the Alien Tort Statute. JA49-86. The complaint sought monetary damages from Samantar "for

his responsibility for the torture of Plaintiff Bashe Abdi Yousuf" and "the extrajudicial killing of Decedents" Mohamed Deria Ali, Mustafa Mohamed Deria, Abdullahi Salah Mahamoud, and Cawil Salah Mahamoud, along with other acts of "torture, arbitrary detention and cruel, inhuman or degrading treatment," and "attempted extrajudicial killing[.]" JA50. Plaintiffs also brought claims against Samantar for crimes against humanity and war crimes. JA50.

Samantar moved to dismiss for lack of jurisdiction on multiple 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. JA15 (Dkt. #89). The district court originally held that Samantar was immune from suit under the Foreign Sovereign Immunities Act. JA16-17 (Dkts. ##102, 107, 108). This Court reversed, *Yousuf v. Samantar*, 552 F.3d 371, 373 (4th Cir. 2009), and the Supreme Court granted *certiorari*, No. 08-1555, 130 S. Ct. 49 (Sept. 30, 2009). The United States submitted an *amicus curiae* brief supporting affirmance of this Court's decision that Samantar enjoyed no immunity under the Foreign Sovereign Immunities Act. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, No. 08-1555, 2010 WL 342031, *7-*8 (Jan. 27, 2010). The Supreme Court unanimously affirmed, holding that the Foreign Sovereign Immunities Act does not grant immunity to individual government officials sued for money damages in their personal capacity, *see Samantar v.*

Yousuf, 130 S. Ct. 2278, 2286-2292 (2010). The Supreme Court then remanded the case for consideration of whether Samantar was entitled to common-law immunity, such as the head-of-state and official-act immunities that he had invoked. *Id*. at 2293. In so holding, the Supreme Court explained that "[w]e 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." *Id.* at 2291.

6. On remand, the Department of State, through the Department of Justice, filed a Statement of Interest, JA87-100, explaining that it had "reviewed this matter carefully and *** concluded that Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case," *id.* at 99. Specifically, the Statement of Interest stressed: (1) "the Executive Branch does not currently recognize any government of Somalia;" (2) "[i]n the absence of a recognized government authorized either to assert or waive [Samantar's] immunity or to opine on whether [Samantar's] alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here[;]" and (3) "[t]he Executive's conclusion that [Samantar] is not immune is further supported by the fact that [Samantar] has been a resident of the United States since June 1997." JA94-95. After full briefing, the

district court ruled that Samantar was not entitled to common law immunity and accordingly denied his motion to dismiss on immunity grounds. JA101.

Samantar moved for reconsideration. JA21 (Dkts. ##150, 151). In denying that motion, JA109, 120, the district court explained:

> I have considered with care your motion for reconsideration, but I'm satisfied that it ought not be granted. The Executive Branch has spoken on this issue and [] they are entitled to a great deal of deference. They don't control but they are entitled to deference in this case. The rationale for finding – for the government's position on sovereign immunity, I think, is sound. As you know, they looked upon among other things the status of the government of Somalia at this point[.] *** And the residency of the defendant has also been taken properly into consideration. In the past, at least the Second Circuit has found that the lack of a recognized government is a factor in the sovereignty determination, and I'm going to go with that.

JA103-104.

7. On April 29, 2011, Samantar filed an interlocutory appeal from the district court's denial of his motion for reconsideration. JA22 (Dkt. #160), JA117-118. Two weeks later, Samantar filed a motion in the district court for a stay pending appeal, but the district court denied it, JA121-123, certifying Samantar's appeal as "frivolous." JA122. On June 18, 2011, Samantar filed a motion to stay in this Court. Appellant Mohamed Ali Samantar's Emergency Motion For A Stay Of Proceedings In the District Court Pending Appellate Review ("Emergency Motion to Stay"), *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Jul 8, 2011), ECF No. 14-1. It too was denied. JA221-222.

On February 9, 2012, Samantar filed a second motion to stay in the district court. *See* JA39 (Dkt. #311). The district court heard argument from both parties, and again declined to stay the ongoing trial proceedings. JA124-156. The district court reasoned that continued delay in the trial proceedings was risking great harm to both parties, and that the likelihood of success on Samantar's immunity claim was "extremely *** slight" in light of the position of the executive branch, which the district court believed would "carry great weight with the Fourth Circuit." JA148-149. The district court told Samantar that "[t]his case has been around for a long time. One way or the other, it needs to be resolved. It's going to go to trial on Tuesday unless the Fourth Circuit—and you can certainly go back to them now with this ruling today—in their wisdom decides that the case should be stayed." JA149.

On February 15, 2012, Samantar sought for a second time a stay from this Court. Appellant Mohamed Ali Samantar's Second Emergency Motion For A Stay Of Proceedings In the District Court Pending Appellate Review ("Second Emergency Motion to Stay"), *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Feb. 17, 2012), ECF No. 55-1. This Court again denied Samantar's stay motion. JA221-224.

8. While proceedings continued in the trial court, the parties filed their briefs in this Court in the interlocutory appeal, and the United States submitted an

amicus curiae brief in favor of Yousuf. *See* Brief for the United States as Amicus Curiae Supporting Appellees, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Oct. 24, 2011), ECF No. 43. Oral argument was heard on May 16, 2012.

On November 2, 2012, this Court issued a published opinion in the interlocutory immunity appeal affirming the district court's determination that Samantar was not entitled to foreign official immunity or head-of-state immunity. JA225-249. "[C]onsistent with the Executive's constitutionally delegated powers and the historical practice of the courts, [this Court] conclude[d] that the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference." JA238. Accordingly, this Court held that "[t]he district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity." JA238. As to foreign official immunity, this Court ruled that "[t]he State Department's determination *** , by contrast, is not controlling, but it carries substantial weight[.]" JA 239. In the end, this Court weighed the State Department's Statement of Interest, as well as its independent conclusion that "this case involves acts that violated *jus cogens* norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups," and also affirmed "the district court's denial of Samantar's motion to dismiss based on foreign official immunity." JA247.

9. Following discovery and after the district court denied defendant's motion for summary judgment, JA36 (Dkt. #290), a jury trial was scheduled to begin on Tuesday, February 21, 2012, JA44 (Dkt. #349). But on Sunday, February 19, Samantar unexpectedly and without warning filed for bankruptcy and sought relief in the district court under the automatic stay protections of the bankruptcy code. JA43 (Dkt. #347). The district court was forced to stay the action. JA44 (Dkt. #349). The plaintiffs immediately moved the bankruptcy court for relief from the automatic stay, which was granted on Tuesday, February 21 and, with the stay lifted, trial was re-set for Thursday, February 23. JA44 (Dkt. #351).

That morning, however, Samantar elected to take a default judgment on liability and damages, forcing the district court to dismiss the jury that had been called in for *voir dire*. JA43 (Dkt. #353). Testifying under oath, Samantar accepted liability "for all the actions described in the plaintiffs' complaint *** [including] for causing the deaths that are at issue in this case, for being responsible for the extrajudicial killings, the attempted extrajudicial killings, *** the torture, and the other very serious allegations." JA162-163. Samantar testified, and his counsel confirmed, that "[h]e underst[ood] fully that his electing to take a default will give rise to liability *** on all the well-pleaded causes of action in respect to this case. He also underst[ood] fully that this decision will

invariably give rise to the Court assessing damages against him, both compensatory and possibly, in the Court's discretion, punitive as well." JA165.

The district court then conducted a two-day bench trial on damages, JA45 (Dkts. ##354, 356), and subsequently issued a thirty-eight page memorandum opinion setting forth its findings and conclusions, JA175-212; JA47 (Dkt. #366), and awarding damages to plaintiffs, JA213, JA47 (Dkts. ##367-368). Execution of the judgment has been stayed pending resolution of Samantar's bankruptcy petition. JA213; JA47 (Dkt. #367).

10. On September 24, 2012, Samantar filed a notice of appeal from the default judgment. JA47-48 (Dkt. #369). He asks that the district court's default judgment orders and the accompanying memorandum opinion be vacated and the case remanded for further proceedings on the ground that the district court was temporarily divested of jurisdiction upon his noticing of the interlocutory appeal of the district court's denial of his request for common-law immunity.

SUMMARY OF THE ARGUMENT

After more than eight years of litigation, two interlocutory appeals to this Court (including one that ended up in the Supreme Court), four denied stay requests, and an unexpected decision to default on the morning of trial that led to a final default judgment, defendant-appellant Samantar now seeks the chance to re-try his case on the theory that the district court should have stayed proceedings

while an interlocutory appeal was pending instead of certifying it as frivolous. Samantar does not deny that he lost his interlocutory appeal when this Court ruled that he was not entitled to common-law immunity, and therefore never enjoyed immunity from standing trial. That decision thus means that there is no wrong to remedy, as this Court's and the district court's stay denials caused him no harm. Moreover, vacatur and a remand at this point would be a futile exercise in asking the district court to re-enter the same default judgment already reached against him.

In any event, the district court was never divested of jurisdiction in the first place. As Samantar concedes, the certification of an appeal as frivolous does not divest a court of jurisdiction because interlocutory divestiture is a judge-made prudential doctrine that is designed to prevent duplication of effort and confusion between the trial and appeals courts. Where, as here, an appeal is wholly lacking in legal merit, the district court may certify an appeal as frivolous in order to minimize disruption of the ongoing legal proceedings – which were already six-years-old at the time of the appeal – while concurrently preserving the appealing party's right to be heard. If an appellant feels that the district court abused its discretion in certifying an appeal as frivolous, he has the opportunity to seek relief from this Court in the form of a stay of ongoing trial proceedings pending the outcome of the appeal. Indeed, that is precisely what happened here: Samantar

twice moved for a stay of proceedings in this court and was twice rebuffed. This double-denial of Samantar's stay motions assured the district court that it appropriately maintained jurisdiction, and this Court's ultimate decision denying Samantar common-law immunity confirmed that both courts were correct not to stay the trial pending his appeal. Given that Samantar was never entitled to immunity from suit in the first place, he is not entitled to vacatur and a second bite at the trial process just because he believes his failed appeal was non-meritorious-but-not-frivolous, contrary to the four separate determinations by this court and the trial court that no stay was warranted and the trial should proceed while the appeal was pending.

ARGUMENT

I. THIS COURT'S AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF SAMANTAR'S CLAIM OF COMMON LAW IMMUNITY HAS RENDERED HIS INTERLOCUTORY JURISDICTIONAL OBJECTION HARMLESS

The only legal error that Samantar asserts in this appeal—that the district court was temporarily divested of jurisdiction over the case for the limited time period while Samantar interlocutorily appealed the district court's common-law immunity determination—was rendered harmless by this Court's affirmance of the district court's immunity order and the entry of final judgment in district court. While Samantar is wrong to argue that the district court was divested of jurisdiction when he filed his interlocutory appeal, the sole issue he raises on

appeal does not entitle him to relief even if the Court agrees with his argument. That is because "even assuming the district court lacked jurisdiction" over the case during the pendency of the appeal, because the district court properly struck Samantar's common-law immunity defense and final judgment was entered against him on that basis, "there is no wrong to remedy" now. *United States v. Hardy*, 545 F.3d 280, 285 (4th Cir. 2008).

Samantar alleges that the district court was temporarily divested of jurisdiction over the underlying case upon his interlocutory appeal and, therefore, the Court should vacate the default judgment orders and all other proceedings that followed the noticing of his appeal. *See* Br. 24. But that argument, and that claim to relief, are foreclosed by this Court's intervening decision in No. 11-1479, which affirmed the district court's decision in all respects. *See* JA227 ("The district court rejected [Samantar's] claims for immunity and denied the motion to dismiss. *** For the reasons that follow, we agree with the district court and affirm its decision."). This ruling means that Samantar was *never* entitled to immunity, such that the "wrong" he asserts of his having had to stand trial despite his (now-rejected) claim to immunity can no longer be remedied. *Cf. Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 214 (4th Cir. 2012) (interlocutory appeals permitted where "the essence of the claimed right is a right not to stand trial") (quotation omitted). Nothing in Samantar's temporary jurisdictional objection casts any

doubt on the substantive merits of the final default judgment, given this Court's conclusive holding that Samantar is not entitled to immunity.

As explained in more detail in Part II, *infra*, the rule that a court is divested of jurisdiction during an interlocutory appeal is purely prudential and "judge made." *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). Samantar's argument—that his failed appeal was meritless-but-not-frivolous, rather than truly frivolous—simply offers no basis for retroactively stripping the district court of the jurisdiction that this Court's double-denial of Samantar's stay motions assured the district court that it had.

This case, in fact, closely parallels *In re White Mountain Mining Co.*, 403 F.3d 164 (4th Cir. 2005), in which this Court held that a purely interlocutory jurisdictional objection was rendered moot by this Court's affirmance of the district court's order on interlocutory appeal and the entry of final judgment. In *White Mountain Mining*, a bankruptcy court denied the motion to compel arbitration brought by appellant Congelton, L.L.C., which owned one half of White Mountain, the bankrupt entity; Congelton moved for a stay of trial pending appeal of the denial of its motion to compel arbitration in that court and in the district court, but both courts denied the stay motions. The bankruptcy court held a trial, Congelton lost, and the district court affirmed the bankruptcy court. On appeal from that final judgment, Congelton argued that its appeal of the motion to compel

arbitration had automatically divested the trial court of jurisdiction to enter that final judgment, rendering the subsequent trial verdict void. This Court disagreed, concluding that although the Fourth Circuit had not then decided whether an interlocutory appeal of a motion to compel arbitration divested a trial court of jurisdiction, "in any event" the interlocutory jurisdictional objection was "now moot." *Id*. at 171. Because "[j]udgment has been entered in the adversary proceeding, and we have held that the bankruptcy court was correct in denying the motion to compel arbitration and in refusing to stay the adversary proceeding pending arbitration," Congelton was "not entitled to" "set aside the judgment in the adversary proceeding." *Id.* "*In no case* has a Court of Appeals granted [such] relief,' that is, 'undoing a trial because the district court lacked jurisdiction to proceed after an appeal from an order denying arbitration' that was ultimately affirmed." *Id*. (quoting *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004)).

As in *White Mountain Mining*, this Court has affirmed the trial court's conclusion that Samantar is not entitled to common-law immunity. This Court also twice denied requests to stay the trial pending the outcome of the appeal, and final judgment has been entered in the adversary proceeding. The question of whether the district court should have retained jurisdiction for the limited time the appeal was pending in this Court has been rendered a moot issue. There is no basis for

this Court to "undo[] a trial," 403 F.3d at 171, now that the district court's immunity judgment has been affirmed on appeal and a final judgment that Samantar does not challenge *on any other ground* has been issued in the case.

For the same reasons, vacatur and a remand at this point would be utterly futile. Because Samantar has already defaulted on his underlying claims (which were never, by virtue of his default, tried to a jury), vacating the default judgment orders and accompanying opinion and remanding the case would be a wasteful and pointless exercise in having the trial court re-issue the exact same judgments. The merits ruling affirming the district court rendered any possible error in the district court's original retention of jurisdiction harmless and eliminated any ground on which this Court could afford Samantar effective relief. *See McMath v. City of Gary, Indiana*, 976 F.2d 1026, 1031 (7th Cir. 1992) (noting on similar facts "that the immunity defense, *even if not frivolous*, is without merit") (emphasis added). There is no point to remanding for the district court to *pro forma* re-enter the exact same final default judgment all over again.[1]

[1] Samantar at one point claims that the failure to stay the proceeding harmed him in that it "undeniably handicapped [his] efforts, *inter alia*, to pursue full appellate review of" either of his appeals. Br. 23. But he provides nothing to substantiate that assertion. *Cf. Long v. Robinson*, 432 F.2d 977, 979-980 (4th Cir. 1970) (denying motion to stay district court order pending appeal because "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough") (quotations and citation omitted). Indeed, as his brief makes clear, Samantar, appellees, and the United

Indeed, Samantar seeks to obtain more relief than he would have received if he had *successfully* challenged the district court's refusal to stay the interlocutory appeal on frivolousness grounds. In such cases, the remedy is merely a stay issued by *the court of appeals* pending the outcome of the appeal, not vacatur of all that transpired after the noticing of the appeal. *See Levin*, 634 F.3d at 266 (noting that a party "may move this court to stay the district court proceedings pending a review of the frivolousness determination); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162-1163 (10th Cir. 2005) ("If this court determines that the appeal is not frivolous, we will stay the litigation in the district court pending the appeal *** ."); *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995) ("The defendant can obtain our immediate review of the district judge's determination of frivolousness by asking us to stay the trial, and that is what Wodnicki did here, unsuccessfully."); *cf. Stewart v. Donges*, 915 F.2d 572, 583 (10th Cir. 1990) (vacating a final jury verdict in favor of plaintiffs but only because "the district court did not declare his appeal frivolous").

States government had a full and fair opportunity to litigate his case in the trial court and on appeal. This Court "heard spirited and vigorous argument from counsel," including Samantar's counsel, at the May 16 argument in the interlocutory appeal, which was followed by "an extensive, reported opinion." Br. 20. Samantar does not explain what different outcome would have obtained had the trial been stayed pending the appeal other than, presumably, another substantial and fruitless delay in proceedings that have already lasted longer than eight years.

Samantar may regret his decision to default on the claims asserted against him, but he has no legal basis now, more than eight years after this litigation started, to unravel the entire trial court proceedings and final judgment because of a previous interlocutory jurisdictional objection pertaining exclusively to an appeal he lost. Nor is there any sound basis for forcing Yousuf and the other plaintiffs, who have already waited close to a decade and now three rounds of appeals for relief on their claims, to endure yet another return to the district court to enter all over again a final judgment to which Samantar has not raised any substantive or other procedural objection. Given that the Court cannot grant Samantar effective relief, the procedural ping-ponging of the case that he seeks will accomplish nothing other than delay.

II. THE DISTRICT COURT PROPERLY RETAINED JURISDICTION DURING SAMANTAR'S INTERLOCUTORY IMMUNITY APPEAL

A. District Courts Commonly Retain Jurisdiction While Interlocutory Appeals Are Pending Because Interlocutory Divestiture Is A Prudential, Judge-Made Rule.

In any event, the district court properly retained jurisdiction. As Samantar concedes (Br. 18), an appeal certified as frivolous does not divest a district court of jurisdiction. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629 (2009) ("Appellate courts can streamline the disposition of meritless claims and even authorize the district court's retention of jurisdiction when an appeal is certified as frivolous."); *Behrens v. Pelletier*, 516 U.S. 299, 310-311 (1996) (approving the

practice because it "enables the district court to retain jurisdiction pending summary disposition of the appeal"); *Abney v. United States*, 431 U.S. 651, 662 (1977) (It "is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy."); *see also Management Science America Inc. v. McMuya*, Nos. 91-1188, 91-1236, 956 F.2d 1162, 1992 WL 42893, at *2 (4th Cir. March 4, 1992) (unpublished table decision) (divestiture rule "does not apply where the district court has certified the appeal to be frivolous") (listing federal appellate cases).

Where a claim of immunity wholly lacks legal merit, "the notice of appeal does not transfer jurisdiction to the court of appeals, and so does not stop the district court in its tracks." *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989). Instead, "[i]f the appeal is deemed frivolous, the district court may certify that the case should proceed to trial." *Eckert Int'l, Inc. v. Government of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167, 174 (E.D. Va. 1993); *see Apostol*, 870 F.2d at 1339 ("[A] district court may certify to the court of appeals that the appeal is frivolous and get on with the trial."). This practice "minimizes disruption of the ongoing proceedings," *Behrens*, 516 U.S. at 311, and "may be valuable in cutting short the deleterious effects of unfounded appeals," *Apostol*, 870 F. 2d at 1339.

Samantar, in suggesting that his interlocutory immunity appeal "effectively divested" (Br. 15) the district court of jurisdiction here, cites no statute or rule requiring that result. That is because there is none. Rather, the "general rule" that an appeal "divests the district court of its control over those aspects of the case involved in the appeal" is "not based upon statutory provisions or the rules of civil or criminal procedure but rather is a judge made rule originally devised *** to avoid confusion or waste of time." *Levin*, 634 F.3d at 263, 265-266 (quotations and citation omitted). Nor does he cite any case—and Yousuf is aware of none—that requires automatic (or even presumptive) divestiture of jurisdiction in cases involving a collateral appeal of a common-law immunity determination. *Cf. Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605 (2009) (noting that the collateral order doctrine "must never be allowed to swallow the general rule that a party is entitled to a single appeal," such that "[t]he justification for immediate appeal must *** be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes") (quotations omitted).[2]

[2] Nor could he have cited such a case, because Samantar's interlocutory appeal was the first time this Court has ever recognized that a denial of common-law immunity is appealable as a collateral order. *See* JA230 n.1 (noting that the court had only "previously determined that an order denying a claim of sovereign immunity under the FSIA is immediately appealable," but saw "no reason to draw a distinction in this regard for orders denying claims of sovereign immunity under the common law").

In other words, this "judge made" rule does not go to the district court's subject matter jurisdiction or power over the case, but is rather properly understood as a prudential rule that "only applies to prevent a trial court from taking actions that might duplicate or confuse issues before the appellate court." *Crutchfield v. U.S. Army Corps of Eng'rs*, 230 F. Supp. 2d 673, 679, 680 (E.D. Va. 2002); *see Wisconsin Mut. Ins. Co. v. United States*, 441 F.3d 502, 504-505 (7th Cir. 2006) (noting "exceptions" to general divestiture rule, "perhaps the foremost of which is that an appeal taken from an interlocutory decision does not prevent the district court from finishing its work and rendering a final decision").

Accordingly, this Court has recognized a wide variety of situations where it is sensible for a district court to retain jurisdiction over a case while an interlocutory appeal is pending, when doing so would be in the best interests of the court system or litigants. For instance, "this court has recognized a 'dual jurisdiction' rule, 'which allows a district court to proceed with trial while a defendant pursues [a] *** double jeopardy appeal, where the district court has concluded that the appeal is frivolous." *Levin*, 634 F.3d at 265 (quoting *United States v. Montgomery*, 262 F.3d 233, 240 (4th Cir. 2001)). Likewise, an appeal from a grant or denial of a preliminary injunction ordinarily "does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending" unless the district court or court of appeals orders otherwise.

11A Fed. Prac. & Proc. Civ. § 2962 (2d ed.); *see* Fed. R. Civ. P. 62(a), (c). Nor does an application for a certified interlocutory appeal "stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." 28 U.S.C. § 1292(b). Still other examples where a district court may retain jurisdiction during interlocutory appeals include appeals from denials of motions to compel arbitration under 9 U.S.C. § 16, *Levin*, 634 F.3d at 265-266, appeals from discovery contempt sanctions, *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 378 (1985), during untimely or otherwise improper appeals, *United States v. Jones*, 367 F. App'x 482, 484 (4th Cir. 2010), or when the district court is "'proceed[ing] as to matters in aid of the appeal,'" *Lytle v. Griffith*, 240 F.3d 404, 407 n.2 (4th Cir. 2001).

B. A District Court Is Not Divested Of Jurisdiction When It Certifies An Appeal As Frivolous.

In this case, the district court properly retained jurisdiction by certifying the appeal as frivolous. As Samantar acknowledges, and as the primary case he relies on makes clear, "certif[ying] the appeal as frivolous," *Levin*, 634 F.3d at 266, is an "exception to the divestiture principle," Br. 18. The district court properly certified Samantar's interlocutory appeal as frivolous and then, with its jurisdiction still intact, declined to stay the case pending the interlocutory appeal. *See* JA122-123. As noted, Samantar also filed two motions with this Court to stay the trial court

proceedings during the pendency of his interlocutory appeal, and this Court denied both of them, thereby affirming the district court's decision. *See* JA221-224.

As such, Samantar's only argument on this appeal—essentially the verbatim argument this Court has already twice rejected, *see* Emergency Motion to Stay, pp. 8-10; Second Emergency Motion to Stay, pp. 10-12—is that the district court was wrong to certify his non-meritorious appeal as frivolous, and accordingly everything that transpired since May 18, 2011 is "nugatory and void." Br. 24-25. Samantar is wrong.

1. Samantar's argument misunderstands the certification procedure by arguing that this Court needs to make an independent determination, or otherwise review again with post-appeal hindsight, the district court's frivolousness certification. *See* Br. 21 ("For its part, this Honorable Court *** has not made nary such a certification" of frivolousness.). Not so. This Court is never required to make an independent determination of frivolousness, and certainly not long after final judgment has been rendered; instead, it is the "the district court," not this Court, that initially "certifies the appeal as frivolous or forfeited." *Levin*, 634 F.3d at 266 (4th Cir. 2011); *see McMath*, 976 F.2d at 1031 ("It is for the district court, and not [the Court of Appeals], to determine in the first instance whether an appeal is frivolous."). If it so finds, the appellant may then move this Court "for a stay pending appeal, asserting that the district court's finding of frivolousness is not

supported by the record," and if this Court agrees that "the appeal is not frivolous, [it] will stay the litigation in the district court pending the appeal." *Levin*, 634 F.3d at 265 (quoting *McCauley*, 413 F.3d at 1162). In general, the Fourth Circuit "accord[s] great deference to the trial court's assessment of whether [a] plaintiff's claim was frivolous, unreasonable, or groundless." *See E.E.O.C. v. Great Steaks, Inc.*, 667 F.3d 510, 517 (4th Cir. 2012). If the court of appeals declines to stay the appeal, the case proceeds to trial.

That, in fact, is the exact process the courts and parties followed in this case, two times: the district court certified the appeal as frivolous, Samantar (twice) moved for a stay in this Court, and this Court (twice) denied the request. In effect, Samantar is asking this Court to declare not only the district court's certification erroneous, but this Court's two denials of his stay motions erroneous as well. There is no need for the Court to take the unusual step of reversing itself, however, as the only determinations relevant to Samantar's appeal were already decided by the district court and affirmed by this Court long ago, and may not be revisited now.

That is what the Seventh Circuit held in *McMath*. The defendants raised a qualified immunity defense but the district court, as in this case, denied the motion, certified the defense as frivolous, and refused to stay the trial pending interlocutory appeal of the immunity issue. *See* 976 F.2d at 1031. Also as in this case, the

Seventh Circuit "entered an order denying the defendants' motion for stay of the trial." *Id*. at 1030. At trial, the defendants were found liable. *See id*. On appeal from the final judgment, the defendants argued that their interlocutory appeal on the immunity issue divested the district court of jurisdiction. *See id*. at 1031.

The Seventh Circuit conceded that, "[g]iven the rather spartan factual pleadings in the plaintiff's amended complaint," it could not "with confidence pronounce that the defendants' interlocutory appeal was frivolous." *McMath*, 976 F.2d at 1031. In fact, it did "not necessarily agree with the magistrate judge's determination that the immunity claim was frivolous[.]" *See id.* But that was beside the point: "In light of [the Seventh Circuit's order denying the defendant's motion to stay], we reject the defendants' argument that the filing of the notice of appeal divested the district court of jurisdiction over the qualified immunity issue." *Id*.

In other words, where, as here, a court of appeals has already denied a stay following a frivolousness certification, there is no legal or logical basis for subjecting parties and the judicial system to retrospectively revisiting that decision after the appeal has (as predicted) failed and vacating the trial court's actions because of a post hoc debate about whether the appeal was frivolous or just non-meritorious-but-something-short-of frivolous. *See McMath*, 976 F.2d at 1031; *see, e.g.*, *Padgett v. Wright*, 587 F.3d 983, 985 (9th Cir. 2009) (declining to review

interlocutory appeal and noting that it had already denied appellant's stay motion); *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 93-98 (1st Cir. 2003) (affirming frivolousness certification procedure and noting that court had already denied appellant's stay motion).

2. The district court and two panels of this Court, moreover, in no way abused their discretion in finding Samantar's appeal frivolous. *See Great Steaks, Inc.*, 667 F.3d at 517 (noting, in context of fee-shifting provisions of Title VII, that Court of Appeals "accord[s] great deference to the trial court's assessment of whether the plaintiff's claim was frivolous, unreasonable, or groundless"); *Nagy v. FMC Butner*, 376 F.3d 252, 255 (4th Cir. 2004) (reviewing determination that claim under the Prison Litigation Reform Act, 28 U.S.C. § 1915, was "frivolous" for abuse of discretion). *See generally Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting that "the issuance of a stay is left to the *** discretion" of the court of appeals); *United States v. Wright*, 187 F.3d 633 (4th Cir. 1999) ("We review a district court's denial of a motion to stay for abuse of discretion."). Indeed, because "[t]he word 'frivolous' is inherently elastic and 'not susceptible to categorical definition,'" that "term's capaciousness directs lower courts to conduct a flexible analysis, in light of the totality of the circumstances, of all factors bearing upon the frivolity of a claim," as such courts "enjoy a comparative

expertise in identifying frivolous suits generally." *Nagy*, 376 F.3d at 256-257 (quoting *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994)).

The district court here reasonably exercised its "comparative expertise" and originally certified Samantar's appeal as frivolous because: (1) the Supreme Court held that the question of whether Samantar can claim common-law official immunity is for the Executive Branch to address in the first instance, *Samantar*, 130 S. Ct. at 2284-2285, 2291-2292; (2) the Department of State decided that Samantar is not entitled to common-law official immunity and filed a Statement of Interest so stating; (3) Samantar presented no meritorious authority or argument providing any basis for the district court to overrule the determination of the Executive Branch in this case; and (4) the district court independently reviewed the position of the United States with appropriate deference, citing factors including "the residency of the defendant" and "the lack of a recognized government." JA103-104, 122. Indeed, Samantar cited no case to the district court (or on appeal) in which an appellate court had ever reversed a district court's common law immunity decision that accorded with such an Executive Branch immunity statement (and to appellees' knowledge, there is no such case).

Moreover, although it is true that the State Department appeared and filed a brief in Samantar's appeal (Br. 19-20), the government appeared as *amicus curiae* in support of appellees and in diametric opposition to Samantar's immunity

position. In addition, this Court's published decision on Samantar's interlocutory appeal, while "extensive," did not rule in Samantar's favor and thus did nothing to prove that his appeal was not frivolous in the sense that it was without legal merit. To the contrary, the opinion focused on a separate question of the appropriate process for courts to analyze such immunity claims when the United States files a statement of interest. While the Court clarified the law governing the judicial process in such cases, nothing about the nature of its decision suggested that Samantar ever had any prospect of prevailing and overturning *both* the United States' and district court's judgments in the case. That a case frames a legal issue for a published decision of value to the law does not mean that the (losing) Appellant ever had a non-frivolous chance of winning. Finally, this same record and all of those same arguments were presented to this Court before it denied both of Samantar's emergency stay requests. *See* JA 221-224; *cf. Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303, 1304 (1983) (where stay was previously granted by Chief Justice, and where merits remain unchanged, the propriety of a new stay in the absence of new information "is essentially the 'law of the case'").

In addition to those factors, the district court (and this Court) were also aware of multiple additional factors that reinforced the district court's discretionary judgment to deny the stay, such as the very real risk that a delay in discovery and trial would effectively deny plaintiffs all relief. At the time of Samantar's

interlocutory appeal, the case had already been pending for seven years, including years of delay while Samantar pursued an immunity claim that was unanimously rejected by this Court and the Supreme Court. Further delay risked compromising both the plaintiffs' ability to prosecute their claims and Samantar's ability to mount a defense as "[w]itnesses die or move away; physical evidence is lost; [and] memories fade[]" with "the passage of time." *Vasquex v. Hillery*, 474 U.S. 254, 280 (1986). The court was also "concerned, frankly, about [Samantar's] health," and specifically that, after a further delay of "six or eight or ten months," Samantar "might not be as able to testify and represent his position." JA149. Indeed, the court concluded, "[i]f this case is delayed, there may never be a proper resolution of the issues with all parties present[.]" *Id*. District courts properly consider such factors in determining whether to maintain jurisdiction, given that "[d]efendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals," and because "[d]efendants may take *** appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal." *Apostol*, 870 F.2d at 1338-1339.

3. Finally, Samantar argues (Br. 17-18) that the district court "retreated" from its earlier frivolousness certification when, on the eve of trial, it denied Samantar's second motion for a stay during a February 15 hearing. But this

Court's precedent requires a district court to certify an appeal as frivolous only once, when the appeal is initially filed. At that point the party may "move [the Fourth Circuit] to stay the district court proceedings pending a review of" that determination, *Levin*, 634 F.2d at 266, which is what Samantar did, but neither the district court nor this Court is placed under a continuing obligation to evaluate whether an appeal has become slightly less frivolous as time goes on.

Regardless, Samantar mischaracterizes what the district court actually said at that hearing. The Court first noted that "a significant aspect of the immunity claim"—namely, the State Department's role in the common-law immunity determination—"has already been fully briefed, addressed by the Fourth Circuit and the United States Supreme Court," and the Supreme Court's "decision strongly suggests that the executive branch's position on [denying Samantar common-law immunity] is going to have a huge amount of weight in the final outcome[.]" JA147-148. Therefore, in this "unique situation," which was "the second time in which the immunity issue is being addressed," the court acknowledged that while "maybe the word 'frivolous' is too strong a word," nevertheless "the likelihood of success *** is extremely in my view slight." JA148-149. The court concluded that, on the eve of trial, Samantar's "very slight likelihood of success on the merits" was outweighed by the "potential harm to both sides" by staying the case. JA148. This was a reasonable determination and well within the district court's

discretion. This Court too rejected the same "retreat[]" argument when Samantar made it in his second emergency motion to stay the district court proceedings. *See* Second Emergency Motion to Stay, at p. 13 n.6 ("It is noteworthy that, since it characterized the instant appeal as 'frivolous' in May of 2011, the District Court has since raised doubts about having made such contention."); JA223-224.

Here, as in *McMath*, the district court properly exercised its authority to determine "in the first instance" that Samantar's immunity appeal was frivolous, 976 F.2d at 1031; *see* JA122, and neither the district court nor this Court saw any basis for disturbing that conclusion, either at the time the immunity decision was first made or when the stay motion was repeated on the eve of trial. Under all the circumstances, the district court did not abuse its discretion in certifying his appeal as frivolous, and panels of this Court did not abuse their discretion in similarly denying stays pending appeal.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 12, 2013

Respectfully submitted,

/s/ James E. Tysse

Kathy Roberts
CENTER FOR JUSTICE & ACCOUNTABILITY
870 Market Street, Suite 680
San Francisco, CA 94102
(415) 544-0444 (telephone)
(415) 544-0456 (fax)

Anya J. Freedman
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067-3010
(310) 229-1062 (telephone)
(310) 229-1001 (fax)

James E. Tysse
Patricia A. Millett
Steven H. Schulman
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 887-4000 (telephone)
(202) 887-4288 (fax)
pmillett@akingump.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify that the foregoing brief complies with the type-volume limitation prescribed by this Court's rules. The brief contains 8,654 words in Times New Roman font, 14-point size.

/s/ James Tysse

James Tysse
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 (phone)
(202) 887-4288 (fax)
jtysse@akingump.com

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2013, I electronically filed the foregoing **Appellees' Response Brief** with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the CM/ECF system:

Joseph Peter Drennan
Third Floor
218 North Lee Street
Alexandria, VA 22314
703-519-3773
joseph@josephpeterdrennan.com

/s/ James Tysse

James Tysse
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 (phone)
(202) 887-4288 (fax)
jtysse@akingump.com