No. 09-1376

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JUAN MANUEL RIVERA RONDÓN,

Defendant-Appellant,

v.

TEOFILA OCHOA LIZARBE AND
CIRILA PULIDO BALDEÓN,

Plaintiffs-Appellees.

On Appeal from the United States District Court
For the District of Maryland, No. 8:07-CV-01809
Peter J. Messitte, United States District Judge

SUPPLEMENTAL BRIEF OF APPELLEES TEOFILA OCHOA LIZARBE AND CIRILA PULIDO BALDEÓN

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. and Local Rule 26.1, Appellees Teofila Ochoa Lizarbe and Cirila Pulido Baldeón state as follows: Appellees are not publicly held corporations or any other corporate entity. No publicly held corporation or any other publicly held entity has a direct financial interest in the outcome of this litigation. No party is a trade association. This case does not arise out of a bankruptcy proceeding.

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INTRODUCTION

On April 23, 2010, the Court removed this case from the oral argument calendar and placed it in abeyance pending the Supreme Court's decision in *Samantar v. Yousuf*. The decision in that case was issued June 1, 2010, *Samantar v. Yousuf*, 130 S. Ct. 2290 (2010), and on June 10, 2010 this Court ordered the parties to brief the effect, if any, of that decision on the issues pending in this appeal.

As explained below, the Supreme Court in *Samantar* held that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602-1611, does not apply to individuals and therefore cannot confer statutory immunity from suit on an individual sued for acts committed as an official of a foreign state. That holding is dispositive of the pending appeal by Appellant Rivera Rondón, who was sued for atrocities in which he participated while serving as an officer in the Peruvian Army.

In *Samantar*, as here, an individual sought to evade liability for egregious human rights abuses by arguing that he was immune from suit under the FSIA because he acted in an "official capacity." The Supreme Court unanimously affirmed this Court's holding that FSIA immunity from suit does not apply to "individuals acting in their official capacity." The

Court explained, "[o]ur review of the text, purpose, and history of the FSIA leads us to the conclusion that the Court of Appeals correctly held the FSIA does not govern petitioner's claim of immunity" as a former foreign government official. *Samantar*, 130 S.Ct. at 2292. The Court expressly rejected the same arguments that Appellant advances in this case. Thus, the *Samantar* decision shuts the door on Appellant's claim of immunity from suit under the FSIA. Accordingly, the Court should affirm the district court's denial of Appellant's motion to dismiss the complaint.

BACKGROUND

Appellees Teofila Ochoa Lizarbe and Cirila Pulido Baldeón, individually and as representatives of the estates of relatives, sued Appellant Rivera Rondón under the Torture Victim Protection Act (TVPA), 28 U.S.C. §1350 (note), and the Alien Tort Statute (ATS), 28 U.S.C. §1350, for torture, war crimes, crimes against humanity, and extrajudicial killing, for his involvement in the Accomarca Massacre in Peru. During the 1985 Massacre, scores of innocent civilians were brutally killed. Appellant personally commanded one of at least four Peruvian Army patrol units involved in the massacre of 69 women, children, and elderly men.

On December 21, 2007, Appellant moved to dismiss the complaint on six grounds. Appellant argued that: (1) he was entitled to immunity under the FSIA; (2) Plaintiffs' claims are time-barred; (3) Plaintiffs failed to exhaust their remedies in Peru before pursuing claims under international law; (4) the complaint raises nonjusticiable political questions; (5) the Court lost jurisdiction after Appellant's deportation from the United States; and (6) the Act of State Doctrine bars Plaintiffs' claims. The district court denied Appellant's motion to dismiss. Appellant filed this interlocutory appeal challenging the denial of his claim of FSIA immunity and asking the Court to exercise pendent appellant jurisdiction to review the district court's refusal to dismiss the complaint on statute of limitations or exhaustion of remedies grounds.[1] With respect to his claim that he is entitled to immunity under the FSIA, Appellant argued "it is hard to imagine a plainer example of a military officer acting in his official capacity than that alleged by Lizarbe and Baldeón themselves in the complaint." App. Br. at 31.

The *Samantar* decision unequivocally resolves in favor of Appellees Ochoa Lizarbe and Pulido Baldeón the central issue before this Court.

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[1] *Samantar* did not address the question of when it is appropriate for the court of appeals to exercise pendent appellate jurisdiction to review additional affirmative defenses asserted by a foreign official claiming FSIA immunity from suit. Accordingly, the *Samantar* decision does not implicate the pendent appellate jurisdiction rule in this circuit, nor does it affect the application of that rule in this case.

Appellant, sued for acts allegedly committed in his official capacity as a Peruvian military officer, is not shielded from suit by the FSIA.[2]

ARGUMENT

I. THE *SAMANTAR* COURT CONCLUDED THAT THE PLAIN LANGUAGE OF THE FSIA DOES NOT EXTEND IMMUNITY TO INDIVIDUALS.

The Supreme Court concluded that the plain language of the FSIA cannot be stretched to encompass individuals acting in their official capacity. The statute provides that "a *foreign state* shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in the Act." 28 U.S.C. §1604 (emphasis added). Section 1603 of the FSIA goes on to define "foreign state" to mean "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)."[3] Appellant argues that he is an "agency or

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[2] In the first case to confront this issue since the decision in *Samantar*, the Second Circuit remanded an individual foreign official's case to the district court on the grounds that, after *Samantar*, the FSIA cannot be interpreted to apply to individuals. *Carpenter v. Chile*, No. 09-3743-ev, 2010 WL 2558012 (2d Cir. June 28, 2010).

[3] Section 1603(b) defines an "agency or instrumentality of a foreign state" as "[A]ny entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USCS § 1332(c) and (e)] nor created under the laws of any third country."

instrumentality" of Peru. App. Br. at 11-14. As the *Samantar* Court concluded, however, the term "agency or instrumentality" refers to an organization, *not* an individual – not even an individual who claims to have been acting in an official capacity on behalf of the foreign state.

In concluding that the text of the FSIA does not encompass individuals, the *Samantar* Court also dispensed with the argument Appellant Rivera Rondón makes here (App. Br. 11-15) that the criteria in §1603(b) defining "agency or instrumentality" should be considered illustrative, not exhaustive. The Court reasoned that even if the list is merely illustrative, "it still suggests that 'foreign state' does not encompass officials, because the types of defendants listed are all entities." 130 S. Ct. at 2287-88 (quoting *Russell Motor Car Co. v. United States*, 261 U. S. 514, 519 (1923) ("'[A] word may be known by the company it keeps.'")).

Furthermore, the Court found it persuasive that Congress expressly included individual officials in other parts of the FSIA when it wanted to "count their acts as equivalent to those of the foreign state," thus suggesting that officials are not included within the unadorned term "foreign state." *Cf. Kimbrough v. United States*, 552 U. S. 85, 103 (2007)("'[D]rawing meaning from silence is particularly inappropriate. . . [when] Congress has shown that it knows how to [address an issue] in express terms.'"). 130 S. Ct. at 2288.

For example, the Court explained that "Congress provided an exception from the general grant of foreign sovereign immunity for cases in which 'money damages are sought against a foreign state' for an injury in the United States 'caused by the tortious act or omission of that foreign state or of *any official or employee of that foreign state while acting within the scope of his office*.' §1605(a)(5) (emphasis added)." 130 S. Ct. at 2288. If Congress had intended the term "foreign state" to encompass individual officials, then it would not have been necessary for Congress to specifically refer to officials in this section. *Id.*

Finally, other parts of the statute likewise compel the conclusion that individuals are not covered under the FSIA. For example, the sections governing service of process (§1698(a)) make no mention of individuals. The Court stated that "[a]lthough some of the methods listed could be used to serve individuals–for example, by delivery 'in accordance with an applicable international convention,'. . . the methods specified are at best very roundabout ways of serving an individual official." *Id.*

As the Court concluded, "[r]eading the FSIA as a whole, there is nothing to suggest we should read 'foreign state' in §1603(a) to include an official acting on behalf of the foreign state, and much to indicate that this meaning was not what Congress enacted." *Id.* at 2289 Because there is no

basis in the text for finding that the term "foreign state" can be read to include officials under the FSIA, *Samantar* established that such persons are not entitled to immunity under the FSIA.

II. THE LEGISLATIVE HISTORY AND PURPOSE OF THE FSIA DEMONSTRATE THAT CONGRESS DID NOT INTEND TO INCLUDE INDIVIDUALS.

In addition to relying on the text of the FSIA, the Court also found that the legislative history and purpose of the statute further demonstrate that Congress did not intend to extend immunity to individuals. The Court found it persuasive that the legislative history of the FSIA explicitly provides that it is not intended to address personal immunities: "'[t]he bill is not intended . . . to affect either diplomatic or consular immunity.'" *Id*. at 2289 n. 12 (quoting H.R. Rep. No. 94-1487 at 12 (1976)), *reprinted in* U.S.C.C.A.N. The Court explained that while Congress intended to codify state immunity, there was no evidence to suggest that it intended to codify individual immunity, and indeed, the evidence is to the contrary. *Id.* at 2291 n.18.

Furthermore, the Court reasoned that in light of the fact that Congress intended for the FSIA to "clarify the rules" for judges, it would hardly have made sense that Congress would have then "lump[ed] individual officials in with foreign states without so much as a word spelling out how and when individual officials are covered." *Id*. at 2291. Indeed, the Court noted that

the lower courts had adopted different and sometimes conflicting criteria for determining when an individual is entitled to immunity under the FSIA. While Appellant tries to make much of the fact that he was just a low level solider acting on orders from his superiors (App. Br. at 29), it is important to emphasize that the *Samantar* Court held that the FSIA does not cover immunity for ***any*** individual. Accordingly, Appellant's military rank has no bearing on the analysis. After this decision, it is beyond doubt that the FSIA does not cover individuals regardless of rank or status.

In deciding that the FSIA does not apply to individuals, the Court expressly rejected the same contention made by Appellant Rivera Rondón– that "excluding individuals from the statute will permit litigants to accomplish indirectly what the Act barred them from doing directly . . . [as] litigants could avoid immunity simply by recasting the form of their pleadings" as a suit against a foreign official rather than against the foreign state the official serves. App. Br. at 14, quoting *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1102. (9th Cir. 1990). The Court catalogued several reasons why its interpretation of the Act is not affected "by the risk that plaintiffs may use artful pleading to attempt to select between application of the FSIA or the common law." *Samantar*, 130 S. Ct. at 2292. Significantly, the Court explained, its interpretation of the FSIA does not

allow plaintiffs simply to substitute an individual defendant who lacks FSIA immunity for the state because "not every suit can be successfully pleaded against an individual official alone." *Id.*

The Court noted that when the state is the real party in interest, a case against an individual official could be treated as a case against the state, and thus it is the immunity of the state, not the individual, that would govern the case. *Id.* (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). Similarly, lawsuits against individual officials could be dismissed where the state is a necessary party that could not, because of immunity, be joined pursuant to Fed. R. Civ. P. 19(a)(1)(b). *Id.* (citing *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008)). In sum, the Court's rationale for holding that the FSIA does not apply to individuals lays to rest Appellant's claim of immunity under the FSIA.

III. THIS COURT NEED NOT ADDRESS THE ISSUE OF WHETHER *FORMER* OFFICIALS ARE ENTITLED TO IMMUNITY.

In deciding that the FSIA does not apply to individuals, the Supreme Court expressly explained that it did not need to consider the narrower issue of whether ***former*** officials are covered by the FSIA. "As an alternative basis for its decision, the Court of Appeals held that even if a current official is covered by the FSIA, a former official is not. *See* [*Samanatar*] 552 F.3d

at 381-383. Because we agree with the Court of Appeals on its broader ground that individual officials are not covered by the FSIA, petitioner's status as a former official is irrelevant to our analysis." *Id.* at 2284 n.5.

Thus, under the *Samantar* decision – all officials, current and former – are precluded from using the FSIA as a shield against lawsuits in the United States. For this reason, Appellant's argument that former officials are entitled to immunity is unavailing.

IV. APPELLANT WAIVED THE DEFENSE OF NON-STATUTORY OFFICIAL IMMUNITY BY NOT RAISING THE ISSUE AT THE DISTRICT COURT.

Although the *Samantar* Court remanded to the district court and noted that the defendant in that case is free to pursue his defense based on common law immunity, Appellant Rivera Rondón is not entitled to the same outcome here. In *Samantar*, the defendant had raised common law immunity in his motion to dismiss the complaint. Here, by contrast, Appellant Rivera Rondón did not raise common law immunity as a ground for dismissal. In keeping with relevant case law, he has waived that defense.

It is well settled that a defense that the court lacks personal jurisdiction is waived if not asserted as part of a Rule 12 motion to dismiss. Fed. R. Civ. P. Rule 12(g)(2) states that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or

objection that was available to the party but omitted from its earlier motion." Rule 12 (h)(1)(A) provides that "[a] party waives any defense listed in Rule 12(b)(2)-(5) by . . . omitting it from a motion in the circumstances described in Rule 12(g)(2)."

In an analogous case, *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, Iran's Rule 12(b) motion to dismiss did not mention non-FSIA grounds for attacking personal jurisdiction and instead was based solely on statutory grounds. On appeal, Iran contended that it also lacked sufficient contacts with the United States to support the exercise of *in personam* jurisdiction consistent with due process. 905 F.2d 438 (D.C. Cir. 1990). The D.C. Circuit held that Iran waived non-FSIA grounds for challenging jurisdiction by not raising the issue below. *Id*. at 453 ("[C]laims regarding defects in personal jurisdiction are waived if not raised.").

CONCLUSION

For the foregoing reasons, the Supreme Court's decision in *Samantar* requires affirmance of the district court's denial of Appellant Rivera Rondón's motion to dismiss and remand of the case to the district court for further proceedings.

Respectfully submitted,

/s/

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August 12, 2010

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order of June 10, 2010 because it contains no more than fifteen pages.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

/s/
Mark N. Bravin

CERTIFICATE OF SERVICE

I hereby certify on this 12th day of August 2010 that I electronically filed the Supplemental Brief of Appellees on:

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