

**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
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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
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Respectfully submitted,

Dated: 17 June 2011, at Alexandria, Virginia

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