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

BASHE ABDI YOUSUF, *et alii*,	*	
	*	
Plaintiffs,	*	
	*	
versus	*	**Civil Action No. 04-1360 (LMB/JFA)**
	*	
MOHAMED ALI SAMANTAR,	*	
	*	
Defendant.	*	

BRIEF IN SUPPORT OF DEFENDANT SAMANTAR'S MOTION TO STAY SCHEDULING ORDER

STATEMENT OF FACTS

On November 29, 2010, defendant Mohamed Ali Samantar ("Samantar" or "Defendant"), filed a Motion to Dismiss the Second Amended Complaint in this action (Docket Entry ("D.E.") # 138). Among the arguments he advanced in that motion, Samantar asserted that this Honorable Court lacks subject matter jurisdiction in that Samantar is immune, at common law, from suit for actions taken in his capacity as an official of a sovereign state.

On 14 February 2011, the United States Department of Justice submitted a "Statement of Interest of the United States of America" (D.E. # 147) (the "Statement of Interest"). The Statement of Interest advised this Honorable Court that "the United States has determined that Defendant Samantar is not entitled to official immunity in the circumstances of this case." *Id.* at 10.

By its order entered the following day, this Honorable Court held that Samantar's "common law sovereign immunity defense is no longer before the Court" (D.E. # 148). The Court premised that holding on the circumstance that "[t]he government has determined that the

defendant does not have foreign official immunity." *Id.*

On 15 March 2011, Samantar moved this Honorable Court to reconsider its order denying immunity and to hold that Samantar was entitled to the protection of sovereign immunity notwithstanding the Statement of Interest (D.E. # 150). Following a hearing, this Honorable Court, on 1 April 2011, denied Samantar's motion for reconsideration (D.E. # 158).

On 29 April 2011, Samantar filed a notice of appeal (D.E. # 160) of the order denying immunity, and, concomitantly, the order denying reconsideration of the immunity order (the "Immunity Orders").[1] Notwithstanding the pendency of this appeal, this Honorable Court did, on 3 May 2011, issued a Scheduling Order authorizing discovery and related activities associated with a continued prosecution of this case (D.E. # 161) (the "Scheduling Order"). In his motion accompanying this brief, Samantar seeks a stay of the Scheduling Order pending the outcome of his appeal.

ARGUMENT

Despite the interlocutory character of the Immunity Orders, Samantar had authority to notice them for immediate appeal. The Immunity Orders represent a denial of Samantar's motion to dismiss the complaint on the grounds of foreign sovereign immunity. 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, 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

1 The notice of appeal was timely in that it was filed within thirty days of the entry of the order denying Samantar's motion for reconsideration. As an appealable order (see "Argument" section herein), the order denying immunity to Samantar was a "judgment" such that Samantar's motion for reconsideration represented a motion "to alter or amend the judgment" and the time to appeal ran from the entry of the reconsideration order. Fed. R. App. P. Rule 4(a)(4)(A)(iv); *see, e.g., S.E.C. v. 4NExchange*, 2005 WL 1518838, *1 (10th Cir. 2005).

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). This Honorable Court, however, has not made any such certification, and, respectfully, could not reasonably make any such certification here. 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 should confirm, the denial of immunity to Samantar raises important issues of the separation of powers and of the scope of the right to common law immunity in the absence of any assertion by the Executive Branch of any harm to United States foreign policy interests from a recognition of that immunity. Not only are these points arguable on their merits, but Samantar earnestly believes, respectfully, that they were wrongly decided.

CONCLUSION

Since the Scheduling Order supposes control by this Honorable 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 pursuant to the Scheduling Order would be improper, and the operation of the Scheduling Order should, accordingly, be stayed pending the outcome of the appeal.

Respectfully submitted,

Dated: 13 May 2011, at Alexandria, Virginia

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CERTIFICATE OF SERVICE

I, Joseph Peter Drennan, undersigned, hereby and herewith certify that, on 13 May 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:

Jonathan P. Robell, Esq.
Joesph William Whitehead, Esq.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036; &

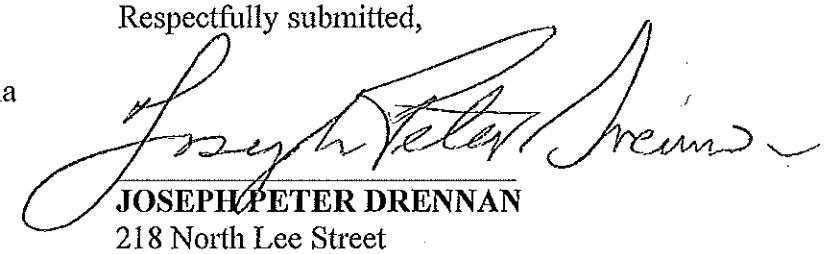
Lauren A. Wetzler, Assistant United States Attorney
2100 Jamieson Avenue
Alexandria, Virginia 22314.and that, on even date, an electronic copy of the foregoing was

sent, by *e-mail*, unto the said Messrs. Robell & Whitehead, and Ms. Wetzler, at the respective *e-mail* addresses of each, *viz.*: jrobell@akingump.com , jwhitehead@akingump.com ; &

lauren.wetzler@usdoj.gov .

Respectfully submitted,

Dated: 13 May 2011, at Alexandria, Virginia



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