IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AZQUERRETA, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

BANK OF NEW YORK MELLON, as Indenture Trustee, EXCHANGE BONDHOLDER GROUP,

Non-Party Appellants,

FINTECH ADVISORY, INC., EURO BONDHOLDERS,

Intervenors.

Nos. 12-105-cv (L), 12-109-cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON), 12-943-cv (CON), 12-951-cv (CON), 12-968-cv (CON), 12-971-cv (CON), 12-4694-cv (CON), 12-4829-cv (CON), 12-4865-cv (CON)

ORAL ARGUMENT REQUESTED

MOTION TO ENFORCE THIS COURT'S STAY PENDING APPEAL OR, IN THE ALTERNATIVE, FOR A STAY OF DISCOVERY PENDING APPEAL

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The Interested Non-Party Appellants listed in Appendix A (collectively, the "Exchange Bondholder Group" or "EBG") submit this Motion to Enforce this Court's November 28, 2012 stay pending appeal (the "Stay"). The EBG respectfully requests that the Court enforce its Stay, which precludes Plaintiffs-Appellees ("Plaintiffs") from seeking discovery from EBG members. In the alternative, the EBG moves for a stay of discovery pending appeal, pursuant to Federal Rule of Appellate R Procedure 8(b).

This motion is necessary because on December 11, 2012, Plaintiffs, ignoring this Court's stay, served five subpoenas on EBG members ("Subpoenas") seeking testimony and documents. (*See* Declaration of Sean F. O'Shea, dated December 21, 2012 ("O'Shea Decl."), Exs. 1-5.) The return date for document production under the Subpoenas was December 20, 2012. *See id.* The Subpoenas further noticed five depositions – one in New York and one in Massachusetts – on December 21, 2012, and three depositions – two in New York and one in California – on December 27, 2012.

BACKGROUND

As this Court is aware, (see the Court's decision in this matter, dated October 26, 2012, Dkt. No. 442 ("Opinion")) the appeals at issue arise from proceedings in the United States District Court for the Southern District of New York (Hon. Thomas P. Griesa) concerning the Republic of Argentina's

("Republic") 2001 default on approximately $82 billion in debt securities issued pursuant to a Fiscal Agency Agreement ("FAA"). Following that default, in 2005 and 2010, the Republic initiated exchange offers ("Exchange Offers") allowing holders of the FAA Bonds to replace those instruments with new, unsecured and unsubordinated external debt at a rate of about 25 to 29 cents on the dollar ("Exchange Bonds"). Over 91% of the holders of the FAA Bonds (including the EBG) elected to participate in the Exchange Offers, allowing the Republic to restructure approximately $74.5 billion of debt. To date, the Republic has fully honored its obligations to the holders of the Exchange Bonds ("Exchange Bondholders" or "EBHs"). The EBG represents EBHs with total holdings in excess of $1 billion. (O'Shea Decl., Ex. 15, at ¶¶ 8-9, Ex. 25, at ¶ 3, Ex. 26 at ¶ 2, Ex. 27 at ¶ 3.) Plaintiffs refused to accept the 2005 and 2010 Exchange Offers, choosing instead to sue the Republic in an attempt to collect the full amounts they claim are due under the original terms of the FAA Bonds.

On December 7, 2011, the district court granted Plaintiffs partial summary judgment, finding the Republic violated a *pari passu* clause contained in the FAA ("December 7 Order"). (*See* O'Shea Decl., Ex. 21 at 4-5.) On February 23, 2012, the district court issued an order requiring specific performance by the Republic and enjoining it from paying the EBH (who were not parties to the district court proceedings) without previously or concurrently making "Ratable Payments" to

Plaintiffs ("February 23 Order"). (*See* O'Shea Decl., ¶ 2.) The Republic appealed both the December 7 and February 23 Orders.

On March 5, 2012, the district court entered an order ("March 5 Order") that stayed the February 23 Order pending the Republic's appeal. (*See* O'Shea Decl., Ex. 23.) The March 5 Order also prohibited the Republic from taking any steps to evade the district court's order while the appeal was pending, including attempting to alter the payment mechanism for the Exchange Bonds. The March 5 Order did not mention or provide for discovery.

On October 26, 2012, this Court issued an Opinion partially affirming the district court's Orders; retaining jurisdiction; and directing the district court to (i) supplement the record regarding the impact of its injunctions on third parties; and (ii) clarify the "Ratable Payment Formula" under which the Republic was ordered to pay Plaintiffs. (See Opinion) On November 21, 2012, the district court issued two opinions and an Order ("November 21 Order"). (*See* O'Shea Decl., Exs. 16-18.)

The November 21 Order adopted amendments proposed by Plaintiffs, expanded the scope of the February 23 Orders, and ordered the Republic to escrow the full $1.3 billion sought by Plaintiffs. (*See id.*) The district court's November 21 Order further amended the February 23 Order to provide for discovery concerning the timing and amounts of payments on the exchange bonds, amounts

owed by the Republic, and other information to confirm compliance with the November 21 Order. (O'Shea Decl., Ex. 18, ¶ 3.) Finally, the district court's opinion concluded that the Republic was attempting to evade the Court's injunction, based upon the Republic's public statements that it would not pay Plaintiffs. (O'Shea Decl., Ex. 16, at 3-4.) Accordingly, the Court lifted the stay imposed by the March 5 Order. Notably, it found no facts indicating that any EBH had attempted to evade its injunction.

On November 26, 2012, the EBG (and with respect to the stay, other parties) filed emergency motions in this Court, requesting, *inter alia*, leave to appear as Interested Non-Parties for the purpose of (i) seeking an emergency stay of the Injunctions pending appeal; (ii) appealing the Injunctions as unlawful; and (iii) challenging the district court's denial of the EBG's Rule 60(b) motion. (O'Shea Decl., Ex. 24.) On November 28, 2012, this Court granted the EBG's motions.

Also on November 28, 2012, this Court entered a stay of the November 21 Order, and ordered an expedited briefing schedule for the appeal.[1] (*See* O'Shea Decl., Ex. 6.) On December 4, 2012, the Court rejected Plaintiffs' motion for an order requiring the Republic to post a bond as a condition of maintaining the Stay,

[1] Under the expedited schedule, Appellants' briefs are due on December 28, 2012; *Amicus* briefs are due on January 4, 2013; opposition briefs are due on January 25, 2013; and reply briefs are due on February 1, 2013. The oral argument is scheduled for February 27, 2013.

as well as their application to override this Court's already expedited briefing schedule. (*See* O'Shea Decl., Ex. 7.)

Although Plaintiffs have attempted to insinuate that the Republic, the EBG, and the other Exchange Bondholders have been trying to circumvent the district court's orders, Plaintiffs have not identified any competent evidence in that regard, citing only speculative, discredited, and unsubstantiated press reports. (O'Shea Decl., Ex. 8, at 9.) By contrast, the EBG has submitted two affidavits from Robert Koenigsberger (a principal of Gramercy Funds Management LLC, the organizer of the EBG) affirming that no efforts have been made to circumvent the district court's injunction. (O'Shea Decl., Exs. 15, 21.) The Republic has submitted an affidavit to the same effect. (O'Shea Decl., Ex. 19.) Further, the EBG has submitted the expert testimony of Professor Stephen Choi, which definitively establishes that it would be impossible as a practical matter for the Republic and the Exchange Bondholders to circumvent the injunction while this appeal is pending. (O'Shea Decl., Exs. 13-14.) The EBG raised this argument first in its Motion for a Stay pending appeal before this Court (O'Shea Decl., Ex. 24, at 4), again in its Opposition to Plaintiffs' Motion to Amend the Stay to require the Republic to post a bond (*id.*, Ex. 8, at 8-10), and once again in correspondence objecting to the Subpoenas (*id.*, Ex. 11, at 2). Plaintiffs have never attempted to

respond to the EBG's evidence, yet persist with their claims of alleged "evasion" of the district court's injunction.

As noted, on December 11, 2012, Plaintiffs served the Subpoenas on EBG members with return dates this week. Plaintiffs, however, served no discovery requests on Exchange Bondholders who have not sought to participate in this appeal.

Counsel for the EBG requested in a letter on December 11, 2012 that Plaintiffs state the basis for their authority to issue subpoenas, noting that the November 21 Order had been stayed by this Court. (*See* O'Shea Decl., Ex. 9.) Counsel for Plaintiffs replied on December 12, 2012 that they issued the Subpoenas pursuant to the March 5 Order, which (unlike the November 21 Order) contained no provision for discovery. (O'Shea Decl., Ex. 10, at 2.) Plaintiffs also claimed that they needed discovery "[b]ecause of the irreparable harm to the plaintiffs threatened by Argentina's progress toward implementation of a plan to evade its obligations under the March 5 Order." (*Id.* at 2-3.)

On December 17, 2012, counsel for the EBG pointed out that the March 5 Order does not provide for discovery and that there is no apparent authority for the Subpoenas. (*See* O'Shea Decl., Ex. 11, at 1.) Plaintiffs' Counsel replied on December 18, 2012 that the Subpoenas were authorized by the "plain language" of the March 5 Order and unspecified Federal Rules of Civil Procedure. (*See* O'Shea

Decl., Ex. 12.) Counsel for the EBG also reiterated on December 17 that "from a practical standpoint, [it would be] *impossible*" to circumvent the district court's injunction and that Plaintiffs had failed to produce any evidence to the contrary. (O'Shea Decl., Ex. 11, at 1.) In their December 18 response, Plaintiffs once again failed to provide any substantive rejoinder to the EBG's position, demurring that "we do not believe any purpose would be served by debating that issue in the abstract." (O'Shea Decl., Ex. 12 at 2.) The EBG now moves this Court for an order confirming and enforcing the Stay precluding the Subpoenas or, in the alternative, to stay discovery pending appeal.[2]

ARGUMENT

I. THE SUBPOENAS CONTRAVENE THIS COURT'S STAY.

The only order of the district court that provides for the discovery that Plaintiffs now seek is Paragraph 3 of the November 21 Order. (O'Shea Decl., Ex. 19, ¶ 3). However, this Court's November 28 Order expressly stayed the November 21 Order in its entirety. (O'Shea Decl., Ex. 6.) Thus, this Court has already stayed any possible discovery pending appeal, thereby precluding issuance of the Subpoenas.

Notwithstanding the Stay, Plaintiffs have issued the Subpoenas without any legal basis. Although Plaintiffs cite the March 5 Order as their source of authority,

[2] The EBG (out of an abundance of caution) has also served Plaintiffs with objections to the subpoenas *duces tecum*.

that Order does not mention discovery. (O'Shea Decl., Ex. 6.) If the district court had intended to allow discovery in connection with the March 5 Order, it would have included express language to that effect, as it did in the now-stayed November 21 Order. It did not do so, and in any event, as noted, the only provision allowing discovery regarding compliance with the injunction (Paragraph 3 of the November 21 Order) has been stayed by this Court.[3]

II. A STAY OF DISCOVERY PENDING APPEAL IS WARRANTED.

In the alternative, the EBG moves for a stay of discovery pending appeal, pursuant to Fed. R. App. P. 8(b) and this Court's inherent power to enforce its own orders and to issue orders in aid of its jurisdiction. *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. 32, 45-46 (1991).

The sole justification provided by Plaintiffs for the discovery they seek is alleged efforts by the Republic and the EBG to circumvent the district court's injunction. (*See* O'Shea Decl., Exs. 10, 12.) However, in its Motion for a Stay (*id.*, Ex. 24, at 4), its opposition to Plaintiffs' motion for a bond (*id.*, Ex. 8, at 8-10), and in correspondence following the issuance of the Subpoenas (*id.*, Ex. 11),

[3] The only Rule providing for postjudgment discovery is Fed. R. Civ. P. 69, which permits limited discovery after return of a money judgment or execution, for the purpose of locating a judgment creditor's assets. Rule 69, however, does not apply in this instance, as Plaintiffs do not have a money judgment or execution to act upon. As the district court has not ordered discovery in connection with the March 5 Order, Plaintiffs have no authority to issue the Subpoenas and the Subpoenas, therefore, are a nullity.

the EBG has demonstrated that it would be impossible from a practical standpoint to successfully engage in any such evasion. The EBG has supported that position with the expert testimony of Professor Choi (*see* O'Shea Decl., Exs. 13-14), and both the Republic and the EBG have submitted affidavits confirming that there have been no efforts to avoid the district court's injunction. (*Id.*, Exs. 15, 19-20.) Despite those opportunities to respond, Plaintiffs have offered only silence. Yet they have issued the Subpoenas notwithstanding this Court's Stay, based on a premise that they have failed to support with any evidence. Under these circumstances, a stay of discovery is plainly warranted.

Given the applicable legal standard, the Court's November 28 Stay of the November 21 Orders pending appeal (O'Shea Decl., Ex. 6), that Stay necessarily entailed a finding that the parties seeking a stay, including the EBG, would suffer irreparable harm from the enforcement of the district court's injunction, and are likely to succeed on the merits of the appeal. (*See id.*) Also inherent in the Stay was a rejection of Plaintiffs' argument that "extraordinary circumstances" (in the form of alleged attempts to evade the injunction) required immediate enforcement of the November 21 Order.[4] (*See* O'Shea Decl., Ex. 16, at 4.) Accordingly, there is no basis for Plaintiffs' discovery.

[4] Similarly, Plaintiffs have already been unsuccessful in their attempt to override this Court's expedited briefing schedule with an even further abbreviated

Just as Plaintiffs failed to demonstrate that they would suffer any substantial injury in the absence of a Stay and in the absence of a bond, so have they failed to articulate any reason, much less an urgent reason why they should be entitled to discovery under the March 5 Order while an expedited appeal is pending.

Indeed, the Subpoenas appear to be designed to harass the EBG, and other Exchange Bondholders. During the period leading up to EBG's deadline to file its expedited appeal brief, Plaintiffs noticed five separate depositions in three different states in the span of six days.[5] (O'Shea Decl., Exs. 1-5.) And, although the March 5 Order has been in place for over nine months, at no time prior to December 11 had Plaintiffs sought discovery pursuant to that Order.

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schedule of their own. *See* Plaintiffs' Emergency Motion to Amend Stay order, dated November 30, 2012, Dkt. No. 506, at 19-20.

[5] Notably, Plaintiffs also have not issued subpoenas to any of the Exchange Bondholders who are not members of the EBG, and therefore not a party to this appeal. Surely if the EBG members, as Exchange Bondholders, have documents relevant to alleged efforts to circumvent the Court's injunction, other Exchange Bondholders not participating in this appeal would as well. Plaintiff's focus on only those Exchange Bondholders who have opposed them in this litigation reveals that their true motive is not to obtain genuinely needed discovery, but rather to harass.

CONCLUSION

To preserve the Stay, prevent interference with the pending appeal, and abate harassment of the EBG, the Court should confirm and enforce the Stay pending appeal.

Dated: New York, New York
December 21, 2012

Respectfully submitted,

By: /s/ Sean F. O'Shea

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
November 26, 2012

Respectfully submitted,

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By ECF to:

All Counsel of Record