

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

REPLY IN FURTHER SUPPORT OF THE EXCHANGE BONDHOLDER GROUP'S
MOTION TO ENFORCE THIS COURT'S STAY PENDING APPEAL

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PRELIMINARY STATEMENT

The Interested Non-Party Appellants (collectively, the “Exchange Bondholder Group” or “EBG”)¹ submit this brief reply in further support of their Motion to Enforce this Court’s November 28, 2012 stay pending appeal (the “Stay”). The Plaintiffs’ Opposition (“Pl. Opp.”) demonstrates once again that they have no meaningful response to the EBG’s argument that circumvention of the district court’s injunction is, for practical purposes, impossible, and therefore Plaintiffs’ sole stated basis for discovery in the midst of an expedited appellate briefing schedule is groundless. Only the district court’s November 21 order authorized Plaintiffs to initiate discovery regarding compliance with its injunction, and this Court has stayed that order. (*See* Declaration of Sean F. O’Shea in Support of the EBG’s Motion to Enforce, dated December 21, 2012, Dkt. No. 621 (“O’Shea Decl.”), Exs. 6, 18.)

I. THIS COURT STAYED DISCOVERY IN ITS NOVEMBER 28 ORDER.

Plaintiffs admit that the November 21 order provided for discovery to enforce the district court’s injunction, and that the March 5 order contains no such provision. (Pl. Opp. at 6-8; *see also* O’Shea Decl., Exs. 6, 23.) They further admit

¹ The members of the EBG are identified in Appendix A to the EBG’s Motion to Enforce this Court’s November 28 stay pending appeal, dated December 21, 2012, Dkt. No. 621 (“Mtn. to Enforce”).

that this Court's November 28 order stayed the district court's November 21 order in its entirety, including the provision permitting discovery. (Pl. Opp. at 6.) Nevertheless, Plaintiffs issued the Subpoenas in the face of the Stay.

Plaintiffs' reliance on the March 5 order is misplaced. Although that order purports to retain jurisdiction in the district court to enforce its injunction, only the November 21 order permits Plaintiffs to initiate discovery, and that order has been stayed. (*See* O'Shea Decl., Exs. 6, 18, 23.) Plaintiffs cite no authority allowing discovery under these circumstances. Notably, the district court's November 21 order was based on its view that the Republic's stated unwillingness to pay the Plaintiffs was somehow evidence of intent to evade the injunction. (*See* O'Shea Decl., Ex. 16 at 2-4.) But in issuing the Stay, this Court implicitly found that any so-called "evasion" did not justify immediate implementation of the injunction. Thus, this Court has already in effect ruled that there is no demonstrated need for discovery on the issue of circumvention. Plaintiffs' motion to compel compliance with the Subpoenas in the district court, which was filed *after* the EBG filed the instant motion, appears to be itself an attempt to "evade" the Stay. (*See* Declaration of Mark T. Stancil in Support of Appellees' Opposition, dated December 26, 2012 ("Stancil Decl."), Dkt. No. 622, Ex. 7.)

II. FOR THE FOURTH TIME, PLAINTIFFS HAVE FAILED TO EXPLAIN HOW THE REPUBLIC AND EXCHANGE BONDHOLDERS COULD CIRCUMVENT THE DISTRICT COURT'S INJUNCTION, OR TO SUPPORT THEIR BASELESS CLAIM THAT CIRCUMVENTION HAS BEEN ATTEMPTED.

Plaintiffs admit that their discovery demands are based entirely on the proposition that the Republic and the Exchange Bondholders are somehow attempting to evade the district court's injunction. (*See* Pl. Opp. at 4, 10, 12.) Plaintiffs' opposition to the instant motion represents their fourth opportunity to refute the EBG's fact and expert evidence proving that it is impossible for anyone to engage in such evasion without the active (and exceedingly unlikely) cooperation and collusion of (*inter alia*) the Trustee, The Bank of New York Mellon ("BNYM"), and the Depository Trust Company ("DTC"). (*See* O'Shea Decl., Ex. 8 at 4; Exs. 13-14, 15, 19-10.) Yet Plaintiffs still have no meaningful response. Their opposition conspicuously skirts this key issue. (*See* Pl. Opp. at 11-12.)

There is no basis for discovery absent evidence that evasion has any chance of actual success. Because Plaintiffs' sole proffered basis for discovery has been eviscerated, a stay pursuant to Fed. R. App. P. 8(a)(2) is warranted because they have no hope of success on the merits; the discovery sought promises only to waste the EBG's time and resources during an expedited appellate briefing schedule; and the public has no interest in discovery that serves no purpose.

Plaintiffs claim there is evidence of evasion in alleged public statements by the Republic and findings by the district court that the Republic refuses to pay them. (*See* Pl. Opp. at 3-4, 11-12.) This, however, is not evidence of attempted circumvention – on the contrary, the injunction allows the Republic to refuse to pay the Plaintiffs, as long as it does not pay the Exchange Bondholders.² (*See* O’Shea Decl., Ex. 18; *see also* this Court’s Opinion, dated October 26, 2012, Dkt. No. 442, at 29:11-12 (“The Injunctions do not require Argentina to pay any bondholder any amount of money”).) And even if the Argentine statements were evidence of attempted circumvention, Plaintiffs have shown no evidence³ that any EBG member has participated in any efforts to circumvent the injunction.

Plaintiffs point to a foreign newspaper written in a foreign language that purportedly indicates that Constellation Capital would accept payment on its Exchange Bonds if the Republic could figure out a lawful way to remit the funds. (Pl. Opp. at 12 n. 7; Stancil Decl., Ex. 8.) This is obviously not evidence of evasion. Nor do Plaintiffs refute the inference of harassment that arises from the

² Plaintiffs claim that the Republic has “sworn not to pay [them], while simultaneously offering reassurances that the Intervening Bondholders somehow *will* be paid.” (Pl. Opp. at 4.) Plaintiffs do not cite a shred of evidence showing any such “reassurances.”

³ Plaintiffs reference two speculative, hearsay articles from mid-November (Stancil Decl., Exs. 2-3), which appeared a month before Plaintiffs issued the subpoenas, which have been thoroughly discredited (*see* O’Shea Decl., Exs. 15, 19-20), and which could have been planted by Plaintiffs themselves. These articles are not competent evidence of anything.

fact that their primary “evidence” of evasion concerns Constellation Capital (which is not a member of the EBG). They have not subpoenaed Constellation, but instead subpoenaed only bondholders (like EBG members) who have joined in this appeal. (*See* Stancil Decl., Ex. 7 at 1 (listing subpoenaed bondholders).)

Plaintiffs suggest that if EBG members are not attempting to evade the injunction, it will be easy to comply with the Subpoenas. (Pl. Opp. at 12.) This argument turns the proper analysis on its head. It is the propounding party’s burden to show a legitimate basis for discovery, particularly when it would interfere with an expedited appeal schedule during which the district court’s injunctive orders have been stayed.⁴ Nor are the Subpoenas limited to attempted evasion of the injunction. They cover numerous broad and unrelated subjects (*see, e.g.,* O’Shea Decl., Ex. 1 at 7, ¶ 4 (“any monetary loss or damage as a result of the Republic’s 2001 debt default”); Ex. 1 at 9, ¶ 5 (“involvement in the 2005 and 2010 Exchange Offers”)) that are plainly burdensome and harassing.

⁴ The same reasoning applies to Plaintiffs’ series of rhetorical questions on page 13 of their opposition. All of the questions proceed from the baseless assumption that there have been efforts to evade the district court’s injunction.

CONCLUSION

The EBG respectfully requests that the Court clarify that the Stay precludes Plaintiffs' Subpoenas or, alternatively, issue a stay of discovery to prevent interference with the pending appeal.

Dated: New York, New York
December 28, 2012

Respectfully submitted,

By: /s/ Sean F. O'Shea

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CERTIFICATE OF SERVICE

I hereby certify that I caused the Exchange Bondholder Group's Reply in Further Support of their Motion to Enforce this Court's Stay Pending Appeal ("Reply") to be served today via ECF and electronic mail on the following counsel:

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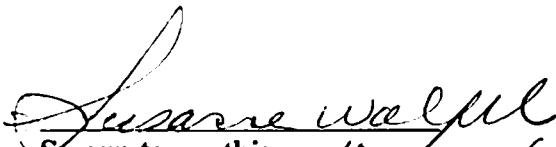
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I further certify that electronic copies of the Reply were e-mailed to caseclosing@ca2.uscourts.gov on December 28, 2012. Three hard copies of the Opposition Materials were also hand delivered to:

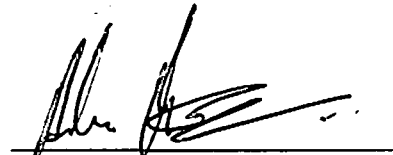
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on the 28th day of December 2012.



Sworn to me this 28th day of December 2012.

SUSANNE WOLFEL
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