

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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AURELIUS OPPORTUNITIES FUND	:	
II, LLC, <i>et al.</i> ,	:	
	:	
Plaintiffs-Appellees,	:	No. 15-1060 (L)
	:	
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant-Appellant.	x	

**APPELLEES’ OPPOSITION TO APPELLANTS’ EMERGENCY MOTION
FOR VOLUNTARY DISMISSAL**

Pursuant to Federal Rule of Appellate Procedure 27 and Local Rule 27.1,
Appellees respectfully submit this opposition to the motion to dismiss these
appeals filed by the Republic of Argentina on February 22, 2016.

PRELIMINARY STATEMENT

Nearly a year into this hard-fought appeal, Argentina has suddenly
announced that it wants to give up. Why? To avoid appearing at oral argument
this week. At that argument, the panel could explore the district court’s announced
intention to lift the injunctions in force against Argentina—seemingly including
the injunctions at issue in this very appeal—for no reason other than that Argentina
has *started* negotiating. Based on the automatic trip-wires in the district court’s

latest order, the injunctions could lift at any time after February 29—and the district court has made no mention of ensuring effective appellate review.

Appellees are working diligently toward a negotiated resolution, but at this time only a small minority of the outstanding claims against Argentina have reached agreements in principle to settle. That simply is no basis for lifting the injunctions—and Argentina does not want to make the contrary argument to this Court this week.

But if Argentina wants the appeal dismissed, it needs either a stipulation—which it did not even ask Appellees for—or this Court’s permission. Fed. R. App. P. 42(b). This Court should exercise its discretion to deny the motion, for two reasons: First, litigants may not manipulate this Court’s procedures abusively, and with this eve-of-argument tactic, Argentina has done just that. Appellees expect to file a motion for sanctions to recover the attorney’s fees spent litigating this appeal. Second, Argentina has failed to satisfy the basic requirements for either an emergency motion in this Court or a motion to dismiss voluntarily. Argentina cannot obtain dismissal until it specifies how it will bear the applicable costs and fees or explains why they should not be taxed against it.

The motion should be denied at this time, and oral argument should proceed as scheduled.

FACTUAL BACKGROUND

1. This case involves injunctions against the Republic of Argentina that the district court issued on November 21, 2012; that this Court affirmed in 2013, *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013); and that the Supreme Court twice declined to review. Those 2012 Injunctions were issued to enforce plaintiffs' rights under the "*pari passu* provision" of an agreement governing defaulted bonds issued by the Republic of Argentina. As the Court is well aware, having prepared for the oral argument scheduled for the day after tomorrow, Argentina pursued this appeal to argue that despite the injunction's unambiguous text, the district court should have allowed Argentina to make payments on certain bonds governed by Argentine law without complying with its *pari passu* obligations. The appeal has been pending for more than ten months, and the parties have filed lengthy briefs, a voluminous appendix, and substantial jurisdictional motion practice.

The district court has also granted injunctions, substantially identical to the 2012 Injunctions, in a set of 49 other cases involving the same defaulted bonds of Argentina. The parties refer to the cases at issue in this appeal as the "original cases" and to the subsequent set as the "me-too cases." (Once the original injunctions were affirmed, various plaintiffs sought the same relief.) Those subsequent injunctions (the "2015 Injunctions") were entered on October 30, 2015,

and Argentina appealed to this Court. That appeal is now pending as No. 15-3675(L).

2. Argentina recently announced an offer to settle the disputes underlying both appeals. In order to coerce plaintiffs to accept, Argentina moved the district court on February 11, by *ex parte* order to show cause, to vacate the injunctions in the original cases *and* the me-too cases, provided that Argentina satisfies certain terms of the settlement agreements it reaches with any plaintiff by February 29. *See* Mem. of L. in Supp. of the Republic of Argentina's Motion, By Order to Show Cause, to Vacate the Injunctions Issued on Nov. 21, 2012, and Oct. 30, 2015, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978 (TPG) (S.D.N.Y. Feb. 11, 2016), D.E. 863.

With respect to the original cases, Argentina contended that the district court could vacate the injunctions notwithstanding the pendency of this appeal before this Court. With respect to the me-too cases, Argentina acknowledged that its pending appeal divests the district court of jurisdiction over the 2015 Injunctions, so Argentina asked the district court to issue an indicative ruling that it *would* vacate the 2015 Injunctions if this Court were to issue a remand.

In recent days, Appellees have worked diligently with representatives of Argentina toward a possible negotiated settlement. Indeed, Argentina itself has

told the media that it is close to a successful resolution.¹ That very recent progress toward settlement prompted Appellees to oppose Argentina's motion for relief from the injunctions: Argentina's seriousness about negotiation came only after (1) the 2012 Injunctions were issued, affirmed by this Court, left undisturbed by the Supreme Court, *and* put into effect; (2) Argentina's numerous attempts to circumvent the injunctions—by (among other schemes) seeking to fire the New York-based indenture trustee on the bonds and replace it with an entity Argentina itself controlled—were shut down by law-abiding third parties and by the district court; and (3) Argentina was held in contempt for flagrantly violating the 2012 Injunctions.

3. On February 19, mere hours after the reply briefs were filed, and without holding a hearing despite multiple requests, the district court issued the indicative ruling Argentina requested as to the 2015 Injunctions. The court observed that Argentina had entered into agreements in principle to settle with a handful of plaintiffs, representing a small fraction of the claims subject to *pari passu* injunctions. *See* Rule 62.1 Indicative Ruling, *NML Capital Ltd. v. Republic of Argentina*, No. 14-cv-8601 (TPG) (S.D.N.Y. Feb. 19, 2016), D.E. 59 (attached as Exhibit A to Appellees' February 20 letter to this Court, ECF No. 198). The

¹ *See, e.g.*, <http://www.lanacion.com.ar/1873020-el-gobierno-afirma-que-esta-cerca-de-un-acuerdo-con-los-holdouts> (translation: “*The government says that it is very close to an agreement with the holdouts*”).

district court reasoned that the injunctions' only purpose was to "promote settlement," *id.* at 16, not—as this Court twice has held—to enforce plaintiffs' contract rights. As requested, the district court's indicative ruling would permit the injunctions to be dissolved once two conditions are met, which could occur any time after February 29, 2016 (next Monday). Although the district court did not issue an order with respect to the 2012 Injunctions, the district court's opinion warns that it intends to vacate the injunctions "in all cases." *Id.* at 19.

On February 20, 2016, Argentina proceeded to file a letter to this Court asking that the "me too" appeals involving the 2015 Injunctions (No. 15-3675(L)) be remanded in light of the indicative ruling. Appellees responded with a letter dated February 21, 2016, asking that this Court refer the remand request to this panel. (Both parties' letters have since been re-filed as formal motions.)

4. Less than 18 hours later, Argentina moved to dismiss this appeal. ECF No. 204. Argentina styled its motion an "emergency" motion, asked that it be ruled on before the scheduled oral argument, and represented to this Court that the urgency was so grave that Argentina could not consult with opposing counsel to ascertain Appellees' position. Argentina states that its newly elected government, which took office more than two months ago, has only now decided not to pursue the appeals. Indeed, just last week a different lawyer, from a different law firm than the one signing the motion to dismiss, had entered an appearance for

Argentina and represented to this Court that he would be arguing the case on Wednesday. ECF No. 195.

ARGUMENT

Argentina's transparent gamesmanship has wasted the Court's time and the parties'. If Argentina genuinely did not want to pursue this appeal, it could have said so at any point in the two months since its new administration took office. Indeed, during that time, not one but *two* different lawyers have filed papers (ECF Nos. 191, 195) expressing intent to argue on behalf of Argentina. What is really at work here is Argentina's attempt to throw a cloak over the district court's stated plan to lift the injunctions in "all cases," including the ones on appeal here. Argentina would rather give up this appeal—which it has tenaciously litigated for nearly a year, after multiple rounds of litigation in the district court *and* a prior appeal to this Court, No. 14-2689(L)—than appear at oral argument to answer questions about the district court's abrupt about-face. This Court should not permit Argentina's tactic to succeed—certainly not based on the cursory, three-paragraph motion that Argentina submitted this morning, without consultation; and certainly not before counsel appear in person for oral argument Wednesday morning.

The Court has discretion to grant or to deny a motion to dismiss an appeal. Such a motion is necessary only when the appellant cannot reach agreement with the other parties about the terms of dismissal. Fed. R. App. P. 42(b); *Albers v. Eli*

Lilly, 354 F.3d 644, 646 (7th Cir. 2004) (per curiam) (“When the parties do not agree on terms, dismissal is discretionary with the court.”). Here Argentina has not sought agreement, and its gamesmanship precludes any such agreement. This Court should in its discretion deny the motion for the same reason.

A. The Court Should Deny The Motion Because Argentina Has Engaged In Blatant Gamesmanship Warranting Sanctions

Appellees agree that Argentina’s appeal lacks merit, and they certainly have no intention of compelling Argentina to pursue the flawed arguments it has now voluntarily abandoned. Issues unrelated to the merits of Argentina’s appeal, however, remain squarely before this Court. Rule 42 does not give appellants license to use the judicial process however they wish for as long as they wish, without consequence. Dismissal should be denied “in the interests of justice” when—as relevant here—“the court believe[s] that the appellant sought dismissal in an improper effort to manipulate the system.” 16AA Charles Alan Wright et al., *Federal Practice & Procedure* § 3988 (4th ed.). That type of manipulation is exactly what has occurred here. Indeed, Argentina’s conduct was sufficiently vexatious to warrant sanctions, and this Court should not permit Argentina to avoid the consequences of its actions by escaping from Foley Square one step ahead of the Rule 38 motion that Appellees intend to file. *See Ins. Co. of W. v. Cty. of McHenry*, 328 F.3d 926, 929 (7th Cir. 2003) (need to consider sanctions and allocate costs justified denying voluntary dismissal); *compare Overseas Cosmos*,

Inc. v. NR Vessel Corp., 148 F.3d 51, 52 (2d Cir. 1998) (allowing dismissal where victim of alleged frivolous appeal never invoked Rule 38). Those are matters that can be addressed during oral argument. *E.g.*, *Ins. Co. of W.*, 328 F.3d at 929.

Sanctionable conduct consists of more than just a frivolous appeal. “[V]exatious litigation conduct” is ample basis for sanctions. *E.g.*, *In re Efron*, 746 F.3d 30, 37-38 (1st Cir. 2014) (Rule 38 is not limited to “frivolousness simpliciter”); *accord Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 317 (2d Cir. 1990) (“vexatious tactics”).²

Argentina’s manipulation of this Court’s docket eminently qualifies as the type of conduct that warrants—at a minimum—this Court’s serious scrutiny. Argentina plainly did not dismiss its appeal because its new government simply had a change of heart. The new government has been in office for months. Even after meetings with Appellees began, Argentina acknowledged—both in January and last week—this Court’s scheduled hearing date and signaled its intent to show up. First one, then another partner at the Cleary Gottlieb firm indicated he would appear for argument. ECF No. 191, 195. The second of those filings came on February 19, 2016, *after* Argentina had already retained the Cravath firm for this

² This Court has not resolved whether subjective bad faith is required, but has noted that most circuits do not impose such a requirement. *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 119 (2d Cir. 2000) (noting conflicting decisions).

litigation.³ The time to suggest a dismissal, a stay, or at least a continuance was *before* Appellees and the Court spent many hours preparing for that oral argument.

Rather, the cause of Argentina's switch in tactics was Appellees' suggestion that this panel should consider what is afoot in the district court—an attempt to attack the 2012 Injunctions that are on appeal in this case, as well as the 2015 Injunctions on appeal in the me-too case. As soon as Appellants proposed to raise those matters in this forum, Argentina sought to make this forum disappear.

Approving of those tactics, without at least subjecting them to the adversarial testing of oral argument, would be unseemly. *Cf. Margulin v. CHS Acquisition Corp.*, 889 F.2d 122, 124 (7th Cir. 1989) (Easterbook, J.) (“Motions to dismiss that do not have the assent of both parties are not routine”; thus, “the appellees should have been given an opportunity to respond”). As this Court is aware, Argentina has been a uniquely recalcitrant litigant for the many years this litigation has been unfolding in this Court and the district court. Argentina even told this Court at oral argument that it “would not voluntarily obey” an injunction. *NML*, 727 F.3d at 238. Yet Argentina is in the district court seeking equitable relief—the post-judgment dissolution of the injunctions. This Court should, at a minimum, examine the cleanliness of Argentina's hands.

³ See, e.g., Julie Wernau, *Argentina Hires New Lawyers in Debt Battle*, Wall St. J., Feb. 9, 2016, <http://www.wsj.com/articles/argentina-hires-new-lawyers-in-debt-battle-1455069493>.

B. The Court Should Deny The Motion Because It Is Procedurally Defective In Any Event

The most basic element of a voluntary dismissal on appeal is provision for costs and fees. Argentina has wholly failed to address those required items. As discussed above, Appellees intend to seek sanctions, but even if no sanctions were available, “costs abide the outcome and have yet to be determined.” *Albers v. Eli Lilly*, 354 F.3d 644, 646 (7th Cir. 2004). And because Argentina has compelled Appellees to brief (and prepare to argue) this appeal, Argentina should have known full well that Appellees have incurred costs that would be taxed against Argentina if and when Appellees prevailed. Fed. R. App. P. 39.

For the foregoing reasons, the motion to dismiss should be denied, and the hearing scheduled for Wednesday morning should remain on calendar.

February 22, 2016

Respectfully submitted,

/s/ Matthew D. McGill

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