

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 NML CAPITAL, et al.,

4 Plaintiffs,

v.

08 CV 6978 (TPG)

6 THE REPUBLIC OF ARGENTINA,

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Defendant.

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New York, N.Y.

May 30, 2014

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4:15 p.m.

11 Before:

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HON. THOMAS P. GRIESA

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District Judge

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APPEARANCES

DECHERT LLP

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Attorneys for Plaintiffs

BY: ROBERT A. COHEN

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DENNIS H. HRANITZKY

-and-

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FRIEDMAN KAPLAN SEILER & ADELMAN LLP

BY: EDWARD A. FRIEDMAN

18

DANIEL B. RAPPORT

-and-

19

GOODWIN PROCTER LLP

BY: ROBERT D. CARROLL

20

CLEARY GOTTlieb STEEN & HAMILTON LLP

21

Attorneys for The Republic of Argentina

BY: CARMINE D. BOCCUZZI

22

MICHAEL BRENNAN

CARMEN CORRALES

23

DAVIS POLK & WARDWELL LLP

24

Attorneys for Citibank

BY: KAREN E. WAGNER

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SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

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1 (Case called)

2 THE COURT: What is the problem that you have?

3 MR. COHEN: Your Honor, Robert Cohen from Dechert for
4 NML.

5 Your Honor, we have a motion seeking an order.

6 THE COURT: What is the problem?

7 MR. COHEN: The problem, your Honor, is something that
8 we think is a clear violation of your Honor's orders
9 prohibiting Argentina from evading your equal treatment
10 injunction has occurred.

11 On May 23rd, we became aware -- our client became
12 aware of the publication in Argentina on our web site of a
13 memorandum that appears from Cleary Gottlieb authored by Mr.
14 Blackman, Mr. Boccuzzi and another attorney at that firm to its
15 client, a ministry of Argentina, in which, according to the
16 excerpt published, Cleary Gottlieb is counseling Argentina
17 about a plan as to how to evade the U.S. Court's jurisdiction
18 and restructure the bonds in the event --

19 THE COURT: You mean the exchange bonds?

20 MR. COHEN: The exchange bonds, your Honor.

21 -- the Supreme Court denies certiorari. We think that
22 requires the immediate attention of the Court, both because we
23 have an ethical obligation to bring to your attention what we
24 think are frauds on the Court and, also, because the Supreme
25 Court may decide the petition for certiorari as early as June

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1 16th, and we need to know what those plans are in order to be
2 able to take steps to stop them by June 30th, which is the next
3 interest on the exchange bonds. The information that we have
4 is now widely disseminated on the Internet and in the Financial
5 Times, newspapers in Argentina. It is well known --

6 THE COURT: What is that information? I have gotten
7 some papers in the last few minutes which I really have not had
8 a chance to absorb in any way. So what is the information?

9 MR. COHEN: The information, your Honor, is that a
10 memorandum, a confidential memorandum, perhaps an
11 attorney-client memorandum -- I shouldn't say "perhaps," I
12 think it was intended to be attorney-client communication
13 between Cleary and Argentina dated May 2nd of this year in
14 which Argentina is given advice with respect to its options
15 should the Supreme Court deny certiorari. And among the advice
16 that appears to have been given is that they should restructure
17 the bonds outside of the jurisdiction of this Court so that the
18 equal treatment injunction cannot be enforced.

19 Now, we have been very careful not to put into the
20 public domain the full text of that memorandum. We have it and
21 we have a translation, but we think that the dissemination of
22 the information is so far in the public domain about the
23 description of it and the fact that, if we are right, that it
24 is a real memorandum, the crime-fraud exception to the
25 attorney-client privilege doctrine would clearly apply to that

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1 kind of communication.

2 So we are asking your Honor to find that that document
3 is not privileged, that the advice that it gives is in
4 violation of your Honor's anti-evasion order and that Argentina
5 be compelled to tell us within 72 hours what its plans are.

6 Your Honor, we also have some language in the proposed
7 order that re-enforces and reiterates the prohibitions on the
8 conduct that Argentina is entitled to engage in, the planning
9 of a mechanism to avoid these courts. So we are asking for an
10 order that includes all of those things for the reason that we
11 have now got what may be the smoking gun.

12 You may remember, your Honor, we were here in November
13 and I was asking for discovery because after the Second Circuit
14 had affirmed your order, Argentina said they were going to
15 evade and I said, they must have a plan, the President of
16 Argentina has said that she is going to restructure these bonds
17 and have them issued out of Argentina, and I said that they
18 must have a plan.

19 And Mr. Boccuzzi and Mr. Blackman said, there is no
20 such plan. And they said, if there was such a plan, Mr. Cohen
21 would bring it to this Court.

22 And I am here today, your Honor, with that plan. And
23 I think that we are entitled to this relief. I think that the
24 conduct, if it is true, is simply outrageous.

25 THE COURT: Mr. Boccuzzi.

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1 MR. BOCCUZZI: There is no smoking gun and there is no
2 plan. The Supreme Court has our cert petition and our reply
3 cert petition and is expected to issue some ruling on July 16.
4 In our reply cert petition, we make very clear that the
5 Republic will comply with the pari passu orders, but what that
6 means, given the fact that the Republic does not have the
7 resources to pay all of the holdouts is that there will likely
8 be a default, an across-the-board default. That is what we
9 have said. That is what is going on. But there is no plan to
10 evade. The status quo remains in effect.

11 In terms of this memorandum that he is talking about,
12 there is a memorandum authored by Cleary Gottlieb. It was not
13 voluntarily waived as to privilege by the Republic of
14 Argentina. It is not clear how some unauthorized individual
15 was able to get it on to a web site somewhere in Argentina, but
16 if I am allowed I would like -- and if the plaintiffs are going
17 to push this issue -- the opportunity to brief the
18 attorney-client portion of this motion. I think the privilege
19 remains in place and that is privileged material.

20 But the important thing is that the status quo which
21 your Honor was worried about was that, pending the appeals
22 here, Argentina would figure out some other way to pay the
23 performing debt so that if your Honor's orders were ultimately
24 affirmed, it would be able to keep pay the performing debt and
25 not pay the defaulted bondholders -- that has nowhere been

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1 said. There is no plan to do that. I am not sure a plan could
2 exist to do that.

3 THE COURT: There is nothing that has been said except
4 that Mr. Blackman in addressing the Court of Appeals said that.
5 He said that the Republic would not comply, and that quotation
6 is in the latest ruling of the Second Circuit.

7 MR. BOCCUZZI: But that statement which the Second
8 Circuit put in the ruling in the context of also staying to
9 give the Supreme Court an opportunity to hear our case, that
10 statement, he was saying, we would not comply by paying these
11 people, preferring them over everybody else.

12 THE COURT: It was not qualified in that way.

13 MR. BOCCUZZI: He was clear in other parts of the
14 argument, your Honor, that there would be a cataclysmic result
15 from the affirmance of the orders, i.e., a nonpayment of
16 everybody. That was part of the grounds in which the Second
17 Circuit affirmed the pari passu injunctions and found that
18 there was no Foreign Sovereign Immunities Act problem, which
19 they said, these orders don't compel the payment to any
20 bondholder.

21 THE COURT: Let's get to basics.

22 If the Republic of Argentina, indeed, is in a
23 financial condition that it cannot pay all of these
24 obligations, what does anybody in good faith do? They come to
25 the Court and there is some negotiation. Nothing like that has

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1 ever been offered. Nothing like that has ever been suggested.
2 All that has ever been done by the Republic is to refuse to pay
3 its just obligations. Obviously, there is no need to talk
4 about catastrophe. There is no need for any such talk -- I am
5 repeating myself.

6 If the Republic would turn around and act in good
7 faith, there could be a negotiation of any such issue. It is
8 done every day in the courts of this land. And that is the way
9 it can be done here. And so there is no need to talk about the
10 kind of thing you are talking about.

11 MR. BOCCUZZI: But the key point, your Honor, is that
12 there is nothing surreptitious going on. There is no secret
13 plan to evade. We have been very upfront in our public filings
14 with the courts and including, most recently, with the Supreme
15 Court, saying what our position is and what our economic
16 condition is.

17 We are still hopeful that the Supreme Court will grant
18 cert. There have been many parties supporting the grant of
19 cert, but we make clear that the consequences -- and that is
20 part of the review of the orders -- if cert is denied, that we
21 simply cannot pay everybody across the board, and we point out
22 that the result of that is a very likely imminent default.

23 So that is out there, your Honor. But what is not in
24 existence is a scheme to evade by just ignoring what this Court
25 has said and saying, fine, exchange bondholders, you want to

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1 get paid, here is your money, and we are just not going to pay
2 these folks. That is not what has appeared anywhere. That is
3 not what is even in their briefs.

4 THE COURT: Isn't that suggested by this memorandum?

5 MR. BOCCUZZI: No, your Honor. Again, I really don't
6 want to end up waiving the attorney-client privilege because I
7 don't think it's been waived. But to be clear, that is not the
8 upshot of the memo. The memo goes through different scenarios
9 of what could happen, including possible settlement
10 scenarios -- the things your Honor was talking about -- and
11 then also points out, when one has a default, then one may have
12 to face an attempt to restructure those defaulted obligations
13 and to query whether that can be done consistent with the
14 outstanding pari passu orders. But there is no -- and there
15 has never been and we have never advised a client just to turn
16 their nose up to the Court's orders and to evade them.

17 And I think the proof is in the last few years, your
18 Honor's anti-evasion injunction has been in place since 2012,
19 for two years. And for two years, everybody has been status
20 quo. And why that would suddenly change at the very end when
21 we are waiting to see what the Supreme Court will do is just
22 not happening. And as your Honor said --

23 THE COURT: It will be a very important development if
24 the Supreme Court denies cert. Then, presumably, the stay
25 issued by the Second Circuit will be vacated and the matter

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1 will be back in the District Court regarding enforcement --
2 something which Mr. Blackman told the Second Circuit would not
3 be carried out. Now, if you don't think that is a problem,
4 then you don't know what the English language says.

5 Now, as far as doing anything today -- even if you
6 take the memo at its full value, what is discussed would come
7 about if the Supreme Court denied cert -- there is no way this
8 afternoon that I can have the ability to sign any order.

9 What I will do is to take the proposed orders home and
10 try to look at them. And if Cleary Gottlieb wants to give my
11 office anything, I will take a package of things home. I will
12 be home beginning Monday, but home is New York City not
13 anywhere else, but I can't do anything this afternoon.

14 MR. BOCCUZZI: Thank you, your Honor.

15 MR. COHEN: Your Honor, would you like to see the full
16 text of the memo?

17 MR. BOCCUZZI: Your Honor, I would like to be able to
18 brief the issue surrounding the memo, including the propriety
19 of in camera inspection and the like. And I can get a letter
20 brief to your Honor on this point if you would give me at least
21 so I have more than just the weekend, maybe until Tuesday, to
22 brief that issue and to provide some context, otherwise, we are
23 going to be in open court talking about the contents of a memo
24 which I believe should be treated as privileged and which also
25 doesn't support the very broad and unnecessary relief that they

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1 are seeking.

2 MR. COHEN: I am not suggesting that it be discussed
3 in open court, your Honor, just that you have it as you
4 consider the proposed order over the weekend. I think that you
5 will find it, based on its description --

6 THE COURT: I will take home what you have filed. I
7 will not go beyond that.

8 MR. BOCCUZZI: Thank you, your Honor.

9 THE COURT: Let's leave it at that.

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