IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

LFOUNDRY ROUSSET, SAS, JEAN YVES GUERRINI,
Individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

ATMEL CORPORATION, ATMEL ROUSSET, SAS, LFOUNDRY GMBH,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES ATMEL CORPORATION AND ATMEL ROUSSET, SAS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellees Atmel Corporation ("Atmel Corp.") and Atmel Rousset SAS ("Atmel Rousset" and, together, the "Atmel Appellees") state that: Atmel Rousset SAS is an indirect wholly-owned subsidiary of Atmel Corporation and Atmel Corporation is an indirect wholly-owned subsidiary of Microchip Technology Incorporated ("Microchip"). Microchip is a publicly-held corporation that has no parent corporation and no publicly-held corporation owns 10% or more of Microchip's stock. As of the date of this filing, The Vanguard Group, Inc. owns more than 10% of Microchip's stock.

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the District Court (Hon. Laura Taylor Swain) abused its discretion by denying Appellants' motion for an indicative ruling in the event of remand after the judgment on appeal was affirmed *without remand*.

COUNTERSTATEMENT OF THE CASE

On July 21, 2015, the District Court dismissed this action on *forum non conveniens* grounds. *LFoundry Rousset SAS v. Atmel Corp.*, No. 14-cv-1476 (LTS)(HBP), 2015 WL 4461617, at *7 (S.D.N.Y. July 21, 2015) (the "Dismissal Decision"). (A-1-13.)[1]

The complaint alleged "the fraudulent circumvention of French labor laws intended to protect French workers facing termination." (Dismissal Decision at A-5-12.) The purported "fraud was allegedly carried out through a transaction negotiated and executed in France by French and German companies, with the help of a French consultant and a France-based legal team." (*Id.*) "No party resides in New York," the Appellants "as well as the hundreds of putative class members, are located in France," and the "core operative facts" at issue in this dispute "occurred in France." (*Id.*)

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[1] Citations to "A __" are to the Joint Appendix submitted with Plaintiffs-Appellants' Brief of Appellants ("Appellants' Brief" or "App. Br.").

Moreover, Appellants admitted (in verified interrogatory responses) that they brought suit in New York to "take advantage of the RICO statute and its treble damages provision, as well as the class action device." (*Id.*) The District Court correctly identified these alleged "conveniences" for what they were: "explicit evidence of forum shopping." (*Id.*) With those findings, the District Court concluded that private and public interest factors "weigh[ed] heavily" in favor of adjudication in France. And the District Court also determined that an adequate alternative forum existed in France, both because similar litigation was already underway in that jurisdiction and because the Appellees provided "written consent to jurisdiction" in France.

Appellants appealed the Dismissal Decision to this Court, which, on June 27, 2016, affirmed the judgment of dismissal in its entirety. *Guerrini v. Atmel Corp.*, No. 15-2664 (Summary Order), __ F. App'x __, 2016 WL 3548238, at *2 (2d Cir. June 27, 2016) (the "First Appeal"). The Court held:

> The district court's well-reasoned opinion identified and applied the three-part *Iragorri* test. We agree with the district court that: (i) the plaintiffs' choice of New York was entitled to little weight because New York was plainly chosen for a tactical advantage and this suit has little to do with New York; (ii) France is an adequate alternative forum because French courts tolerate claims like those brought by the plaintiffs and the defendants expressly consented to jurisdiction there; and (iii) the private and public interest factors strongly support adjudication in France because the locus of operative facts is in France and France has a far greater interest in the litigation than does New York.

(First Appeal at 2.)

The same tactical advantages Appellants sought in selecting a United States forum in the first place also have motivated the pursuit of baseless post-judgment motion practice in an effort to re-litigate the Dismissal Decision and maintain this action in New York. Specifically, while the First Appeal was pending, Appellants filed a motion in the District Court, based on alleged post-judgment conduct, seeking an indicative ruling (pursuant to Federal Rules of Civil Procedure 62.1 and 60(b)) that the District Court *would* vacate the Dismissal Decision *if* this Court "were to *remand* for that purpose." (App. Br. at 14; A-26-27 (the "62.1 Motion") (emphasis added).)[2]

Appellants notified this Court of the 62.1 Motion during the First Appeal, and presented the underlying *lis pendens* motions in two Requests for Judicial Notice, which were referred to the merits panel. (First Appeal Dkt. Nos. 96, 100, 109, 121, 123, 131, 135, 147.) Appellants also advanced arguments based on the 62.1 Motion in their merits briefing (*id.* Dkt. No. 97), at oral argument (*id.* Dkt.

[2] The alleged conduct underlying the 62.1 Motion was Appellee LFoundry GmbH's ("LF Germany") submission of motions for *lis pendens* in the French proceedings, which Appellants argued contradicted its affidavit of consent to jurisdiction in France. The Atmel Defendants did not join (and, in fact, opposed (A-238-56)) the *lis pendens* motions. Indeed, the Atmel Appellees sought to *invoke* the jurisdiction of the French courts to achieve a dismissal for procedural default in the French proceedings after Appellants declined to appear (while they pursued these appeals), as required, at various hearings in France. (*Id*.)

No. 151), in post-argument correspondence submitted to this Court before it decided the First Appeal (*id.* at Dkt. Nos. 152, 154), and in a motion seeking "clarification" filed after the Court's summary affirmation in the First Appeal (*id.* Dkt. Nos. 166, 172).[3]

The Court not only affirmed the Dismissal Decision, finding that "France is an adequate alternative forum because French courts tolerate claims like those brought by the plaintiffs," but also held that "*the defendants expressly consented to jurisdiction*" there. (First Appeal at 2 (emphasis added).) The Court also found "no merit in the plaintiffs' other arguments" (*id.*) and denied (without opposition) the motion filed by Appellants in this Court for "clarification" as to the issues resolved by the First Appeal (First Appeal Dkt. No. 172). Immediately upon receiving notice that the Dismissal Decision had been affirmed without remand, the District Court denied the 62.1 Motion as moot in "light of the Summary Order of the United States Court of Appeals for the Second Circuit in this matter." (A-271.)

This second appeal (the "Second Appeal") is Appellants' latest attempt to undo the Dismissal Decision and further delay resolution of the underlying claims in France. In Appellants' own words, the Second Appeal seeks to resolve

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[3] As set forth in Appellee LF Germany's Request for Judicial Notice (Dkt. No. 55) which the Atmel Appellees have joined, the Court may consider the Court's own records in the First Appeal. (*Id.* (citing Fed. R. Evid. 201(b)(2); *Anderson v. Rochester-Genesee Regional Transp. Auth.*, 337 F.3d 201, 205 n. 4 (2d Cir. 2003) (compiling cases).)

"whether or not [LF Germany] complied with its sworn affidavit consenting to French jurisdiction." (App. Br. at 16.) But that issue already was resolved by the First Appeal. As the Court already concluded, the post-judgment arguments advanced by Appellants have "no merit," and the denial of the 62.1 Motion by the District Court was compelled by Federal Rule 62.1, as well as this Court's affirming mandate in the First Appeal.[4]

COUNTERSTATEMENT OF THE FACTUAL ALLEGATIONS

Background

As summarized in the First Appeal, the underlying litigation at issue in this Second Appeal arises from the 2010 sale of a French manufacturing facility (the "Rousset Facility") by Atmel Rousset (an indirect French subsidiary of Atmel Corp., a California-based corporation) to LF Germany (a German corporation). (A-2-5.) After the sale, LF Germany owned and operated the Rousset Facility for three years through its French subsidiary (Appellant LFoundry Rousset SAS ("LFR")) before LFR went into insolvency and, later, liquidation in France. (*Id.*)

[4] Appellants also abandoned the 62.1 Motion as to the Atmel Appellees. (A-257-65.) Appellants have stated that their "allegations of misconduct were appropriately directed at Defendant LFoundry *only*." (*Id*. (emphasis added).) In fact, Appellants have stated that the 62.1 Motion was merely "served on" the Atmel Appellees as required by Southern District Local Rule 6.1 and "not made against Atmel." (*Id*.)

That insolvency spawned extensive litigation in French courts on behalf of the Appellants here. (First Appeal at 1; A-5.) LFR's "court-appointed receivers and creditors' representatives attempted, unsuccessfully, to extend LFR's insolvency proceeding to reach the assets of Atmel Rousset." (*Id*.) LFR also "filed a fraud case against Atmel in a French court on September 16, 2013, but later requested that the court dismiss the case without prejudice, which the court did on October 6, 2014" (the "Second Paris Action"). (*Id*.)[5] And, "there are currently pending in a French court five hundred individual labor actions by former [LFR] employees against Atmel Rousset and [LF Germany] seeking to hold those entities liable for worker assistance benefits" (the "Labor Court Actions"). (*Id*.)

In addition to the French litigations, on March 4, 2014, Appellants commenced in the Southern District of New York this action seeking treble damages under the Racketeer Influenced and Corrupt Organizations Act on behalf of a putative class of over 700 terminated former LFR employees. (A-1(b-n).) An amended complaint was filed on November 4, 2014. (*Id*.)

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[5] Appellants sought to manipulate the process in the Second Paris Action to minimize the evident duplication between those actions and this action. (Dismissal Decision at A-2-5.) Most telling, Appellants voluntarily dismissed the nearly-identical Second Paris Action only after counsel in this action expressed their intention (during the District Court's meet-and-confer process) to move to dismiss on *forum non conveniens* grounds. (*Id*.)

The Dismissal Decision

The District Court's Dismissal Decision found — on a record developed after discovery on *forum non conveniens* issues — that, among other things:

- "Here, no party resides in New York. Plaintiffs, as well as the hundreds of putative class members, are located in France. . . . Defendants Atmel Rousset, LFoundry GMBH, and Atmel are located in France, Germany, and California, respectively." (Dismissal Decision at A-6-7 (quotation and citation omitted).)

- "Moreover, the 'core operative facts' of this lawsuit — alleged misstatements made to the Works Council about the sale of the Business and Plaintiffs' alleged reliance on such misrepresentations — occurred in France." (*Id.*)

- "Negotiation and execution of the SPA [Stock Purchase Agreement] took place in France. The meetings between the Works Council and Atmel, LFoundry GMBH, and Syndex [an advisor appointed to advise the Works Council], during which the alleged misrepresentations were made, occurred in France." (*Id.* at A-7-8.)

- "Indeed, Plaintiffs can point to only one event in New York — a 2012 attempt by Atmel and LFoundry GMBH to negotiate an extension of the Supply Agreement — and that meeting occurred after the allegedly fraudulent sale." (*Id.*)

- "Thus, unsurprisingly, a mere fraction of the potential witnesses are located in New York. Out of nine witnesses Plaintiffs identify, two are based in New York. Neither is significant." (*Id.* (citation omitted).)

- "Moreover, Plaintiffs' witness list neglects to identify a single member of the Works Council or any employee from the consulting firm Syndex — surely important, and France-based, witnesses. Defendants additionally identify a number of witnesses in Europe and none in New York (sixteen in Europe and two in California)." (*Id.*)

- "The interest in having local disputes settled locally 'weighs heavily' against the United States as a forum here" where the "allegations concern the fraudulent circumvention of French labor laws intended to protect French workers facing termination" through a "transaction negotiated and executed in France by French and German companies, with the help of a French consultant and a France-based legal team." (*Id.* at A-10-12.)

- "Adjudicating this case in the United States would also likely present the difficulty of applying foreign law to Plaintiffs' common law claims." (*Id*.)

The District Court further held that, in "addition to the relative *inconvenience* of adjudicating this case in New York," Appellants had "admit[ed]" that their motivations in selecting a New York forum were the availability of "treble damages" and the "class action device" which, under this Court's precedent, are "*strong indicators of forum shopping*." (Dismissal Decision at A-8 (emphases added).)

The Dismissal Decision was without prejudice to "litigation of the controversy in France." (A-9-10.) And although the District Court found that the "Atmel Defendants admit[ed] they are 'subject to service of process in France'" and that the "pendency of multiple lawsuits in France concerning the subject matter of this litigation certainly suggests that Defendants are amenable to suit in that country" (A-9-10, 12), it nevertheless conditioned, "for the avoidance of doubt," the "dismissal of this case upon Defendants' written consent to jurisdiction" in France. (First Appeal at 1; A-9-10, 12.)

On August 5, 2015, the Atmel Appellees supplied an affidavit from the then Senior Vice President, Secretary and Chief Legal Officer of Atmel Corp., the indirect corporate parent of Atmel Rousset, stating that:

> The Atmel Defendants *consent to personal jurisdiction in French courts* of competent subject matter jurisdiction specifically and only for the claims that are asserted by one or more of the parties here and based upon the same underlying subject matter as this litigation. By giving this consent, the Atmel Defendants *do not waive, and expressly preserve, their rights to interpose any available defense other than a lack of personal jurisdiction* as to any claims concerning the subject matter of this litigation in French courts of competent jurisdiction.
>
> For the avoidance of doubt, the Atmel Defendants do not consent to personal jurisdiction in French courts generally or for any purpose other than claims concerning the subject matter of this litigation. Nor do the Atmel Defendants consent that the claims advanced, relief sought, or procedural mechanisms employed in this litigation are viable claims, forms of relief, or procedural devices, in any French courts. *Nor do the Atmel Defendants waive any defenses to the merits of any claim concerning the subject matter of this litigation in any French court, including that such claims are foreclosed by prior or existing litigation or otherwise fail to state viable claims for relief.*

(A-16-18 (the "Wornow Affidavit") ¶¶ 4-5 (emphases added).)

On August 10, 2015, Appellants objected that the Wornow Affidavit was "non-compliant" and suggested the Atmel Appellees were "intent to avoid adjudication of Plaintiffs' claims in this dispute in any forum." (A-19-21.) Appellants argued that the Wornow Affidavit showed an intent "to argue before a French jurisdiction that the claims made by Plaintiffs in this dispute are not 'viable claims, forms of relief, or procedural devices, in any French courts.'" (*Id*.)

On August 11, 2015, the Atmel Appellees responded in the District Court that Plaintiffs' objection was "both inaccurate and improper." (A-22.) With the parties' submissions on the adequacy of the Wornow Affidavit before it, and by Order dated August 21, 2015, the District Court held that the Appellees had "filed affidavits in accordance with" the Dismissal Decision. (A-23.) On August 27, 2015, the District Court entered judgment dismissing the case. (A-24-25.)

The First Appeal

On September 3, 2015, Appellants noticed an appeal of the Dismissal Decision and resulting judgment. (First Appeal Dkt. No. 1.) In addition to attacking the District Court's *forum non conveniens* analysis generally, Appellants specifically identified "[w]hether the District Court erred in finding that the affidavits filed by [Appellees] complied with the [Dismissal Decision]" as an issue to be reviewed on appeal. (*Id.* Dkt. No. 17.) Appellants argued, among other things, that:

> Defendants' unwillingness to consent, without reservation, to the jurisdiction of French courts over Plaintiffs' claims in this dispute betrays Defendants' strategy of avoiding the hearing of Plaintiffs' claims by any court. Despite Defendants' obvious disregard of the court's conditional order that purportedly protects Plaintiffs' interest in having its claims heard, the court confirmed its dismissal order on the basis of Defendants' defective affidavits.

(First Appeal Dkt. No. 53 at 42.)

The 62.1 Motion

Additionally, on February 17, 2016 — while the First Appeal was pending (and more than six months after the Dismissal Decision) — Appellants wrote Appellees stating that they had "recently learned" about a "position taken" by Appellees before the "French courts" that "compelled" Appellants to "file a rule 60(b) motion before Judge Swain." (A-237.) The correspondence stated that defendant *LF Germany* had "argued that the case should be heard by SDNY *and that Atmel Rousset did not oppose that request*." (*Id.* (emphasis added).)[6]

After threatening (but not making) the 62.1 Motion, on March 17 and 28, 2016, Appellants filed two Requests for Judicial Notice in this Court (*see* First Appeal Dkt. Nos. 96, 109.) The Requests for Judicial Notice argued that this Court should consider if "circumstances have changed between the ruling below and a decision on appeal" and asked the Court to take judicial notice of LF Germany's *lis pendens* motions — the basis of this Second Appeal — as "directly relevant to the disposition" of the First Appeal "insomuch as they bear on the adequacy of France

[6] The accusations were untrue and rejected by the Atmel Appellees in pre-motion correspondence dated February 19, 2016. (A-236.) In fact, the Atmel Appellees argued in France that the conditions for the *lis pendens* motion advanced by LF Germany were "not met." (A-238-56.) And Atmel Rousset's counsel further argued that the *lis pendens* motion is one that Atmel Rousset "oppose[d]." (*Id*.)

as an alternative forum." (*Id.*) Both Requests for Judicial Notice were referred to the merits panel in the First Appeal. (First Appeal Dkt. Nos. 100, 121.)[7]

On April 22, 2016 — months after their February 17, 2016 correspondence — Appellants filed the 62.1 Motion in the District Court. The 62.1 Motion argued that the "Atmel Defendants *de facto* [stood] to benefit from [LF Germany's] violations," (District Court Dkt. No. 124 at 1) and that the "Atmel Defendants should not be allowed to objectively benefit from LFoundry GmbH's disloyal tactics" (*id*. at 7). The same day, Appellants notified this Court of the 62.1 Motion, and attached a copy of the notice of motion. (First Appeal Dkt. No. 135.)

Two weeks ahead of oral argument, on June 6, 2016, Appellants notified Judge Swain of the oral argument and requested a ruling on the 62.1 Motion ahead of the decision on the First Appeal. (A-266-67.) The same day, Appellants wrote this Court advising of the status of the 62.1 Motion in the District Court and stating that Appellants' counsel "will be ready to address any question the Panel may have in relation to the above." (First Appeal Dkt. No. 147.)

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[7] The Atmel Appellees' response to the Requests for Judicial Notice reiterated the Atmel Appellees' offer not to oppose the request for judicial notice if the Appellants would consent to a submission "supplying the official records from the hearing at issue, which demonstrated that the Atmel Defendants did not join (and in fact opposed) the *lis pendens* motions Appellants ask this Court to notice." (First Appeal Dkt. No. 126.) The response concluded that the Atmel Appellees "disagree with the characterizations and conclusions in the Amended Request" but that they "do not, however, object should the Court wish to take judicial notice of the documents themselves." (*Id.*)

On June 20, 2016, at oral argument on the First Appeal, Appellants' counsel argued — referring explicitly to LF Germany's *lis pendens* motion — that "circumstances that occurred after entry of the conditional dismissal order based on *forum non conveniens*, and during this appeal reveals that one of the defendant appellant here has refused the jurisdiction of the alternate court that was designated by the District Court." (*See* First Appeal Dkt. No. 151; Second Appeal Dkt. No. 55 at 3:10-4:5.)

To make those arguments, counsel for Appellants relied on the record supplemented through the Requests for Judicial Notices, stating that Appellees "showed up at the hearing [in France] and they said 'lis pendens motion.' And you will find in the *record* exactly what I've just described." (*Id.* at Tr. 28:12-14 (emphasis added).) In addressing the arguments concerning the 62.1 Motion advanced on the First Appeal, Judge Jacobs stated:

> But dismissal hasn't been granted in France. If dismissal is granted in France, then perhaps you can come back and make a Rule 60 motion or we can say, were we to affirm the District Court, that we do so with the understanding that if this is dismissed in France, that you can come back here. Or we can do it by actually interpreting the waiver requirement that the District Court made more broadly — that is where [there are] any number of ways in which we can protect your client from [sic] being dismissed in France, should that happen.
>
> But why should we now, when that hasn't happened, use that [as] a reason for ignoring the substantive grounds for forum non conveniens?

(*Id.* at Tr. 4:6-18.) Judge Jacobs further addressed the issue by asking LF Germany's counsel: "You're prepared to be in France; you're not prepared to be in France and the United States at the same time," to which LF Germany's counsel responded: "Exactly." (*Id.*)

On June 22, 2016, immediately following oral argument, counsel for LF Germany wrote this Court (and the District Court) in "response to the concerns raised by, and at the suggestion of the appellate panel" to give assurances "that, upon the judgment of the District Court being affirmed, becoming final, and being subject to no further appeal or applications prolonging its pendency, such as an application for rehearing *en banc* or a writ of *certiorari*, and this action therefore being no longer pending, [LF Germany's successor] will withdraw any and all *lis pendens* objections in the French courts based upon the pendency of this action." (First Appeal Dkt. No. 152; A-268.)

On June 24, 2016, Appellants objected to LF Germany's assurances as "disloyal" and further evidence of a "record of misconduct in these proceedings." (*Id.* at Dkt. No. 154; A-269-70.) At no point did Appellants suggest that the *lis pendens* motions had not been part of the record before the Court. In fact, based upon that record, Appellants asked the Court to "*find* that Defendant-Appellee has *not consented* to the jurisdiction of French courts." (*Id.* (emphasis added).)

On June 27, 2016, this Court affirmed the Dismissal Decision, holding that:

> The district court's well-reasoned opinion identified and applied the three-part *Iragorri* test. We agree with the district court that: (i) the plaintiffs' choice of New York was entitled to little weight because New York was plainly chosen for a tactical advantage and this suit has little to do with New York; (ii) France is an adequate alternative forum because French courts tolerate claims like those brought by the plaintiffs *and the defendants expressly consented to jurisdiction there*; and (iii) the private and public interest factors strongly support adjudication in France because the locus of operative facts is in France and France has a far greater interest in the litigation than does New York.

(First Appeal at 2 (emphasis added).) In affirming the Dismissal Decision, the Court further held that it found "*no merit in the plaintiffs' other arguments*." (*Id.* (emphasis added).)

The Second Appeal

On June 27, 2016, the same day this Court decided the First Appeal, the District Court also held that "[i]n light of the Summary Order of the United States Court of Appeals for the Second Circuit in this matter . . . Plaintiffs' motion for relief from the judgment pursuant to Federal Rule of Civil Procedure 62.1 and 60(b) is denied as moot." (A-271.)

On July 11, 2016, Appellants filed a motion in this Court seeking "clarification" as to whether this Court's decision on the First Appeal addressed Appellants' argument that LF Germany's *lis pendens* motion, "as presented to the Court in Plaintiffs-Appellants' Amended Motion for Judicial Notice dated March

28, 2016." (First Appeal Dkt. No. 166.) On July 13, 2016, without opposition, this Court denied Appellants' motion for clarification. (First Appeal Dkt. No. 172.)

On July 25, 2016, Appellants noticed this Second Appeal. (A-272.) The Second Appeal argues that it was error for Judge Swain to deny the 62.1 Motion after this Court affirmed the judgment to which that motion was directed. (App. Br. at 16-17.) Appellants thus seek to re-litigate the issue of "whether or not" Appellee LF Germany "complied with its sworn affidavit consenting to French jurisdiction," as required and approved by the District Court in the Dismissal Decision and affirmed by this Court during the First Appeal. (*Id.*)

SUMMARY OF THE ARGUMENT

This is the second appeal stemming from the dismissal below, which this Court held was a "well-reasoned opinion" that "identified and applied the three-part" test that governs in this Circuit. (First Appeal at 2.) In doing so, as the District Court observed, the Court found that "New York was plainly chosen for a tactical advantage and this suit has little to do with New York." (*Id.*)

The Court did not remand the case. Nevertheless, Appellants have invented a further appeal in which they assign error to Judge Swain's post-judgment and post-appeal denial of an application seeking an indicative ruling *in the event of remand* by this Court.

The denial of that motion (the 62.1 Motion) was not only within the District Court's discretion; it was compelled by operation of Federal Rule of Civil Procedure 62.1 and this Court's affirming mandate in the First Appeal. Furthermore, the 62.1 Motion itself had no basis in law or fact as to the Atmel Appellees — as Appellants apparently recognized by abandoning it during the proceedings below.

STANDARD OF REVIEW

The denial of a motion under Rules 62.1 and 60(b) is reviewed for abuse of discretion. *See, e.g.*, 2 Federal Rules of Civil Procedure, Rules and Commentary Rule 62.1 (West 2016) ("Standard of review. A district court's denial of a Rule 62.1 motion is reviewed for abuse of discretion."); *Aurelius Capital Master, Ltd. v. Republic of Argentina*, 644 F. App'x 98, 106 (2d Cir. 2016) (Summary Order) (reviewing the granting of a Rule 62.1 motion for "abuse of discretion"); *Feurtado v. City of New York*, No. 16-716-cv (Summary Order), __ F. App'x __, 2016 WL 7131977, at *2 (2d Cir. Dec. 7, 2016) ("We review a district court's denial of a Rule 60(b) motion for abuse of discretion.").

Appellants' argument (App. Br. at 15-16) that the denial of the 62.1 Motion should be reviewed *de novo* as a disposition on "mootness" misconstrues the

procedural context of the ruling.[8] Rule 62.1(a)(1) states that the District Court may "defer considering the motion" and Rule 62.1(c) further states that the District Court "may decide the motion *if the court of appeals remands for that purpose*." Fed. R. Civ. P. 62.1(a), (c) (emphasis added).

Given what occurred in this case — the District Court's deferral of consideration of the motion and no remand by this Court — the denial of the 62.1 Motion as moot was compelled by Rule 62.1. The District Court properly exercised its discretion to defer consideration of the 62.1 Motion. Under any standard of review, the District Court properly denied the 62.1 Motion as moot when the Dismissal Decision was affirmed without remand.

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[8] Each case Appellants cite involved review of a merits adjudication on mootness grounds. *See White River Amusement Pub, Inc. v. Town Hartford*, 481 F.3d 163, 167 (2d Cir. 2007) (reviewing summary judgment determination concerning whether the destruction of premises at issue in litigation mooted the controversy); *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2d Cir. 1996) (reviewing summary judgment determination that the de-funding of certain hunting-authorization legislation mooted a challenge brought by environmental groups under the National Environmental Policy Act which required review of environmental consequences); *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) (reviewing whether the mooting of class representatives' claims and the defendants' voluntary cessation of the allegedly violative conduct mooted a federal housing assistance class action).

ARGUMENT

I. DENIAL OF THE 62.1 MOTION WAS COMPELLED BY RULE 62.1.

This Circuit has "repeatedly held that the docketing of a notice of appeal ousts the district court of jurisdiction except insofar as it is reserved to it explicitly by statute or rule." *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992) (quoting *Ryan v. United States Line Co.*, 303 F.2d 430, 434 (2d Cir. 1962)).[9] Accordingly, a "district court may *grant* a rule 60(b) motion after an appeal is taken only if the moving party obtains permission from the circuit court." *Id.* (emphasis in original).

Federal Rule of Civil Procedure 62.1 was adopted in 2009 in recognition that a "problem frequently arises in the context of a Rule 60(b) motion for relief from judgment" because "the period for filing a Rule 60(b) motion for relief extends far beyond the 30-day time period for filing an appeal." 11 Wright & Miller, Fed. Prac. & Proc. Civ. § 2911 (3d ed. 2016). As set forth in Rule 62.1's Advisory

[9] Although this Court has been careful to "remind the clerks of the district courts that the filing of a notice of appeal does not divest the district court of jurisdiction to decide any of the post judgment motions listed in Fed. R. App. P. 4(a)(4)(A), if timely filed," none is implicated here. *Hodge ex rel. Skiff v. Hodge*, 269 F.3d 155, 157 n.4 (2d Cir. 2001). The 62.1 Motion was filed nearly eight months after judgment was entered (A-26-27), and not within the twenty-eight days required under Federal Rule of Appellate Procedure 4(a)(4)(A)(v). Further, the 62.1 Motion was made specifically pursuant to Federal Rule of Civil Procedure 62.1 (*id.*), which applies only to motions "made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1(a).

Committee Notes, the "new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal." Fed. R. Civ. P. Adv. Comm. Notes (2009).

Under Rule 62.1, "once an appeal has been docketed, the trial court *cannot grant the motion without a remand*." Wright & Miller, Fed. Prac. & Proc. Civ. § 2911 (emphasis added). Indeed the Advisory Notes state that the Rule's sub-provision 62.1(c) also "confirms that the district court may grant the motion *only* if the appellate court specifically remands for that purpose." Fed. R. Civ. P. 62.1 Adv. Comm. Notes (emphasis added); *see also* Fed. R. Civ. P. 62.1(c) ("The district court may decide the motion *if* the court appeals *remands for that purpose*." (emphasis added). The decision to remand "remains within the appellate court's discretion under Appellate Rule 12.1." *Id*.

The 62.1 Motion was made nearly eight months after judgment was entered and while an appeal was pending in this Court. (A-26-27.) The 62.1 Motion was brought to this Court's attention by notice provided pursuant to Federal Rule of Civil Procedure 62.1. (First Appeal Dkt. Nos. 135-37.) The First Appeal did not conclude with a remand to the District Court pursuant to Federal Rule of Appellate Procedure 12.1; this Court instead issued a "mandate" affirming the "judgment of the district court." (First Appeal at 2; A-1(n).)

Because a remand was a legally-required condition precedent to the District Court's granting the 62.1 Motion (Fed. R. Civ. P. 62.1(c)), the District Court did not abuse its discretion in denying the 62.1 Motion (as moot). To the contrary, it was the only decision the District Court's limited jurisdiction permitted.[10]

II. THE 62.1 MOTION WAS MOOTED BY THE FIRST APPEAL.

The "mandate rule" — which this Circuit recognizes is a branch of the law of the case doctrine — "prevents re-litigation in the district court not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." *Manolis v. Brecher*, 634 F. App'x 337, 338 (2d Cir. 2016) (Summary Order) (quoting *Brown v. City of Syracuse*, 673 F.3d 141, 147 (2d Cir. 2012); *Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010))).

The First Appeal and resulting mandate (A-1(n)) held that "France is an adequate alternative forum because French courts tolerate claims like those brought by the plaintiffs *and the defendants expressly consented to jurisdiction there*." (First Appeal at 2 (emphasis added).) The decision and mandate affirmed "the judgment of the district court" without remand directing any further proceedings and found "no merit in plaintiffs' *other arguments*." (*Id.* (emphasis added).)

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[10] As a legally correct decision, the District Court's denial of the 62.1 Motion likewise would be affirmed under a *de novo* standard of review.

Before this Court decided the First Appeal, the same facts and arguments that formed the basis of the 62.1 Motion (and this Second Appeal) were presented to this Court in multiple submissions. In their initial and amended Requests for Judicial Notice, Appellants argued that the *lis pendens* motions "directly relate to arguments [LF Germany] has made before this Court, namely that France is an adequate alternative forum, as discussed in its brief." (First Appeal Dkt. No. 96, 109.)

Appellants further argued (on reply in support of their Requests for Judicial Notice) that "the adjudicative facts presented by Appellants are *relevant to the resolution of this dispute*" and that the violation of the Dismissal Decision they allegedly proved was "therefore highly relevant to this appeal." (*Id.* at Dkt. No. 131 at 3.) Both Requests for Judicial Notice were referred to the merits panel. (*Id.* at Dkt. Nos. 100, 121.)

To downplay the import of their Requests for Judicial Notice, Appellants now claim they merely "call[ed] the Court's attention to the fact" that LF Germany "made certain filings and statements in French legal proceedings." (App. Br. at 28.) But Appellants' Reply Memorandum in support of their merits briefing did more than that. Appellants argued in that submission the purported significance of these facts — claiming that LF Germany "currently asserts in France that this case should be heard by New York courts" and that its "behavior before French courts"

(referring explicitly to the *lis pendens* motions set forth in the Requests for Judicial Notice) "shows that it seeks to escape any adjudication and that the District Court's Conditional Dismissal does not sufficiently protect Appellants." (First Appeal Dkt. No. 97 at 12-13.)

The *lis pendens* motions were also discussed at length at the oral argument on the First Appeal (*see* 12-13, *supra*) and in Appellants' post-argument submissions, reflecting unmistakably that the facts underlying the 62.1 Motion (and their claimed significance) were before this Court in the First Appeal. (*Id.*) The Court mandated an affirmation of the "judgment of the district court" without any further proceedings and separately denied Appellants' motion for clarification seeking to further litigate the Court's consideration of the Requests for Judicial Notice. (First Appeal Dkt. No. 172.)

Accordingly, under the mandate rule, the First Appeal foreclosed any further proceedings in the District Court and, therefore, compelled denial of the 62.1 Motion as moot. *See, e.g.*, *Puricelli v. Argentina*, 797 F.3d 213, 218 (2d Cir. 2015) (a "district court must follow the mandate issued by an appellate court" and has "no discretion in carrying out the mandate" (citing *Ginett v. Comput. Task Grp., Inc.*, 11 F.3d 359, 360-61 (2d Cir. 1993); *Soto–Lopez v. N.Y.C. Civil Serv.*

Comm'n, 840 F.2d 162, 167 (2d Cir. 1988); *In re Ivan F. Boesky Sec. Litig.*, 957 F.2d 65, 69 (2d Cir. 1992))).[11]

III. APPELLANTS ABANDONED THE 62.1 MOTION AS TO THE ATMEL APPELLEES.

The Second Appeal concedes that the 62.1 Motion concerned only LF Germany's (and not the Atmel Appellees') purported "efforts to escape the jurisdiction of both United States and French Courts." (App. Br. at 23.) That is because the Atmel Appellees did not join the *lis pendens* motions that are the subject of the Second Appeal, and opposed those motions in France. (A-238-56.)

The Atmel Appellees did "not attack the 'jurisdiction' of the French Labor Courts;" rather, they "invoke[d] the jurisdiction of the French Labor Courts and [sought] dismissal for procedural default" under French law. (A-240.) And it is

[11] The Fifth Circuit has recently addressed this issue affirming the denial of a Rule 62.1 motion rendered moot by the appellate court's affirming mandate. *Matter of Bandi*, No. 16-30633 (Summary Order), __ F. App'x __, 2017 WL 344286, at *2 (5th Cir. Jan. 23, 2017) ("The case has been decided, and the mandate has issued. It does not matter whether the district court believes the motion raises a substantial issue, as the purpose of such a ruling is to allow us to remand the case if we deem it 'useful to decide the motion before [deciding] the pending appeal.' There is no case to remand, and, as a result, the requested hearing would serve no purpose. Thus, the motion is moot, and the district court did not abuse its discretion by refusing to reopen the case." (citing Fed. R. Civ. P. 62.1 Adv. Comm. Notes)).

for that reason that Appellants' counsel represented that the Rule 62.1 Motion was "not made against Atmel." (A-257-65.)[12]

In fact, Appellants made several other representations regarding their 62.1 Motion, including that it was: (i) "not made on the basis of any fraud misrepresentation, or misconduct on the part of the Atmel Defendants;" (ii) "directed at Defendant LFoundry only;" (iii) "never actually targets the Atmel Defendants;" and (iv) was merely "served on" the Atmel Appellees because Southern District Local Rule 6.1 "mandates" service on "all non-moving parties that appeared in the action." (A-257-65.)[13]

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[12] Appellants' suggestion that the Atmel Appellees "raised additional grounds to avoid adjudication of Plaintiffs-Appellants' claims by French courts" (App. Br. at 14) is inaccurate. The procedural defenses interposed in France were consistent with the Wornow Affidavit. The Wornow Affidavit "consent[ed] to personal jurisdiction in French courts of competent subject matter jurisdiction specifically and only for the claims that are asserted by one or more of the parties here and based upon the same underlying subject matter as this litigation." (A-16-17, Wornow Affidavit ¶ 4.) It did not waive, and expressly preserved, Atmel Rousset's right to interpose any defense other than lack of personal jurisdiction (including the *caducity* defense Appellants refer to) in the French courts. (*Id.* Wornow Affidavit ¶¶ 4-5.)

[13] Appellants' argument that LF Germany's alleged violation of LF Germany's affidavit of consent undid the entire Dismissal Decision because "a court must satisfy itself that the litigation may be conducted elsewhere against *all* defendants" (App. Br. at 31 (citation omitted)) is misguided. This argument ignores that the District Court *did* find that the litigation could be conducted in France on the bases of other current litigation in that jurisdiction and "for the avoidance of doubt" that all defendants did provide compliant affidavits of consent. (First Appeal at 2; A-12-25.) It also ignores that this Court has affirmed a *forum non conveniens* dismissal where the consent to jurisdiction was provided by less than all

Appellants' representations to the District Court about the Atmel Appellees during the pendency of the 62.1 Motion would have foreclosed their ability to meet the "onerous burden" of demonstrating the "exceptional circumstances" through "highly convincing" evidence as required in seeking Rule 60(b) relief. *See, e.g.*, *Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co.*, 609 F.3d 122, 131 (2d Cir. 2010).[14]

Accordingly, even if the 62.1 Motion were not mooted pursuant to Federal Rule 62.1 and the First Appeal (*see* §§ I-II *supra*), Appellants' representations foreclosed their ability to establish the elements of Rule 60(b), and thus present alternative grounds for affirming the District Court's decision. *See, e.g.*, *Restivo v. Hessemann*, No. 14-4662-cv (Summary Order), __ F. App'x __, 2017 WL 218006, at *14 (2d Cir. Jan. 19, 2017) (setting forth the Court's ability to "affirm the district court's ruling on an alternative ground.").

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defendants. *See, e.g.*, *Wilson v. ImageSat Int'l. N.V.*, No. Civ. 6176 (DLC), 2008 WL 2851511, at *6 (S.D.N.Y. July 22, 2008) ("All but one of the defendants have consented to suit there [Israel], and this representation is sufficient to satisfy the court's inquiry as to defendants' amenability to suit in the alternative forum"), *aff'd sub nom*, 349 F. App'x 649, 650-51 (2d Cir. 2009).

[14] Although the 62.1 Motion also invoked Federal Rule 60(b)(6), that sub-provision would not have applied because a "party may not depend on the broad 'any other reason' provision of Rule 60(b)(6) where the basis for the Rule 60(b) motion may be construed under any other clause of Rule 60(b)." *Crawford v. Franklin Credit Mgmt. Corp.*, No. 08 Civ. 6293 (JFK), 2013 WL 2951957, at *2 (S.D.N.Y. June 14, 2013) (internal citation and quotation omitted).

CONCLUSION

For the foregoing reasons, the Atmel Appellees respectfully request that the Court affirm the District Court's denial of Appellants' 62.1 Motion.

Dated: New York, New York
February 6, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the page limitations and type-volume limitations of Fed. R. App. P. 32(a)(7)(A) and (B) because this brief contains does not exceed 30 pages and contains 6,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14-point Times New Roman font.

Dated: New York, New York
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