

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 11-4626-CV Caption [use short title] _____

Motion for: Dismissal of Appeal

Set forth below precise, complete statement of relief sought:
Pursuant to Fed. R. App. P. 42(b), Appellant
requests that the Court dismiss the appeal, with
prejudice and without the right to re-file, each
party to assume its own costs and attorneys' fees.

Northwestern National Insurance Company,
Petitioner – Appellee v. Insko, Ltd.,
Respondent – Appellant

MOVING PARTY: Insko, Ltd.
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: Northwestern National Ins. Co.

MOVING ATTORNEY: James J. Boland
[name of attorney, with firm, address, phone number and e-mail]
Freeborn & Peters LLP
311 S. Wacker Drive, Suite 3000
Chicago, IL 60606
312-360-6548, JBoland@FreebornPeters.com

OPPOSING ATTORNEY: Evan L. Smoak
Barger & Wolen, LLP
10 East 40th Street, 40th Floor, New York, NY 10016
212.557.2800 esmoak@bargerwolen.com
mferlazzo@bargerwolen.com

Court-Judge/Agency appealed from: U.S. District Court, Southern District of New York, Hon. Shira A. Scheindlin

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date: November 1, 2012 (postponed)

Signature of Moving Attorney: _____

Date: 11/7/2012

Service by: CM/ECF Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

No. 11-4626

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INSCO, LTD.,)
)
 Appellant,)
)
 v.)
)
 NORTHWESTERN NATIONAL)
 INSURANCE COMPANY)
)
 Appellee.)

INSCO, LTD.’S MOTION TO DISMISS APPEAL

Pursuant to Federal Rules of Appellate Procedure 42(b), Appellant, Insko, Ltd. (“Insko”) respectfully moves the Court to dismiss the appeal on terms agreed to by the parties. The grounds for this motion are set forth below and in the attached affidavit of James J. Boland:

1. This appeal arises from a motion filed by Northwestern National Insurance Company (“NNIC”) to disqualify Insko’s counsel from representing Insko in an on-going private arbitration, which was granted by the district court on October 3, 2011. *See* Ex. A, Aff. of James Boland at ¶ 3.

2. As NNIC reported to the Court in its October 26, 2012 Motion to Postpone Oral Argument (Doc. 128), Insko and NNIC have reached a settlement of the underlying dispute in arbitration. Ex. A, at ¶ 4. In the Settlement Agreement and Release, no party conceded the merits of the other party’s positions in the arbitration. *Id.*

3. The Settlement Agreement did not address the merits of the issues in this appeal or the parties’ positions. *Id.* Insko does not concede the merits of any of NNIC’s positions in

this appeal and continues to adhere to the positions set forth in its briefs on appeal. *Id.* at ¶ 5.

4. Nevertheless, in the Settlement Agreement the parties acknowledged that, as a result of the settlement of the dispute in arbitration, this appeal “is rendered moot.” *Id.* at ¶ 6. Accordingly, in the Agreement, the parties agreed that after the settlement became effective, “Insko will withdraw with prejudice, and without the right to re-file,” this appeal. *Id.*

5. Solely as a result of the Settlement Agreement between Insko and NNIC, Insko respectfully requests that the Court enter an order dismissing this appeal, with prejudice and without the right to re-file, with each party to bear its own costs and attorneys’ fees.

6. On November 5, 2012, Insko attempted to obtain NNIC’s signature on a stipulation to dismiss this appeal. *Id.* at ¶ 7. An e-mail containing the stipulation was sent to NNIC’s counsel at 9:44 a.m. Chicago-time. A written response was not received from NNIC’s counsel until seven hours later, at 4:45 p.m. Chicago-time. *Id.* Although the parties agreed to dismissal and to assume their own costs and attorneys’ fees, they were unable to agree on the remaining language in the stipulation. *Id.*

7. Pursuant to Local Rule 27.1(b), on November 6, 2012, Insko’s counsel sent an e-mail to NNIC’s counsel informing them of this motion and asking if NNIC objects to the relief requests and file a response. *Id.* at ¶ 8. In its response, NNIC did not disclose either whether it objects to the relief requested or whether it will submit a response. *Id.*

WHEREFORE, Insko respectfully requests that this Court grant this motion and enter an order dismissing this appeal, with prejudice and without right to refile, with each party bearing its own costs and attorneys' fees.

Date: November 6, 2012

Respectfully submitted,

/s/ James J. Boland

James J. Boland

Catherine A. Miller

FREEBORN & PETERS LLP

311 South Wacker Drive, Suite 3000

Chicago, Illinois 60601-6677

Tel: (312) 360-6000

Fax: (312) 360-6575

jboland@freebornpeters.com

cmiller@freebornpeters.com

Attorneys for Appellant Insko, Ltd.

Exhibit A

No. 11-4626

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INSCO, LTD.,)
)
 Appellant,)
)
 v.)
)
 NORTHWESTERN NATIONAL)
 INSURANCE COMPANY)
)
 Appellee.)

**AFFIDAVIT OF JAMES BOLAND IN SUPPORT OF
INSCO, LTD.’S MOTION TO DISMISS APPEAL**

I, James J. Boland, state as follows:

1. I am over the age of eighteen and competent to testify as to the matters set forth herein which are based on my personal knowledge.

2. I am an attorney licensed to practice in the State of Illinois. I am lead counsel for Appellant, InscO, Ltd. (“InscO”), in the above-captioned matter.

3. This appeal and the district court proceeding below arise out of a private arbitration initiated by Northwestern National Insurance Company (“NNIC”) against InscO. Specifically, this appeal arises out of a motion filed by NNIC to disqualify InscO’s counsel from representing InscO in the arbitration, which the district court granted on October 3, 2011.

4. InscO and NNIC have reached a settlement of the underlying dispute in arbitration. In the executed Settlement Agreement and Release, neither party concedes the merits of the other party’s positions in the arbitration. The Agreement does not address the merits of the issues in this appeal or the parties’ positions.

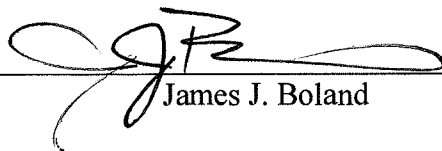
5. Insko does not concede the merits of any of NNIC's positions in this appeal and continues to adhere to the positions set forth in Insko's briefs on appeal.

6. In the Settlement Agreement, Insko and NNIC agreed that this appeal "is rendered moot" as a result of that Agreement and that, after the settlement became effective, "Insko will withdraw with prejudice, and without the right to re-file, the appeal pending in the matter captioned *Northwestern National Insurance Company v. Insko, Ltd.*, U.S. Court of Appeals for the Second Circuit, Docket No. 11-4626."

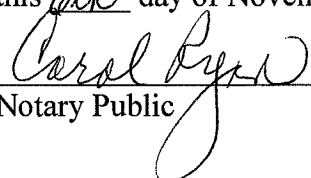
7. On November 5, 2012, counsel for Insko attempted to obtain the signature of NNIC's counsel on a stipulation to dismiss the appeal. An e-mail containing the stipulation was sent to NNIC's counsel at 9:44 a.m. Chicago-time. A written response was not received from NNIC's counsel until seven hours later, at 4:45 p.m. Chicago-time. The parties agreed on language calling for dismissal and that the parties would assume their own costs and attorneys' fees on appeal, but did not agree on the remaining language in the proposed stipulation.

8. Pursuant to Local Rule 27(b), on November 6, 2012, I sent NNIC's counsel an e-mail informing counsel of Insko's Motion to Dismiss and asking if NNIC objects to the relief requested and/or will file a response. NNIC responded, but did not disclose whether it objects to the relief request in this motion or whether it will respond in writing.

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


James J. Boland

Signed and sworn to before me
this 6th day of November, 2012.


Notary Public



No. 11-4626

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INSCO, LTD.,)
)
 Appellant,)
)
 v.)
)
 NORTHWESTERN NATIONAL)
 INSURANCE COMPANY)
)
 Appellee.)

CERTIFICATE OF SERVICE

The undersigned, being one of the attorneys for Appellant, InSCO, Ltd., hereby certifies that on November 6, 2012, he caused a copy of **INSCO, LTD.’S MOTION TO DISMISS APPEAL** to be filed via the Court’s ECF Filing system and served upon all counsel of record listed below through the same means.

Daniel L Fitzmaurice
Matthew John Shiroma
Day Pitney, L.L.P. (Hartford)
242 Trumbull Street
Hartford, CT 06103
Email: dlfitzmaurice@daypitney.com
Email: mshiroma@daypitney.com

Evan L Smoak
Matthew Christian Ferlazzo
Barger and Wolen LLP
10 East 40th Street, 40th Floor
New York, NY 10016
Email: esmoak@bargerwolen.com
Email: mferlazzo@bargerwolen.com

Date: November 6, 2012

/s/ James J. Boland