

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): 12-105-cv(L)

Caption [use short title]

Motion for: Emergency Stay Pending Appeal

Set forth below precise, complete statement of relief sought:

NML Capital, Ltd. v. Republic of Argentina

Urgent stay of the district court's Nov. 21 Orders

and "me too" Orders pending further appellate

review, including review of pending

petition for panel rehearing and rehearing en banc.

MOVING PARTY: Republic of Argentina

OPPOSING PARTY: NML Capital, Ltd.

☐ Plaintiff☒ Defendant☒ Appellant/Petitioner☐ Appellee/Respondent

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Court-Judge/Agency appealed from: Southern District of New York / District Judge Thomas P. Griesa

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☒ Yes☐ No (explain):

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:

Signature of Moving Attorney:

Carmine Boccuzzi

Date: 11/26/2012

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: _____

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)

United States Court of Appeals

for the

Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs-Appellees,
(continued on inside cover)

— v. —

REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

EMERGENCY MOTION BY DEFENDANT-APPELLANT THE REPUBLIC OF ARGENTINA FOR STAY PENDING APPEAL

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(Plaintiffs-Appellees Continued)

ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUEÑO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AQUIERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

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Defendant-Appellant the Republic of Argentina (the “Republic”) submits this emergency motion pursuant to FRAP 8 and 27 in support of its request for an immediate stay of the district court’s Amended February 23, 2012 Order (the “Amended Injunctions”) (Ex. D),¹ the Opinion (Ex. E) and the Stay Opinion (Ex. F) entered on November 21, 2012 (together, the “Orders”),² pending appellate review of the Orders and the resolution of the Republic’s petition for panel rehearing and rehearing *en banc* (the “Rehearing Petition”) (Ex. O) of this Court’s October 26, 2012 decision (the “October 26 Decision”) (Ex. Q). As set forth in the declaration of Carmine D. Boccuzzi, a stay is needed urgently.

STATEMENT OF EMERGENCY

The Republic brings this emergency motion to stay the Amended Injunctions that would imperil debt service on \$24 billion of performing debt. That is because the district court, in response to this Court’s direction to conduct further proceedings following the October 26 Decision, issued the Orders conditioning the Republic’s payment of its restructured debt on its paying over \$1.3 billion (the full face amount of these pre-judgment plaintiffs’ defaulted debt, plus interest) *into an escrow account*, thus ordering the Republic to turn over funds that are immune under the

¹Exhibits are attached to the declaration of Carmine D. Boccuzzi, dated November 26, 2012. A-numbers refer to the Joint Appendix filed March 21, 2012.

²The district court on November 26, 2012 began to enter substantially identical Orders in the “me too” cases in this litigation (Exs. A-B). The Republic also moves to stay these Orders and any related “me too” Orders of the district court.

FSIA, contrary to the Republic's own law and public policy. The district court – which rushed to issue the Orders, despite serious arguments from the Republic and third parties – made the Orders effective immediately and lifted the Stay that protects litigants while an appellate process is ongoing.

Far from following this Court's direction to "more precisely determine the third parties to which the [Amended] Injunctions [should] apply," Oct. 26 Decision at 28, the district court extended the coercive force of the Amended Injunctions to broad, catch-all categories of third parties, including all "the indenture trustees," the registered owners of the Republic's performing debt, and the clearing corporations, as well as all of the agents of these entities. *See* Amended Injunctions ¶ 2(f). The inequitable result of the Orders, unless a stay is entered and they are ultimately corrected, is patent: the destruction of the debt restructuring conducted by the Republic (and upheld by this Court) as part of its efforts to emerge from its historic and tragic economic collapse, and extreme harm to numerous third parties. If the court had adopted a "Ratable Payment" formula that treated plaintiffs and those similarly situated on the same terms as the Republic extended in its 2010 Exchange Offer, then that would be a "remedy" consistent with Argentine law and public policy. Under Argentine law, the Argentine Executive could present that proposal to Congress, but it cannot present a proposal that treats some creditors better than others, and it cannot fund an escrow.

BACKGROUND

A. The Court’s October 26 Decision. This Court affirmed in part and remanded in part the district court’s orders dated February 23, 2012 (the “Injunctions”) granting plaintiff NML and the various “me too” plaintiffs permanent injunctive relief purporting to remedy the Republic’s alleged violation of the pari passu clause. Oct. 26 Decision at 28-29. The Court remanded to the district court for further analysis and proceedings concerning two critical aspects of the Injunctions. First, the Court asked the district court to clarify precisely how to calculate the “Ratable Payments” owed to plaintiffs when the Republic makes a scheduled payment on its performing debt. *Id.* at 11. Second, the Court, expressing serious concerns about the effect of the Injunctions on third parties, directed the district court to “determine the third parties to which the Injunctions will apply” so that this Court could assess “whether the Injunctions’ application to them is reasonable.” *Id.* at 28. The Court thus questioned whether the Injunctions’ sweeping application to third parties was appropriate at all – a concern also raised by the panel during oral argument. *See* July 23, 2012 Hr’g Tr. at 56:12-14 (“I’m not sure that courts [can] enter injunctions primarily for the purpose of taking action against such third parties.”) (Ex. R).

B. The District Court’s November 21 Orders. On November 21, three business days after receiving powerful briefs from third parties, which were given one week to file papers – a schedule that shut out other parties that wanted to be heard – and,

as the district court itself recognized, with the mandate still with this Court and the Republic's Rehearing Petition still pending, Nov. 9, 2012 Hr'g Tr. at 19:20-21 (Ex. P), the district court entered the Orders. In the Amended Injunctions the court adopted the exact "Ratable Payment" language used in the Injunctions, requiring the Republic to pay plaintiffs all principal and interest as a precondition to making a single interest payment to the exchange bondholders on their discounted debt. *See* Amended Injunctions ¶ 2; Op. at 4. Moreover, the district court all but ignored the seriousness of the third parties' papers. The district court appeared less inclined to heed the significant legal concerns and policies raised by these parties than to be goaded by plaintiffs to disregard applicable law in order to punish Argentina.

Notwithstanding this Court's concerns about the application of the Injunctions to third parties, the district court *expanded* the coercive reach of the Injunctions, and in the Amended Injunctions bound specific individual entities that are "participants in the payment process of the Exchange Bonds," *see* Amended Injunctions ¶ 2(e), *as well as* countless other unspecified entities and individuals, some of which (*i.e.*, the Euroclear and Clearstream entities) are not even within the court's jurisdiction:

"(1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon . . .);

(2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees;

(3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depositary Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System);

(4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London))); and

(5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.” Amended Injunctions ¶ 2(f).

In entering the Amended Injunctions without jurisdiction to do so, the district court ignored the interests and positions of numerous third parties. The third parties that filed papers include The Bank of New York Mellon (“BNYM”), the Trustee for holders of approximately \$24 billion of the Republic’s restructured debt, as well as significant holders of the restructured debt, including a group of exchange bondholders comprising a wide segment of the investing public and including such organizations as pension funds, charitable foundations, and endowments (Exs. I-K). In addition, the New York Clearing House, which represents the world’s largest commercial banks, DTC, whose shareholders are made up of approximately 525 banks and brokerage houses, and the Federal Reserve Bank of New York each submitted letters to the court opposing the application of any injunctions to them and other entities involved in the funds transfer process (Exs. L-N).

Finally, the district court vacated its March 5, 2012 stay of the Injunctions pending appeal (the “Stay”) (Ex. U), and required the Republic to pay into an escrow account over \$1.3 billion prior to making a December 15 scheduled payment to holders of its restructured debt – thereby significantly prejudicing the Republic’s right to seek rehearing of the October 26 Decision, as well as the Republic’s ability to appeal the Orders. *See* Stay Op. at 4-5. In vacating the Stay, the court acted with respect to extra-territorial, immune assets (as opposed to property located in the United States to which the court’s enforcement jurisdiction is limited), and to compel the Republic to violate its own laws – the very laws that enabled the Republic to implement its debt restructuring on a principle of creditor equity. Argentine law – including Law 26,017 (A-436) and budget laws carrying out the Republic’s sovereign decision to defer the servicing of defaulted debt until the restructuring process is complete – forbids payment of plaintiffs on better terms than the restructured debt. These laws are not intended to discriminate, but to enact internationally accepted principles of inter-creditor equity, as advanced by the United States and all leading countries of the world vested in orderly sovereign debt restructuring.

Citing newspaper articles, the district court concluded that its lifting of the Stay was justified because the Republic’s President and Minister of Economy had publicly manifested shock and indignation. From this, the court concluded that the

Republic had violated the Stay’s condition that “the Republic shall not during the pendency of the appeal to the Second Circuit take any action to evade the directives of the February 23, 2012 Orders in the event they are affirmed,” Stay Op. at 4, even though the only competent evidence on this point was the Republic’s declaration, dated less than a week prior, unequivocally confirming that it “*has complied, is complying and will comply* with the terms of the [Stay].” See Decl. of Francisco Eggers ¶ 4, Nov. 16, 2012 (“Eggers Decl.”) (emphasis added) (Ex. H).

ARGUMENT

The Court should stay the effect of the Orders pending appeal because all four factors weigh in favor of granting a stay: (1) there is a substantial possibility of success on appeal; (2) there is a risk of irreparable injury to the Republic and third parties if a stay is denied; (3) plaintiffs would not be substantially harmed by a stay; and (4) a stay is in the public interest. See *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002); *McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.)*, 503 F.3d 167, 170 (2d Cir. 2007) (stay factors to be applied flexibly).

I. A STAY IS CRITICALLY NECESSARY TO AVOID IRREPARABLE HARM TO THE REPUBLIC AND NUMEROUS THIRD PARTIES

Even if the district court had jurisdiction to enter its unprecedented Amended Injunctions – which it did not, *see infra* II.A – the Orders should be stayed, because by ordering the Republic to pay into an “escrow” over \$1.3 billion by December 15,

and refusing to stay that directive pending review by this Court, the Orders will cause irreparable harm to the Republic and numerous third parties for three reasons.

First, the Orders have deprived the Republic of its appellate rights. As of the filing of this motion, the Republic's Rehearing Petition is still pending before this Court. The right to file such petitions is expressly provided to the Republic by Congress pursuant FRAP 35 and 40. Further, even if the petition is denied and the mandate issues, this Court clearly expressed in the October 26 Decision that it intended to review the district court's Amended Injunctions *before* they took effect. This intent is clear both from the Court's use of the procedure set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), which dictates that the mandate (once issued) will return to the Court of Appeals without the need to file a notice of appeal, and by this Court's expressly stated concern as to how the Injunctions would function. *See* Oct. 26 Decision at 28 (instructing district court to clarify "precisely" how the Injunctions will apply to third parties so this Court can "decide whether the Injunctions' application to them is reasonable"). By vacating the Stay, the district court has prevented the Court from conducting that review.

Second, by simultaneously entering the sweeping Amended Injunctions and vacating the Stay, the district court has placed the Republic in an impossible position. The Republic faces the threat of being prevented from servicing its legitimate debts, although it cannot legally comply with the court's "Ratable Payment" formula or an

order to “turn over” into an escrow³ over \$1.3 billion in immune assets to pay plaintiffs. If the court had adopted an equitable “Ratable Payment” formula, the Argentine Executive would have proposed treating plaintiffs in the same manner as participants in the 2010 Exchange Offer, but this would take time and be subject to Congressional approval. The Order for an immediate *escrow* under these threats is impossible to comply with and disregards the many third party interests involved as well as the Republic’s sovereignty.

Finally, the most irreparable injury of all: by conditioning payment of performing debt, currently in the amount of some \$24 billion, on the payment of immune assets into an unprecedented escrow, the Orders would imperil payment on the Republic’s performing debt without the Republic having had any opportunity for appellate review. The third party bondholders holding that debt raised these concerns to the court below, but the court summarily dismissed their concerns. Under the court’s interpretation, payment in full to plaintiffs, in escrow or otherwise, would open the floodgates of other bondholders claiming “*pari passu* rights.”

³ The district court declined to explain the particulars of the escrow account. This aspect of the Orders has no support anywhere in the law and clearly violates the limitation in the FSIA that immunizes sovereign assets unless they are located in the United States and used for a commercial activity here. *See* Rehearing Petition at 4-10; US Amicus Br. at 22-28, dated Apr. 4, 2012 (“US Br.”) (Ex. T).

II. THE REPUBLIC IS LIKELY TO SUCCEED ON THE MERITS

A. The District Court Lacked Jurisdiction To Enter The Amended Injunctions

As an initial matter, the Republic will succeed on the merits of its appeal because the district court entered the Amended Injunctions before this Court issued the mandate from the Republic's appeal of the February 23 Orders. The court thus lacked jurisdiction to enter any substantive relief and its Amended Injunctions are accordingly void. *See Dague v. City of Burlington*, 976 F.2d 801, 805 (2d Cir. 1992) (order issued by the district court prior to mandate being issued by Court of Appeals was a "nullity"); *United States v. Timewell*, 387 F. App'x 23, 25, 28 (2d Cir. 2010) (summary order) (same); *Doe v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006) (same). Although the Republic presented this authority to the district court, and the district court agreed that the mandate had not issued, it nonetheless improperly entered the Amended Injunctions. *See* Nov. 9, 2012 Hr'g Tr. at 19:20-21 (THE COURT: "[The Court of Appeals] . . . *hasn't issued its mandate.*") (emphasis added).

Plaintiffs' only rebuttal below was that, because the Court in its October 26 Decision remanded to the district court for further proceedings pursuant to *Jacobson*, the Court's "dictation of the mandate's journey" in the October 26 Decision meant that this Court had actually issued the mandate. But regardless of whether the Court "dictated the mandate's journey," the fact remains that that "journey" has not yet begun, because the mandate has not yet issued and will not

issue until after the Republic's Rehearing Petition is no longer pending. *See* Fed. R. App. P. 41(d)(1); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1998) (stating that the mandate does not issue "merely upon the filing of an opinion or summary order . . . [because] it is the clerk, not the judges, who 'issues' it").⁴ The district court therefore lacked jurisdiction to enter the Amended Injunctions.

B. The Amended Injunctions Purport To Bind Numerous Third Parties In Violation Of Rule 65 And All Applicable Law

The Republic will also prevail on the merits because there is no basis for binding to the Amended Injunctions the numerous third parties and categories of third parties targeted by the district court, including BNYM (the Trustee for holders of the Republic's debt), the many financial institutions that transfer payments en route from BNYM to the exchange bondholders, the book-entry depository system and the exchange bondholders and their nominee. This conclusion of the district court conflicts with two clear aspects of the Court's October 26 Decision.

First, notwithstanding this Court's observation that the Injunctions could not be interpreted to mean that "plaintiffs would 'execute upon' any funds, much less those held in trust for the exchange bondholders," Oct. 26 Decision at 25 n.14, the

⁴*Jacobson* makes clear that the better practice when remanding is to require the issuance of the mandate before the district court may take any action, and, more fundamentally, that there *must* be a mandate issued to give a district court jurisdiction for the "enforcement of compulsory process," which an injunction that imposes its coercive effect on hundreds of third parties clearly is, since such process is not "normally within the power of a district court when the court of appeals has 'retained' jurisdiction." 15 F.3d at 22.

Amended Injunctions in fact restrain any and all funds “*held in trust for the exchange bondholders*,” and hold third parties liable for any payments to those bondholders. The Amended Injunctions therefore function in the *precise manner* as a CPLR § 5222 restraining notice, including with extraterritorial effect on funds that are not in the United States and thus absolutely immune from restraint under the FSIA. *See Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009). The district court cited no case, and we are aware of none, for the proposition that a plaintiff can indefinitely restrain, based upon the actions of a separate obligor, the property of a third party in which plaintiff can assert *no* right.

Second, the district court failed to address this Court’s express “concerns” about the application of the injunctions to third parties, Oct. 26 Decision at 27, and simply ruled that the injunctions *must* bind the third parties involved in transferring funds to exchange bondholders. Op. at 9. The court sweepingly held – *citing no caselaw and without explanation* – that each and every entity within each broad category in the Amended Injunctions is bound under Rule 65(d) because each entity is “‘in active concert or participation’ with Argentina.” *Id.* at 11.

In fact, as the Republic – and the third parties themselves – established below, these targeted entities cannot be bound by the Amended Injunctions because, as the district court itself previously recognized, they are not under any theory “aiders and abettors” of any violation by the Republic. *See* Feb. 23, 2012 Hr’g Tr. at 7:22-24

(THE COURT: “The banks wouldn’t be aiding and abetting. The banks only pay the exchange offer people. That’s what they do.”) (A-2296). It is unprecedented – and unwarranted – to hold liable as aiders and abettors participants in the financial markets doing no more than carrying out their normal business functions and fulfilling their *own* obligations to third parties. *See Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (“[T]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden . . . but what it has power to forbid, an act of a party.”).

Bank of New York Mellon. BNYM is the Trustee for, and so owes fiduciary duties to, the holders of the Republic’s restructured debt. Under the governing Indenture, the Republic pays the holders of that debt in Argentina when it pays the Trustee, which receives, holds, and transfers the funds in trust for the beneficial owners of the restructured debt. Trust Indenture § 3.1, dated June 2, 2005 (A-2282-3). Once that transfer takes place, the funds are no longer property of the Republic, which then has no right to the funds. *See id.* § 3.5(a) (A-2284). It would thus be manifestly *unreasonable* to apply the Amended Injunctions to the Trustee, who holds funds (in which the Republic and plaintiffs have no interest) for the exchange bondholders.

Financial Institutions. The various financial institutions caught up by the Amended Injunctions transfer payments en route from the Trustee to the restructured

debt holders, which payments *at all times remain in trust for the restructured debt holders*. These institutions are protected by Article 4-A of the U.C.C. (the precise body of law identified by this Court as an area of concern, Oct. 26 Decision at 27-28), which determines the rights, duties and liabilities of entities involved in the funds transfer process in New York and the rest of the country. *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998). Article 4-A provides, *inter alia*, that creditor process be directed only *to the bank of the party that owes the creditor the debt*. See, e.g., N.Y. U.C.C. § 4-A-502 cmt. 4. Thus, because the financial institutions are not the “Republic’s banks,” the U.C.C. bars the injunctions from binding them. The district court acknowledged the U.C.C., but then proceeded to ignore it. Under the U.C.C., no injunction may issue against BNYM and financial intermediaries. BNYM’s account as a funds transfer beneficiary is located offshore, and will in any event contain solely assets belonging to third parties and not to Argentina. Those assets are not available for execution by the Republic’s creditors. Other intermediaries are caught in the Amended Injunctions, although they fulfill only ministerial roles and are not in any way agents of the Republic.

Clearing Systems and Nominees. Book-entry depository systems, such as DTC and its nominee Cede & Co., indisputably owe no obligations to plaintiffs, and are not agents of the Republic. Application of the injunctions to DTC and other depositories and clearing systems is thus unreasonable on its face. Plaintiffs have no

claim against these entities, no interest in the amounts that depositories transfer to their Participants, and no basis to bind them to the injunctions.

None of these entities has any role, “causal” or otherwise, in the Republic not paying plaintiffs. *See Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 883 N.Y.S.2d 486, 489 (1st Dep’t 2009) (actions of the aider/abettor must proximately cause alleged harm). These entities act no differently with respect to the performing debt than they have for the past seven years, *i.e.*, since the Republic’s Exchange Offers in 2005 (or 2010) – transactions which this Court noted did not violate the *pari passu* clause. *See* Oct. 26 Decision at 19 n.10. If left to stand, the district court’s ruling – which calls into doubt long-settled New York law and practice – will both hugely impair the use of New York law to govern sovereign and corporate issuances and severely disadvantage New York financial institutions with respect to such issuances. Jonathan Wheatley, *New York law: not what it used to be*, *Fin. Times*, Nov. 23, 2012 (effect of injunctions was to “wipe[] out the New York law premium” for sovereign debt) (Ex. C); *see also* Ex. W.

C. The District Court’s Interpretation Of “Ratable Payment” Is Inequitable Because It Severely Harms Third Parties And Grants Plaintiffs Relief That Is Untethered From Their Injury

The Republic is also likely to succeed on the merits of its claim that the district court’s interpretation of “Ratable Payment” is patently inequitable. As the Court noted in its October 26 Decision, “Ratable Payment” is an equitable remedy

(as opposed to actual contractual performance required by the clause itself). *See* Oct. 26 Decision at 11, 19 n.10. And when fashioning an equitable remedy, “[e]specially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent [third] parties, the courts must look to the practical realities and necessities inescapably involved in reconciling competing interests, in order to determine the special blend of what is necessary, what is fair, and what is workable.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 375 (1977). In adopting wholesale plaintiffs’ proposed definition of “Ratable Payment,” the district court’s action clearly infringed on the “expectations of innocent third parties” and was not “fair,” “necessary,” or “workable.”

The inequity of the district court’s “Ratable Payment” definition is demonstrated by the fact that the periodic payments to holders of restructured debt represent only a small percentage of the entire amount owed to the restructured debt holders, which amount itself is but a fraction – “30 cents on the dollar” as NML conceded – of the exchange bondholders’ original debt. *See* Brief for Plaintiff-Appellant NML Capital, Ltd. at 17, dated Apr. 7, 2005 (Ex. V); *see also id.* at 8.⁵ Whereas exchange bondholders are due to receive small interest payments until *up to 2038*, under the district court’s interpretation of “Ratable Payment,” plaintiffs are

⁵In affirming the district court’s rejection of NML’s attempt to disrupt the 2005 Exchange Offer, this Court explained that the Republic’s “[debt] restructuring [was] obviously of critical importance to the economic health of a nation,” *EM Ltd. v. Republic of Argentina*, 131 F. App’x 745, 747 (2d Cir. 2005) (summary order).

immediately entitled to a one-time payment in full of 100 cents on the dollar on their non-performing debt in 2012. A workable interpretation of “Ratable Payment” would afford plaintiffs equitable treatment to the 2010 exchange bondholders.

The district court rationalized its definition of “Ratable Payment” by concluding that the exchange bondholders “knew full well that other owners of FAA Bonds were seeking to obtain *full payment* of the amounts due on such bonds through persisting in the litigation.” Op. at 8. But exchange bondholders could not have foreseen that a court would enjoin independent third parties, disable trustees, and disregard settled aspects of New York law and the territorial limits to its own jurisdiction in order to condition payment of restructured debt on payment in full to holdout creditors. Like everyone else in the market, exchange bondholders could not have anticipated this outcome, since the theory on which it is based had no prior support in decades of market practice. Had the exchange bondholders remotely understood that their contracts supported this extraordinary result, no one would have entered into an exchange offer in the first place. *See* US Br. at 17 (the Injunctions incentivize bondholders not to restructure their debt).

The Argentine Executive could appeal to Argentina’s Congress to treat plaintiffs and others similarly situated in an equitable manner, but Argentina is a sovereign subject to a balance of powers. It cannot fulfill the district court’s demand, particularly while under this threat to its performing debt and debt holders.

III. A STAY WILL NOT HARM PLAINTIFFS

Staying the enforcement of the Amended Injunctions can cause no conceivable harm to plaintiffs. Exchange bondholders have been paid for years (while plaintiffs were perfectly content to let those payments occur), *and regular payments on exchange debt are scheduled for periodic intervals extending up to 2038. See, e.g., 2005 Prospectus Supplement (A-669).* The Court should not accept the false urgency plaintiffs created, and should allow the Republic and all interested third parties to prosecute their appeal rights before the Amended Injunctions – which *will* cause massive harm to the Republic and third parties – go into effect.

Moreover, *clear and convincing evidence* is necessary to find an injunction has been violated, but the district court relied solely on newspaper hearsay. *Latino Officers Ass’n of N.Y. v. City of New York*, 558 F.3d 159, 164 (2d Cir. 2009). The only evidence properly before the court stated the opposite of the court’s conclusion and affirmed that the Republic has complied, is complying and will comply with the Stay, which should be reinstated immediately. Eggers Decl. ¶ 4.

IV. THE PUBLIC INTEREST STRONGLY SUPPORTS A STAY

A stay is simply the only way to protect the significant interests of the public and third parties. By restructuring nearly 92% of its defaulted debt in 2005 and 2010, the Republic resolved thousands of claims that would otherwise be in the federal courts, and cleared the dockets of actions that had been brought on defaulted

debt. It is clearly not in the public interest to prevent a party from resolving the vast majority of the claims against it, and potentially subject it to new claims, only because it has been unable to resolve *all* claims against it. *See In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 202 (2d Cir. 2006) (noting the Second Circuit’s “longstanding adherence to the principal that courts are bound to encourage the settlement of litigation”) (citation and quotation marks omitted).

The third party submissions below demonstrated that the court lacked any legal basis to bind to the Amended Injunctions potentially hundreds of entities, and that the result of that ruling will be to disrupt an untold number of unrelated payment transfers and compel the Trustee to violate its fiduciary duties to exchange bondholders. In addition, the Amended Injunctions will no doubt prompt pari passu claims by other debt holders who will potentially claim that the clause is violated unless *they* are immediately paid in full when *plaintiffs* are paid, or that they should share, pari passu, in plaintiffs’ recovery.

In brief, absent a stay, the Amended Injunctions will result in increased litigation and inject more confusion and uncertainty into New York’s payment system and future debt restructurings. *See* Clearing House Amicus Br. at 26, dated Apr. 4, 2012 (noting “deleterious long-term impact on New York’s financial institutions and its preeminence as a financial center”) (Ex. S); James Mackintosh, *Argentina’s battle with Elliott*, *Fin. Times*, Nov. 22, 2012 (the October 26 Decision

and Orders “increase[] the incentive to reject future restructurings, even those with collective action clauses. . . . [F]uture borrowers would be well advised to avoid issuing bonds under New York law, unless they are happy to run the risk of ending up in the sovereign equivalent of a 19th-century debtors’ prison.”) (Ex. G); Mario Blejer, Op-Ed, Fin. Times, Nov. 25, 2012 (the Orders, if upheld, would “limit the tools available to policy makers in Europe and beyond”) (Ex. X). These are important issues affecting the Republic and numerous third parties, the interests of which, we respectfully submit, were not fully considered by the district court in the extremely brief amount of time it allowed for briefing and its decision – a fact highlighted by the apparent weight given by the court to statements made by Argentine officials expressing shock and strong disagreement with the court’s rulings (which as leaders of a sovereign nation they have a right to do), as opposed to the legal briefing and declaration submitted by the Republic, as well as the submissions of third parties in the proceedings below.

CONCLUSION

For the foregoing reasons, this Court should grant the Republic’s emergency motion for a stay.

Dated: New York, New York
November 26, 2012

Respectfully submitted,

CLEARY GOTTlieb STEEN &
HAMILTON LLP

By: /s/ Carmine Boccuzzi
Jonathan I. Blackman
(jblackman@cgsh.com)
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Attorneys for the Republic of Argentina

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----	X	
NML CAPITAL, LTD.,	:	
	:	
Plaintiff-Appellee,	:	
	:	
- v. -	:	12-105-cv(L)
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant-Appellant.	:	
	:	
	:	
-----	X	

DECLARATION OF CARMINE D. BOCCUZZI

Pursuant to 28 U.S.C. § 1746, Carmine D. Boccuzzi declares as follows:

1. I am an attorney admitted to practice before this Court and a partner at Cleary Gottlieb Steen & Hamilton LLP, counsel for defendant the Republic of Argentina (the “Republic”) in these matters. I submit this declaration on behalf of the Republic in support of the Republic’s Emergency Motion for Stay Pending Appeal.
2. As set out in the Motion, the district court’s Orders condition debt service on \$24 billion of performing debt on the Republic’s payment into an escrow some \$1.3 billion to these pre-judgment creditors, and accordingly a stay is needed urgently.

3. Attached to this declaration as Exhibits A-X are true and correct copies of the following documents:

<u>Ex.</u>	<u>Document</u>
A	Order, <i>Olifant Fund, Ltd. v. Republic of Argentina</i> , No. 10 Civ. 9587 (TPG) (S.D.N.Y. Nov. 26, 2012);
B	Order, <i>Varela v. Republic of Argentina</i> , No. 10 Civ. 5338 (TPG) (S.D.N.Y. Nov. 26, 2012);
C	Jonathan Wheatley, <i>New York law: not what it used to be</i> , Fin. Times, Nov. 23, 2012;
D	Order, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 21, 2012);
E	Opinion, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 21, 2012);
F	Stay Opinion, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 21, 2012);
G	James Mackintosh, <i>Argentina's battle with Elliott</i> , Fin. Times, Nov. 22, 2012;
H	Declaration of Francisco Guillermo Eggers, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012);
I	Memorandum of Law of Exchange Bondholder Group Regarding Issues Remanded by the Second Circuit and in Support of Motion to Vacate Pursuant to Rule 60(b), <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012);
J	Opposition Brief of Interested Non-Party Fintech Advisory Inc., <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012);
K	Brief of Non-Party Bank of New York Mellon, As Indenture Trustee, Addressing the Issues Raised on Remand from the Court of Appeals, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 16, 2012);

<u>Ex.</u>	<u>Document</u>
L	Letter of T. Baxter to J. Greisa, dated Nov. 16, 2012;
M	Letter of E. Heichel to J. Griesa, dated Nov. 16, 2012;
N	Letter of J. Alexander to J. Griesa, dated Nov. 16, 2012;
O	Petition for Panel Rehearing and Rehearing En Banc of Defendant-Appellant the Republic of Argentina, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 12-105-cv(L) (2d Cir. Nov. 13, 2012);
P	Hr’g Tr., <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 9, 2012);
Q	Slip Opinion, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 12-105-cv(L) (2d Cir. Oct. 26, 2012);
R	Hr’g Tr., <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 12-105-cv(L) (2d Cir. July 23, 2012);
S	Brief for <i>Amicus Curiae</i> the Clearing House Association L.L.C. in Support of Reversal, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 12-105-cv(L) (2d Cir. Apr. 4, 2012);
T	Brief for the United States of America as <i>Amicus Curiae</i> in Support of Reversal, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 12-105-cv(L) (2d Cir. Apr. 4, 2012);
U	Order Pursuant to F.R.C.P. 62(c), <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 08 Civ. 6978 (TPG) (S.D.N.Y. Mar. 5, 2012);
V	Brief for Plaintiff-Appellant, <i>NML Capital, Ltd. v. Republic of Argentina</i> , No. 05-1543-cv(L) (2d Cir. Apr. 7, 2005);
W	Agustino Fontevicchi, <i>Fed’s \$2.6T Payment System Risks Paralysis As Judge Orders Argentina To Pay Defaulted Bonds</i> , Forbes, Nov. 26, 2012;
X	Mario Blejer, Op-Ed, Fin. Times, Nov. 25, 2012.

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

Executed on November 26, 2012, in New York, New York.

/s/ Carmine Boccuzzi
CARMINE D. BOCCUZZI

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

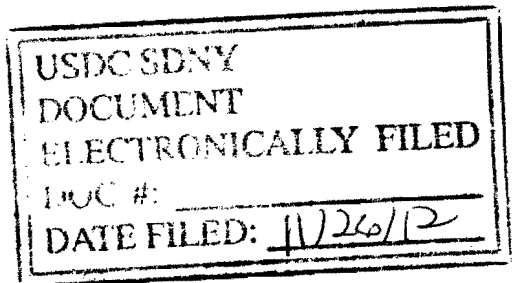
OLIFANT FUND, LTD.,

Plaintiff,

- against -

REPUBLIC OF ARGENTINA,

Defendant.



ORDER

10 Civ. 9587 (TPG)

~~RECEIVED~~ AMENDED FEBRUARY 23, 2012 ORDER

Upon consideration of the motion by Olifant Fund, Ltd. ("Olifant") for partial summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure ("FRCP") and for injunctive relief and/or specific performance pursuant to FRCP 65(d) and the court's inherent equitable powers, the response of the Republic of Argentina (the "Republic") thereto, and all other arguments submitted to the court in the parties' papers and at the hearing on this matter;

WHEREAS the uncontested facts establish that:

1. The Republic issued bonds pursuant to a 1994 Fiscal Agency Agreement ("FAA").
2. Paragraph 1(c) of the FAA provides, among other things, that:

The Securities [i.e., the bonds] will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).

3. The bonds issued pursuant to the FAA contain the following clause, as quoted in *EM Ltd. v. The Republic of Argentina*, 720 F. Supp. 2d 273, 278 (S.D.N.Y. 2010):

The Republic has in the Fiscal Agency Agreement irrevocably submitted to the jurisdiction of any New York state or federal court sitting in the Borough of Manhattan, The City of New York and the courts of the Republic of Argentina (the “Specified Courts”) over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Securities of this Series or the Fiscal Agency Agreement (a “Related Proceeding”) except with respect to any actions brought under the United States federal securities laws. The Republic has in the Fiscal Agency Agreement waived any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought in an inconvenient forum. The Republic agrees that a final nonappealable judgment in any such Related Proceeding (the “Related Judgment”) shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the “Other Courts”), by a suit upon such judgment.

4. Olifant owns bonds pursuant to the FAA (“Olifant’s Bonds”).
5. The Republic issued other bonds in its 2005 and 2010 Exchange Offers (“Exchange Bonds”), thereby creating new unsecured and unsubordinated External Indebtedness.
6. The Republic has satisfied the payment obligations that have come due to date under the Exchange Bonds.
7. The Republic has not paid principal or interest on Olifant’s Bonds since December, 2001.
8. Olifant has brought the above-captioned action to recover on the defaulted bonds, pursuant to its legal rights, and also pursuant to the express undertakings in the bonds.

9. On February 10, 2005, Argentina enacted Law 26,017, providing that the “national State shall be prohibited from conducting any type of in-court, out-of-court or private settlement with respect to bonds” that were eligible to participate in the 2005 Exchange Offer.

10. On December 9, 2009, Argentina enacted Law 26,547, which, inter alia, suspended the effect of Law 26,017 for a period of time during which the 2010 Exchange Offer was launched, closed, and consummated. Law 26,547 also provides that the “Republic of Argentina . . . is prohibited to offer holders of government bonds [including those issued pursuant to the FAA] who may have initiated judicial, administrative, arbitration or any other type of action [to enforce their rights], more favorable treatment than what is offered to those who have not done so.”

WHEREAS Olifant claims that the Republic breached (and continues to breach) its contractual duty to rank its payment obligations under Olifant’s Bonds at least equally with all its other present and future unsecured and unsubordinated External Indebtedness, Olifant seeks summary judgment on the Republic’s liability for that breach, and Olifant seeks an injunction that would restore it to its bargained-for position among other creditors;

It is HEREBY ORDERED that:

1. The motion for partial summary judgment pursuant to Rule 56(a) is GRANTED.

2. It is DECLARED, ADJUDGED, and DECREED that the Republic is required under Paragraph 1(c) of the FAA at all times to rank its payment obligations

pursuant to Olifant's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated External Indebtedness.

3. It is DECLARED, ADJUDGED, and DECREED that the Republic's payment obligations on the bonds include its payment obligations to bondholders who have brought actions to recover on their defaulted bonds, and on judgments entered pursuant to judicial action brought by bondholders.

4. It is DECLARED, ADJUDGED, and DECREED that the Republic violates Paragraph 1(c) of the FAA whenever it lowers the rank of its payment obligations under Olifant's Bonds below that of any other present or future unsecured and unsubordinated External Indebtedness, including (and without limitation) by relegating Olifant's Bonds to a non-paying class by failing to pay the obligations currently due under Olifant's Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness or by legislative enactment.

5. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Olifant's Bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Olifant's Bonds.

6. It is DECLARED, ADJUDGED, and DECREED that the Republic lowered the rank of Olifant's Bonds in violation of Paragraph 1(c) of the FAA when it enacted Law 26,017 and Law 26,547.

7. It is DECLARED, ADJUDGED, and DECREED that the aforesaid laws were in direct violation of the right of Olifant under the FAA and the bond agreements to bring a legal action in court to recover on the defaulted bonds.

8. It is DECLARED, ADJUDGED, and DECREED that Olifant is irreparably harmed by and has no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

- a. Absent equitable relief, Olifant would suffer irreparable harm because the Republic's payment obligations to Olifant would remain debased of their contractually-guaranteed status, and Olifant would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.
- b. There is no adequate remedy at law for the Republic's ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear—indeed, it has codified in Law 26,017 and Law 26,547—its intention to defy any money judgment issued by this Court.
- c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to Olifant. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Olifant to harm. On the other hand, the Order requires of the Republic only that which it promised Olifant and similarly situated creditors to induce those creditors to purchase the

Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both Olifant (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Olifant, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

- d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

9. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Olifant under Paragraph 1(c) of the FAA as follows:

- a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur

in the future (collectively, the “Exchange Bonds”), the Republic shall concurrently or in advance make a “Ratable Payment” to Olifant (as defined below and as further defined in the Court’s Opinion of November 21, 2012 in the *NML Capital, Ltd. v. The Republic of Argentina* cases, Nos. 08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708).

- b. Such “Ratable Payment” that the Republic is ORDERED to make to Olifant shall be an amount equal to the “Payment Percentage” (as defined below) multiplied by the total amount currently due to Olifant in respect of the bonds at issue in this case (10 Civ. 9587), including pre-judgment interest (the “Olifant Bonds”).
- c. Such “Payment Percentage” shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.
- d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Olifant.
- e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds (“Participants”). Such

Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Olifant.

- f. “Participants” refer to those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New

York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

- g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an “intermediary bank,” under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.
- h. Any non-party that has received proper notice of this ORDER, pursuant to Rule 65(d)(2), and that requires clarification as to its duties, if any, under this ORDER may make an application to this Court, with notice to the Republic and Olifant. Such clarification will be promptly provided.
- i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for Olifant, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Olifant.

10. Olifant shall be entitled to discovery to confirm the timing and amounts of the Republic’s payments under the terms of the Exchange Bonds; the amounts the

Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

11. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

12. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
November 21, 2012


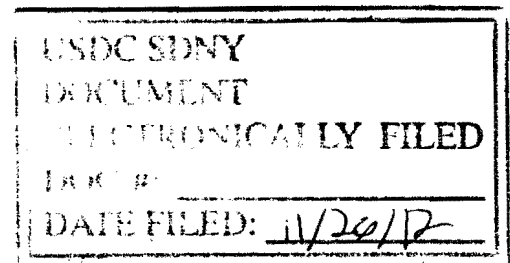

Thomas P. Griesa
U.S. District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



PABLO ALBERTO VARELA, *et al.*,

Plaintiffs,

No. 10 Civ. 5338 (TPG)

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

~~PROPOSED~~ AMENDED FEBRUARY 23, 2012 ORDER

WHEREAS, in an Order dated December 13, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement (“FAA”), the Republic is “required . . . at all times to rank its payment obligations pursuant to Plaintiffs’ Bonds at least equally with all the Republic’s other present and future unsecured and unsubordinated External Indebtedness.”

WHEREAS, in its December 13, 2011 Order, this Court granted partial summary judgment to Plaintiffs on their claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, “ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs’ Bonds.”

And WHEREAS Plaintiffs have filed a motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court’s inherent equitable powers.

Upon consideration of Plaintiffs’ motion, the response of the Republic of Argentina

(the “Republic”) thereto, Plaintiffs’ reply, and all other arguments submitted to the Court in the parties’ papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that Plaintiffs are irreparably harmed by and have no adequate remedy at law for the Republic’s ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

- a. Absent equitable relief, Plaintiffs would suffer irreparable harm because the Republic’s payment obligations to Plaintiffs would remain debased of their contractually-guaranteed status, and Plaintiffs would never be restored to the position they were promised that they would hold relative to other creditors in the event of default.
- b. There is no adequate remedy at law for the Republic’s ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear – indeed, it has codified in Law 26,017 and Law 26,547 – its intention to defy any money judgment issued by this Court.
- c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic’s repeated failures to make required payments to Plaintiffs. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting Plaintiffs to harm. On the other hand, the Order requires of the Republic only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase the Republic’s bonds. Because the Republic has the financial wherewithal to meet its

commitment of providing equal treatment to both Plaintiffs (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.

- d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to Plaintiffs under Paragraph 1(c) of the FAA as follows:

- a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to Plaintiffs (as defined below and as further defined in the Court's Opinion of November 21, 2012 in the *NML Capital, Ltd. v. The Republic of Argentina* cases, Nos. 08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708).

- b. Such “Ratable Payment” that the Republic is ORDERED to make to Plaintiffs shall be an amount equal to the “Payment Percentage” (as defined below) multiplied by the total amount currently due to Plaintiffs in respect of the bonds at issue in these cases (09 Civ. 8757, 09 Civ. 10620, 10 Civ. 1602, 10 Civ. 3507, 10 Civ. 3970, 10 Civ. 4101, 10 Civ. 4782, 10 Civ. 8339), including pre-judgment interest (the “Plaintiffs’ Bonds”).
- c. Such “Payment Percentage” shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.
- d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to Plaintiffs.
- e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds (“Participants”). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to Plaintiffs.
- f. “Participants” refer to those persons and entities who act in active concert or

- participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depositary Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London))); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.
- g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an “intermediary bank,” under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.
- h. Any non-party that has received proper notice of this ORDER, pursuant to Rule 65(d)(2), and that requires clarification as to its duties, if any, under this ORDER may make an application to this Court, with notice to the Republic

and Plaintiffs. Such clarification will be promptly provided.

- i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for Plaintiffs, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to Plaintiffs.

3. Plaintiffs shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

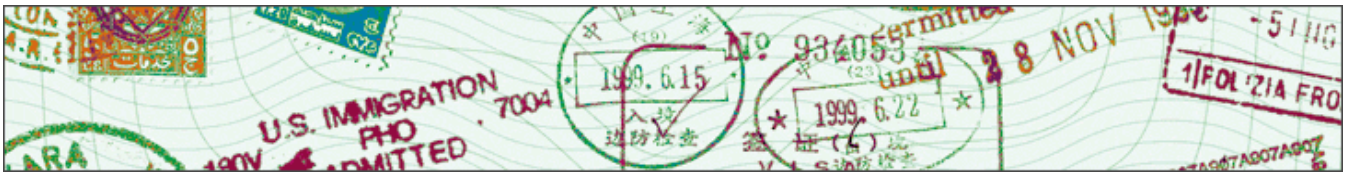
5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
Nov. 21, 2012



Thomas P. Griesa
U.S. District Judge

EXHIBIT C



FINANCIAL TIMES

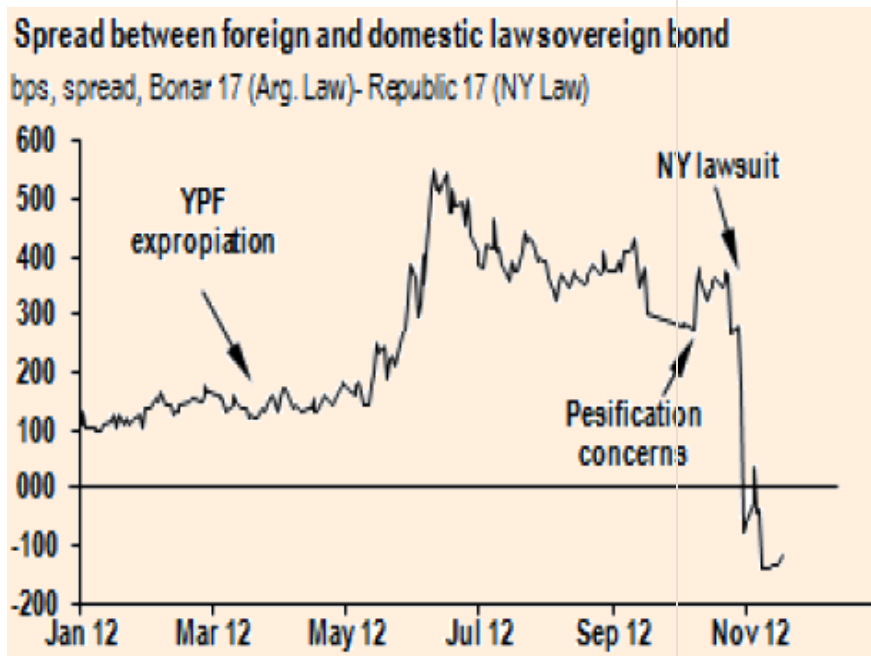
New York law: not what it used to be

November 23, 2012 4:49 pm by Jonathan Wheatley

There was a time, not long ago – until Wednesday night, to be exact – when investors would pay a premium on emerging market debt subject to New York law. Not any more.

Judge Thomas Griesa's ruling that Argentina must pay \$1.3bn to holdout creditors has all sorts of implications for sovereign borrowers and lenders. It has also, at a stroke, wiped out the New York law premium, as a chart from Vladimir Werning at JP Morgan illustrates.

Here it is:



Source: JP Morgan

Speaks for itself. But to elaborate (paraphrasing Werning): as the risk of a New York ruling in favour of the holdouts has increased (overnight), the value of New

York law to holders of restructured bonds has decreased. In his words, “The domestic law risk premium is currently trading at a discount.”

It’s not hard to see why. Werning again:

Investors considering a future sovereign restructuring are being told by a US Court that a debtor’s (post-restructuring) access to the US payment system will be conditional on a pro rata payment (possibly 100%) to defaulted debt holders not participating.

As he told beyondbrics: “Investors considering taking part in restructuring would be inclined to reconsider. So the proposed pro rata remedy defeats the pseudo cram-down process that collective action clauses were intended to provide to sovereign bonds.”

The Griesa ruling, if upheld, means that any sovereign bondholder thinking of participating in a restructuring will know there is a good chance that they will only get paid once any holdouts have been paid their 100 per cent.

So why would anybody take a haircut?

Related reading:

Argentina angry at hedge fund court win, FT

Chronicle of a default foretold? FT

Argentina debt: it’s not just the ruling, it’s the attitude, beyondbrics

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
NML CAPITAL, LTD.,	:	
	:	
Plaintiff,	:	<u>ORDER</u>
	:	08 Civ. 6978 (TPG)
- against -	:	09 Civ. 1707 (TPG)
	:	09 Civ. 1708 (TPG)
REPUBLIC OF ARGENTINA,	:	
	:	
Defendants.	:	
	:	
-----X		

AMENDED FEBRUARY 23, 2012 ORDER

WHEREAS, in an Order dated December 7, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement (“FAA”), the Republic is “required . . . at all times to rank its payment obligations pursuant to NML’s Bonds at least equally with all the Republic’s other present and future unsecured and unsubordinated External Indebtedness.”

WHEREAS, in its December 7, 2011 Order, this Court granted partial summary judgment to NML on its claim that the Republic repeatedly has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, “ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under NML’s Bonds.”

And WHEREAS NML Capital, Ltd. (“NML”) has filed a renewed motion for equitable relief as a remedy for such violations pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court’s inherent equitable powers.

Upon consideration of NML’s renewed motion, the response of the Republic of Argentina (the “Republic”) thereto, NML’s reply, and all other arguments submitted to the Court in the parties’ papers and at oral argument, it is HEREBY ORDERED that:

1. It is DECLARED, ADJUDGED, and DECREED that NML is irreparably harmed by and has no adequate remedy at law for the Republic’s ongoing violations of Paragraph 1(c) of the FAA, and that the equities and public interest strongly support issuance of equitable relief to prevent the Republic from further violating Paragraph 1(c) of the FAA, in that:

- a. Absent equitable relief, NML would suffer irreparable harm because the Republic’s payment obligations to NML would remain debased of their contractually-guaranteed status, and NML would never be restored to the position it was promised that it would hold relative to other creditors in the event of default.
- b. There is no adequate remedy at law for the Republic’s ongoing violations of Paragraph 1(c) of the FAA because the Republic has made clear – indeed, it has codified in Law 26,017 and Law

26,547 – its intention to defy any money judgment issued by this Court.

- c. The balance of the equities strongly supports this Order in light of the clear text of Paragraph 1(c) of the FAA and the Republic's repeated failures to make required payments to NML. In the absence of the equitable relief provided by this Order, the Republic will continue to violate Paragraph 1(c) with impunity, thus subjecting NML to harm. On the other hand, the Order requires of the Republic only that which it promised NML and similarly situated creditors to induce those creditors to purchase the Republic's bonds. Because the Republic has the financial wherewithal to meet its commitment of providing equal treatment to both NML (and similarly situated creditors) and those owed under the terms of the Exchange Bonds, it is equitable to require it to do so. Indeed, equitable relief is particularly appropriate here, given that the Republic has engaged in an unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to NML, in direct violation of its contractual commitment set forth in Paragraph 1(c) of the FAA.
- d. The public interest of enforcing contracts and upholding the rule of law will be served by the issuance of this Order, particularly here, where creditors of the Republic have no

recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

2. The Republic accordingly is permanently ORDERED to specifically perform its obligations to NML under Paragraph 1(c) of the FAA as follows:

- a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to NML (as defined below and as further defined in the Court's Opinion of November 21, 2012).
- b. Such "Ratable Payment" that the Republic is ORDERED to make to NML shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to NML in respect of the bonds at issue in these cases (08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708), including pre-judgment interest (the "NML Bonds").
- c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic

intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

- d. The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to NML.
- e. Within three (3) days of the issuance of this ORDER, the Republic shall provide copies of this ORDER to all participants in the payment process of the Exchange Bonds (“Participants”). Such Participants shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA, such as any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to NML.
- f. “Participants” refer to those persons and entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds, including: (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York);

(2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depository (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London))); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

- g. Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an “intermediary bank,” under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104, implementing a funds transfer in connection with the Exchange Bonds.
- h. Any non-party that has received proper notice of this ORDER, pursuant to Rule 65(d)(2), and that requires clarification as to

its duties, if any, under this ORDER may make an application to this Court, with notice to the Republic and NML. Such clarification will be promptly provided.

- i. Concurrently or in advance of making a payment on the Exchange Bonds, the Republic shall certify to the Court and give notice of this certification to its Participants, and to counsel for NML, that the Republic has satisfied its obligations under this ORDER to make a Ratable Payment to NML.

3. NML shall be entitled to discovery to confirm the timing and amounts of the Republic's payments under the terms of the Exchange Bonds; the amounts the Republic owes on these and other obligations; and such other information as appropriate to confirm compliance with this ORDER;

4. The Republic is permanently PROHIBITED from taking action to evade the directives of this ORDER, render it ineffective, or to take any steps to diminish the Court's ability to supervise compliance with the ORDER, including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval by the Court;

5. This Court shall retain jurisdiction to monitor and enforce this ORDER, and to modify and amend it as justice requires to achieve its equitable purposes and to account for changing circumstances.

Dated: New York, New York
November, 21 2012

A handwritten signature in black ink, reading "Thomas P. Griesa", written over a horizontal line.

Thomas P. Griesa
U.S. District Judge

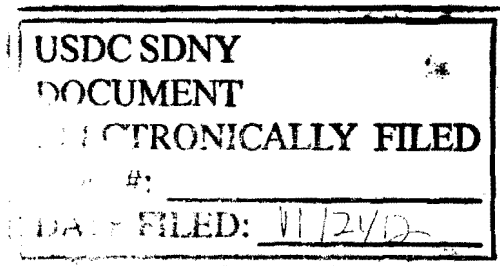


EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
NML CAPITAL, LTD.,	:	
	:	
Plaintiff,	:	<u>OPINION</u>
	:	08 Civ. 6978 (TPG)
– against –	:	09 Civ. 1707 (TPG)
	:	09 Civ. 1708 (TPG)
REPUBLIC OF ARGENTINA,	:	
	:	
Defendants.	:	
	:	
-----X		

On October 26, 2012, the Court of Appeals handed down an opinion affirming certain injunctions entered by the District Court. These injunctions were designed to remedy Argentina’s breach of the *Pari Passu* Clause, including the “Equal Treatment Provision,” contained in the contractual provisions of the Fiscal Agency Agreement Bonds (“FAA Bonds”) at issue in this litigation. This breach resulted from the fact that Argentina had issued new debt pursuant to exchange offers in 2005 and 2010 (“Exchange Bonds”), and was making the payments required on this new debt, but had declared that it would make no payments to those still holding the FAA Bonds. It is of note that the Court of Appeals affirmed the finding of the District Court that, although there had originally been a default on the FAA Bonds because of a well-known financial crisis, currently Argentina is able to make the payments on both the FAA Bonds owned by plaintiffs and the Exchange Bonds.

An essential part of the ruling of the Court of Appeals was to affirm the injunctive relief fashioned by the District Court. It ruled that Argentina must make appropriate payments to plaintiffs on their FAA Bonds concurrent with or in advance of any payments to holders of the 2005 and 2010 Exchange Bonds. However, the Court of Appeals remanded, directing that the District Court clarify precisely how the payment formula, regarding payments to plaintiffs, is intended to operate. Also, the Court of Appeals directed a more precise determination as to how the injunctions would apply to third parties, including intermediary banks.

On remand, the court has not only received briefs from plaintiffs and Argentina, but has also received briefs and letters from exchange bondholders, parties responsible for handling the payment process to these bondholders, and the Federal Reserve Bank. The court has considered these materials without requiring formal interventions.

Payment Formula

The injunctions affirmed by the Court of Appeals are contained in an Order of the District Court dated February 23, 2012, which contains a number of injunction provisions and which is referred to by the Court of Appeals as the “Injunctions.” Paragraph two of the Injunctions provides:

The Republic accordingly is permanently ORDERED to specifically perform its obligations to NML under Paragraph 1(c) of the FAA as follows:

- a. Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" (as defined below) to NML.
- b. Such "Ratable Payment" that the Republic is ORDERED to make to NML shall be an amount equal to the "Payment Percentage" (as defined below) multiplied by the total amount currently due to NML in respect of the bonds at issue in these cases (08 Civ. 6978, 09 Civ. 1707, and 09 Civ. 1708), including pre-judgment interest (the "NML Bonds").
- c. Such "Payment Percentage" shall be the fraction calculated by dividing the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.

The Court of Appeals stated that it is unable to discern from the record precisely how this formula is intended to operate, and further stated:

It could be read to mean that if, for example, Argentina owed the holders of restructured debt \$100,000 in interest and paid 100% of that amount then it would be required to pay the plaintiffs 100% of the accelerated principal and all accrued interest. Or it could be read to mean that, if such a \$100,000 payment to the exchange bondholders represented 1% of the principal and interest outstanding on the restructured debt, then Argentina must pay plaintiffs 1% of the amount owed to them. The following discussion is intended to provide the clarification requested by the Court of Appeals.

Although the provisions of the February 23, 2012 Injunctions regarding the "Ratable Payment" are phrased in a somewhat complicated manner, the actual meaning is quite straightforward. The obligation to plaintiffs under the February 23, 2012 Injunctions accrues whenever Argentina "pays any amount due" under the terms of the Exchange Bonds. The next time this will occur will be in December 2012, when Argentina is scheduled to make interest payments

on the Exchange Bonds of about \$3.14 billion: \$42 million on December 2, \$3 billion on December 15, and \$100 million on December 31. When this occurs, Argentina will be required to make a “Ratable Payment” to plaintiffs. Assuming that Argentina pays 100% of what is then due on the Exchange Bonds, this is the “Payment Percentage” referred to in paragraph 2(b). Argentina would be required to pay 100% “multiplied by the total amount currently due” to plaintiffs. There is no question about what is “currently due” to plaintiffs. The amount that is currently due is the amount of the unpaid principal, the due date of which has been accelerated, and accrued interest.¹ The total of these amounts due to plaintiffs is approximately \$1.33 billion. Thus, at some time in December 2012, when Argentina makes the interest payments on the Exchange Bonds, amounting to a total of about \$3.14 billion, Argentina will be required to pay plaintiffs approximately \$1.33 billion.

This is in accord with the first hypothetical situation posed in the Court of Appeals’ opinion, describing the situation in which Argentina owes the holders of restructured debt \$100,000 in interest and pays 100% of that amount, resulting in the requirement to pay plaintiffs 100% of the accelerated principal plus all accrued interest.

¹ Although judgments have been entered in other related cases, the cases before the court in this matter are ones where judgment has not been entered. See Transcript of Oral Argument at 26-27, NML Capital v. The Republic of Argentina, (February 23, 2012) (03 Civ. 8845).

The second hypothetical situation posed by the Court of Appeals, resulting in Argentina paying plaintiffs 1% of the amount owed to them, is based on a misinterpretation of the relevant language of the Injunctions. The second hypothetical assumes a \$100,000 payment to the Exchange bondholders, representing 1% of the total “principal and interest outstanding on the restructured debt,” most of which is payable in the future. But the obligation of Argentina under the payment formula in the Injunctions arises when Argentina “pays any amount due” to the exchange bondholders. In the present case, this would next occur when Argentina pays the interest due on the Exchange Bonds in December 2012. Also, the Payment Percentage is calculated on the basis of “the amount actually paid or which the Republic intends to pay,” as a percentage of “the total amount then due.” None of this relevant language refers to any calculation based upon the total amount of principal and interest outstanding on the restructured debt, including large amounts of principal and interest to be paid into the future.

To recapitulate, the Ratable Payment provisions in the Injunctions, as correctly interpreted and as intended by the court, would be currently applied as follows. In December 2012, there are interest payments of approximately \$3.14 billion due on the Exchange Bonds. Presumably, Argentina intends to pay 100% of what is owed. There are currently debts owed to plaintiffs by Argentina of approximately \$1.33 billion. It should be emphasized that these are debts currently owed, not debts spaced out over future periods of time. In

order to comply with the terms of the Injunctions, Argentina must pay plaintiffs 100% of that \$1.33 billion concurrently with or in advance of the payments on the Exchange Bonds.

This result is not only in accordance with the payment formula provisions of the Injunctions, it is consistent with the *Pari Passu* Clause and its Equal Treatment Provision. In saying this, the court recognizes that the debt now owed to the exchange bondholders is of a different amount and of a different nature from what is owed to plaintiffs. What is owed in December 2012 to exchange bondholders are interest payments, which are part of a series which will go on being paid until the maturity of the Exchange Bonds. The debt owed to plaintiffs is accelerated principal plus accrued interest. But it is obvious that a *Pari Passu* Clause does not require that the debts in question be in the same amount or of the same nature. What is required is that the obligations under the various debts are complied with to the same extent, rather than having the obligations on one debt honored and the obligations on the other debt repudiated, as has occurred in the present case.

Of course, what is being done here is not literally to carry out the *Pari Passu* Clause, as would be done in a normal commercial situation, but to provide a remedy for Argentina's violation of the Clause. NML Capital v. The Republic of Argentina, No. 12-105(L), at 19 n.10 (2d Cir. Oct. 26, 2012)(hereinafter "Opinion"). Yet, the remedy must bear some reasonable relation to the *Pari Passu* Clause in order to be a sensible remedy. One

definition of *pari passu* in Black's Law Dictionary (8th ed. 2004) is "proportionally," obviously referring to the use of the same proportion in paying down two kinds of debts. This is clearly reflected in the Ratable Payment provisions in the Injunctions, as correctly interpreted. These provisions properly start with the fact that if 100% of what is currently due to the exchange bondholders is paid, then 100% of what is currently due to plaintiffs must also be paid. The payment to plaintiffs must surely relate to a debt actually due to them. And this leads to the problem which this court finds in the second hypothetical posed by the Court of Appeals. There is simply no debt owed to plaintiffs on terms providing for payments of 1% of some sum of money, spaced out over 100 installments of 1% each. The second hypothetical of the Court of Appeals would involve a radical departure from the payment formula in the Injunctions and from the *Pari Passu* Clause.

Again, there is no suggestion of interfering with what the exchange bondholders are due to be paid. The question raised by the Court of Appeals relates solely to how much plaintiffs are to be paid at the time exchange bondholders are paid. But the fact is that the amount owed to plaintiffs by Argentina is the accelerated principal plus accrued interest. Argentina owes this and owes it now. No one has suggested any basis in contract or in policy why Argentina deserves to have payment of the amount due to plaintiffs spread over some period of time.

Moreover, and this is most important, to apply the second hypothetical of the Court of Appeals and spread payment to plaintiffs over a period of time, would be a far cry from a proper remedy for the flagrant and intentional contract violations committed by Argentina.

Argentina and certain exchange bondholders argue that it is unjust for them to be receiving thirty cents on the dollar by virtue of the Exchange Bonds, while plaintiffs receive full payment pursuant to the court rulings. The Court of Appeals essentially answered this argument (Opinion at 26 n.15). However, some further discussion is in order.

In accepting the exchange offers of thirty cents on the dollar, the exchange bondholders bargained for certainty and the avoidance of the burden and risk of litigating their rights on the FAA Bonds. However, they knew full well that other owners of FAA Bonds were seeking to obtain full payment of the amounts due on such bonds through persisting in the litigation. Indeed, the exchange bondholders were able to watch year after year while plaintiffs in the litigation pursued methods of recovery against Argentina which were largely unsuccessful. However, decisions have now been handed down by the District Court and the Court of Appeals based on the *Pari Passu* Clause, which give promise of providing plaintiffs with full recovery of the amounts due to them on their FAA Bonds. This is hardly an injustice. The exchange bondholders made the choice not to pursue the route which plaintiffs have pursued. Moreover, it is hardly an injustice to have legal rulings which, at long last, mean that

Argentina must pay the debts which it owes. After ten years of litigation this is a just result.

Third Parties

It is the intention of the court to properly apply Rule 65(d) of the Federal Rules of Civil Procedure. This Rule provides that an injunction binds the parties, the parties' agents, and other persons who are in active concert or participation with the parties or their agents. It is further provided that an injunction binds these people only if they receive actual notice of the injunction.

The issue arises because of the need to ensure enforcement of the Injunctions' requirement that payments are to be made on the Exchange Bonds only if appropriate payments are made concurrently or in advance to plaintiffs. The Court of Appeals noted that the District Court was invoking Rule 65(d), "Anticipating that Argentina would refuse to comply with the Injunctions and in order to facilitate payment." It goes without saying that if Argentina is able to make the payments on the Exchange Bonds without making the payments to plaintiffs, the District Court and Court of Appeals' rulings and the Injunctions will be entirely for naught. To avoid this, it is necessary that the process for making payments on the Exchange Bonds be covered by the Injunctions, and that the parties participating in that process be so covered.

The February 23, 2012 Injunctions contain a provision prohibiting Argentina from taking any action to evade the directives of the Injunctions and further prohibiting Argentina from altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval of the court.

The process and the parties involved in making payments on the Exchange Bonds are as follows. Argentina transfers funds to the Bank of New York Mellon (“BNY”), which is the indenture trustee in a Trust Indenture of 2005.² Presumably there is a similar indenture for the 2010 exchange offer. BNY then forwards the funds to the “registered owner” of the Exchange Bonds. There are two registered owners for the 2005 and 2010 Exchange Bonds. One is Cede & Co. and the other is the Bank of New York Depositary (“BNY Depositary”). Cede and BNY Depositary transfer the funds to a “clearing system” such as the Depository Trust Company (“DTC”). The funds are then deposited into financial institutions, apparently banks, which then transfer the funds to their customers who are the beneficial interest holders of the bonds.

Plaintiffs assert that under Rule 65(d), the Injunctions should bind Argentina, the indenture trustee, the registered owners, and the clearing system, whoever they are. It is probably true that these parties are not all

² There is apparently a dispute as to whether this payment takes place in Argentina or the United States. However, BNY is surely a United States entity. The rest of the process, without question takes place in the United States.

agents of Argentina, but they surely are “in active concert or participation” with Argentina in processing the payments from Argentina to the exchange bondholders.

There is a problem under Article 4A of the U.C.C. about including intermediary banks. But plaintiffs address this in seeking a carve-out in the Injunctions for such intermediary banks. Plaintiffs are also not requesting that the financial institutions receiving funds from the DTC be bound by the Injunctions.

It would appear that plaintiffs have requested that a reasonable set of parties be bound by the Injunctions, and this is in compliance with Rule 65(d).

BNY, and to some extent others on the above list, object to any application of Rule 65(d) to them. Particularly BNY strenuously asserts that it has duties as indenture trustee, and these duties should be the beginning and the end of its responsibilities.

These arguments miss the point. If Argentina complies with the rulings of the Court of Appeals, there will be no problem about funds destined for exchange bondholders being deposited with BNY and going up the chain until they arrive in the hands of such bondholders. But if Argentina attempts to make payments to the exchange bondholders, contrary to the ruling of the Court of Appeals and thus contrary to law, this would not involve the normal and proper situation dealt with by BNY under the indenture, and dealt with by

others in the chain. Under these circumstances, these third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps.

The Order

Since the Court of Appeals has essentially affirmed the February 23, 2012 Order containing the Injunctions, that Order will remain in effect, subject to the following qualifications. In paragraph 2a, there will be an appropriate reference to the definitions contained in the current opinion, which does not change the relevant wording but further defines it.

The court believes that plaintiffs properly recommend specific wording listing the parties bound by the Order under Rule 65(d). Accordingly, that listing will be included.

Dated: New York, New York
November 21, 2012



Thomas P. Griesa
U. S. District Judge

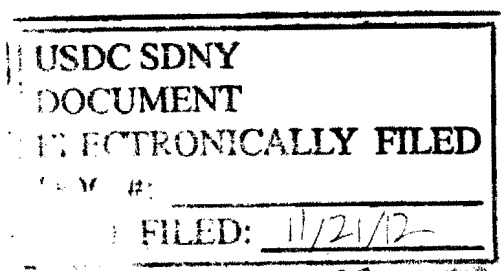


EXHIBIT F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
NML CAPITAL, LTD.,	:	
	:	
Plaintiff,	:	<u>OPINION</u>
	:	08 Civ. 6978 (TPG)
– against –	:	09 Civ. 1707 (TPG)
	:	09 Civ. 1708 (TPG)
REPUBLIC OF ARGENTINA,	:	
	:	
Defendants.	:	
	:	
-----X		

On March 5, 2012, this court signed an order staying the effect of the February 23, 2012 Order pending Argentina's appeal. Specifically, the stay was to remain in effect until the Court of Appeals issued its mandate disposing of Argentina's appeal. However, the March 5, 2012 Order contained the following provision in paragraph 2:

2. To secure Plaintiffs' rights during the pendency of the Republic's appeals of the February 23, 2012 Orders to the Second Circuit, it is ordered that the Republic shall not during the pendency of the appeal to the Second Circuit take any action to evade the directives of the February 23, 2012 Orders in the event they are affirmed, render them ineffective in the event they are affirmed, or diminish the Court's ability to supervise compliance with the February 23, 2012 Orders in the event they are affirmed, including without limitation, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without prior approval of the Court.

Finally, the concluding paragraph 4 of the March 5, 2012 Order provided:

4. This Court shall retain jurisdiction to monitor and enforce this ORDER, and, on notice to the parties, to modify, amend, or extend it as justice requires to achieve its equitable purposes and account

for materially changed circumstances, including any failure by the Republic to abide by Paragraph (2) herein.

The February 23, 2012 Order was affirmed by the Court of Appeals on October 26, 2012, subject to a remand to the District Court for clarification on two specified questions. The District Court is this day filing an opinion responding to the questions raised by the Court of Appeals. The matter will now return to the Court of Appeals to deal with the District Court's responses to the questions posed. After that, there will be a final ruling by the Court of Appeals. However, it should be made clear that the questions posed to the District Court did not affect the basic ruling of the Court of Appeals that there can be no payments by Argentina to exchange bondholders without an appropriate payment to plaintiffs.

Under these circumstances, the District Court would ordinarily leave the March 5, 2012 Stay in effect until the Court of Appeals has finished its work. However, an extraordinary circumstance has arisen, which clearly demands judicial action, and that action can only be taken now by the District Court, where the case now resides.

From the moment of the October 26, 2012 Court of Appeals' decision, the highest officials in Argentina have declared that Argentina would pay the exchange bondholders but would not pay one dollar to holders of the original FAA Bonds. President Cristina Kirchner made such a statement. The Minister

of Economy, Lorenzino, declared that despite any ruling to come out of any jurisdiction, Argentina would not pay the FAA bondholders.

On November 9, 2012, the court met with counsel and asked the attorney for Argentina if the press reports of the above statements were correct. In response, the attorney turned to other subjects, meaning that the press reports were not denied. At the November 9, 2012 meeting, the court reminded all concerned that Argentina is subject to the jurisdiction of the federal courts in New York, to which Argentina has consented. For the past ten years Argentina has repeatedly submitted matters to the District Court and the Court of Appeals, and received what was undoubtedly fair treatment, since Argentina prevailed in most matters. The court went on to urge that the Argentine government should back away from these ill-advised threats to defy the current court rulings, and that any defiance of the rulings of the courts would not only be illegal but would represent the worst kind of irresponsibility in dealing with the judiciary.

This did not stop the highest Argentine officials who have continued to the present time their inflammatory declarations that the court rulings will not be obeyed.

These statements are a violation of paragraph 2 of the March 5, 2012 Stay Order. In that paragraph, Argentina is prohibited, during the appeal, from taking any action to evade the February 23, 2012 Order in the event it is affirmed, and is further prohibited from taking any action to diminish the

court's ability to supervise compliance with the February 23, 2012 Order in the event of affirmance. Pursuant to paragraph 4 of the Stay Order, the Court retains jurisdiction to deal with materially changed circumstances, including any failure by Argentina to abide by paragraph 2.

It could be argued that the statements of the high Argentine officials do not literally constitute the kind of "action" referred to in paragraph 2. But the essential issue goes beyond this.

Surely an extraordinary circumstance of the most serious nature arises from continuous declarations by the President of Argentina and cabinet officers, that Argentina will not honor or carry out the current rulings of the District Court and Court of Appeals in the litigation to which Argentina is a party.

It is the view of the District Court that these threats of defiance cannot go by unheeded, and that action is called for.

After due consideration, the court has resolved that the following steps should be taken. The court believes that the Order regarding Ratable Payments should be put into effect at the earliest possible time. The less time Argentina is given to devise means for evasion, the more assurance there is against such evasion. Therefore, the provision in the March 5, 2012 Order staying the carrying out of the February 23, 2012 Order is vacated and it is directed that the February 23, 2012 Order, as now somewhat modified, is to be

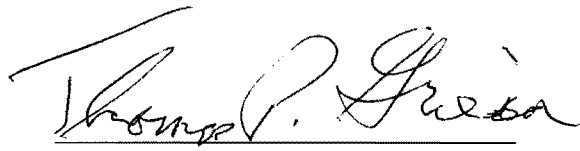
carried out forthwith. This means that the February 23, 2012 Order will be applicable to the interest payments made to exchange bondholders in December 2012. In order to avoid confusion and to give some reasonable time to arrange mechanics, the court specifies that the precise interest payment involved will be that of December 15, 2012. Counsel for Argentina is directed to consult with counsel for plaintiffs in order to arrive at the exact amount to be paid to plaintiffs and other mechanics.

Since the Court of Appeals has not finally spoken on the subject of the calculation of the payment to plaintiffs, such payment is to be made into an escrow account, so that any adjustments required by the final Court of Appeals' ruling can be made. The court will consult with counsel about the proper party or institution to hold the escrow account.

Copies of this opinion, together with copies of the Amended February 23, 2012 Order, such amendment to be dated as of this date, will be promptly provided to the parties involved in payments to exchange bondholders, who will be on notice that the December 15, 2012 interest payments due to exchange bondholders cannot be made unless Argentina certifies that it is making the appropriate payment for the benefit of plaintiffs to the escrow account, either in advance of or concurrent with any payment to exchange bondholders.

The Amended February 23, 2012 Order is being issued today. It will be called "Amended February 23, 2012 Order," and will be dated today, November 21, 2012.

Dated: New York, New York
November 21, 2012


Thomas P. Griesa
U. S. District Judge

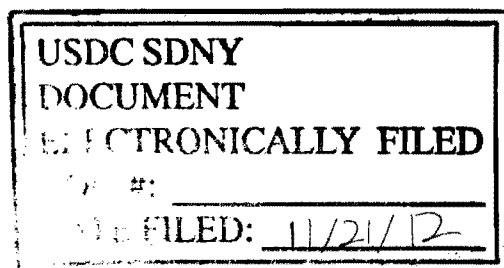


EXHIBIT G

FINANCIAL TIMES

THE SHORT VIEW

November 22, 2012 7:34 pm

Argentina's battle with Elliott

By James Mackintosh

Contract law and sovereign debt never sat well together, as states cannot be wound up. A US court this week may have broken the informal structures developed for state insolvency.

Argentina has been the subject of a classic legal battle. US hedge fund Elliott Associates, run by Arsenal fan and billionaire Paul Singer, hoovered up Argentine bonds on the cheap after the country hit crisis and defaulted on its debts in 2001. Elliott then refused to take part in debt restructurings that saw 93 per cent of bondholders accept new bonds worth only a third of their previous value.

Instead, Elliott fought in the courts. On Wednesday, New York Judge Thomas Griesa made a radical order: Elliott must be paid \$1.3bn (the face value of its bonds plus interest) before holders of restructured bonds are paid interest due next month. In addition, the US bank acting as trustee for restructured bonds (as well as Belgium-based Euroclear) was ordered not to help Argentina.

There will be last-minute appeals, but Argentina might well default again rather than pay Elliott.

The judge argues it is fair for Elliott to be paid in full, while others take big losses, because they chose not to go to court. "[It] is hardly an injustice to have legal rulings which, at long last, mean that Argentina must pay the debts which it owes," Mr Griesa wrote.

He would have been better off quoting Billy Bragg: "This isn't a court of justice, son, this is a court of law." The ruling increases the incentive to reject future restructurings, even those with collective action clauses. Countries that find themselves unable to pay their debts will be locked out of the international financial system until they somehow come up with the money.

Argentina deserves little sympathy, having behaved atrociously towards its creditors. But future borrowers would be well advised to avoid issuing bonds under New York law, unless they are happy to run the risk of ending up in the sovereign equivalent of a 19th-century debtors' prison.

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Bungled fungals

The man who would be PM

Ukip nurtures grassroots network

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Unisex annuity rates not so bad for men

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EXHIBIT H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD.,

Plaintiff,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

08 Civ. 6978 (TPG)
09 Civ. 1707 (TPG)
09 Civ. 1708 (TPG)

AURELIUS CAPITAL MASTER, LTD. and
ACP MASTER, LTD.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

09 Civ. 8757 (TPG)
09 Civ. 10620 (TPG)

AURELIUS OPPORTUNITIES FUND II, LLC
and AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

10 Civ. 1602 (TPG)
10 Civ. 3507 (TPG)
10 Civ. 3970 (TPG)
10 Civ. 8339 (TPG)

(captions continue on following pages)

DECLARATION OF FRANCISCO GUILLERMO EGGERS



-----	X	
BLUE ANGEL CAPITAL I LLC,	:	
	:	
Plaintiff,	:	10 Civ. 4101 (TPG)
	:	10 Civ. 4782 (TPG)
- against -	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----	X	
OLIFANT FUND, LTD.,	:	
	:	
Plaintiff,	:	10 Civ. 9587 (TPG)
	:	
- against -	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----	X	
PABLO ALBERTO VARELA, et al.,	:	
	:	
Plaintiffs,	:	10 Civ. 5338 (TPG)
	:	
- against -	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----	X	



DECLARATION OF FRANCISCO GUILLERMO EGGERS

Pursuant to 28 U.S.C. § 1746, Francisco Guillermo Eggers declares as follows:

1. I am the National Director of the National Bureau of Public Credit of the Ministry of Economy and Public Finance of the Republic of Argentina (the "Republic").
2. I am familiar with the facts of this case and submit this declaration on behalf of the Republic and in support of the Memorandum of the Republic in Response to Plaintiffs' Brief on Remand.
3. During the November 9, 2012 conference before the Court, the Court read the following provision of the Order dated March 5, 2012 (the "March 5 Stay Order") into the record: "[t]o secure Plaintiffs' rights during the pendency of the Republic's appeals of the February 23, 2012 Orders to the Second Circuit, it is ordered that the Republic shall not during the pendency of the appeal to the Second Circuit take any action to evade the directives of the February 23, 2012 Orders in the event they are affirmed, render them ineffective in the event they are affirmed, or diminish the Court's ability to supervise compliance with the February 23, 2012 Orders in the event they are affirmed, including without limitation, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without prior approval of the Court" (March 5 Stay Order ¶ 2).
4. As requested by the Court, on behalf of the Republic, I confirm that the Republic has complied, is complying, and will comply with the terms of the March 5 Stay Order as set forth above in paragraph 3.



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

Executed on November 16, 2012, in Buenos Aires, Argentina.



Francisco Guillermo Eggers

EXHIBIT I

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NML Capital, LTD

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA

Defendant.

08 Civ. 6978 (TPG)

08 Civ. 1707 (TPG)

08 Civ. 1708 (TPG)

and related cases

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW OF EXCHANGE BONDHOLDER GROUP REGARDING
ISSUES REMANDED BY THE SECOND CIRCUIT AND IN SUPPORT OF MOTION
TO VACATE PURSUANT TO RULE 60(b)**

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The interested non-parties listed in Appendix A (collectively, the “Exchange Bondholder Group” or “EBG”) submit this Memorandum Regarding Issues Remanded by the Second Circuit and in Support of Motion to Vacate Pursuant to Rule 60(b). Together the EBG represents holdings of over \$1 billion worth of exchange bonds.¹

PRELIMINARY STATEMENT

The Plaintiffs’ proposed revisions to the Court’s February 23, 2012 Order (the “Injunction”) seriously threaten the interests of numerous innocent third party creditors of the Republic of Argentina (the “Republic”), including the EBG, who have not had a proper opportunity to be heard. These creditors and their predecessors-in-interest have already suffered tens of billions of dollars in losses as a result of the Republic’s 2001 debt default and subsequent exchange offers under which 92% of aggrieved bondholders accepted less than thirty cents on the dollar. Yet the Injunction threatens to magnify the losses of these guiltless third-parties by making it impossible for them to receive payments that *everyone* agrees are lawfully owed, solely in an effort to force the Republic to make payments to the Plaintiffs.

If the Republic continues to comply with its domestic legislation prohibiting any payment to Plaintiffs—and for numerous reasons the Court must assume that it will—§ 2(e) of the Injunction will make it impossible for the EBG and others to receive payments to which they are lawfully entitled. The Court should make every effort to avoid a situation in which the Plaintiffs’ non-payment of approximately \$1.3 billion snowballs into a \$20 billion crisis for innocent third parties. It is far beyond the bounds of equity to seek to enforce the rights of one litigant by jeopardizing the rights of others.

Plaintiff’s attempt to silence the EBG members (*see* NML 11.13.12 Brief, at 24-25) — who have never had formal notice or an opportunity to be heard even though Plaintiffs’ proposed injunction terms were unlawfully seize EBG’s property—is particularly unseemly. Plaintiffs

¹ Other entities are expected to join the EBG. *See* Declaration of James P. Taylor dated November 16, 2012 (“Taylor Dec.”) ¶ 2.

have every incentive to understate the default risk to encourage the Court to enter an injunction that ignores third-party rights. Argentine press reports, however, indicate that *Plaintiffs have been purchasing credit default swaps effectively betting that the Republic will default.* Declaration of Stephen Choi dated November 16, 2012 (“Choi Dec.”) ¶ 18. With the Republic’s senior officials stating publicly that they will not pay the Plaintiffs, and the Plaintiffs making \$100 million bets that the Republic will default on its obligations to the EBG, it is inarguable that the Injunction gravely jeopardizes the rights of third parties.

Recognizing the potential for injustice, the Second Circuit has requested that this Court “more precisely determine the third parties to which the Injunction[] will apply before [the Circuit] can decide whether [its] application to them is reasonable.” Second Circuit Order dated Oct. 26, 2012 (the “2d Cir. Op.”). As demonstrated below, Plaintiffs’ proposal is not only at odds with fundamental principles of equity, but threatens to deprive the EBG members of their Due Process rights, and would be a taking under the Fifth Amendment.

The EBG fully understands that, in entering the Injunction, the Court sought to secure the a remedy for the Plaintiffs. Respectfully, we ask the Court to accept the Second Circuit’s invitation to consider the effect of the Injunction on the interests of third parties like the EBG, recognize the serious harm that Plaintiffs’ proposal would impose on innocent bondholders, and take necessary steps to ensure that any remedy does not interfere with payment of the Republic’s lawful obligations to those creditors.

FACTS

A. The FAA Bonds and the Republic’s Default

The relevant background is well known. Between 1994 and 2001, the Republic issued debt securities in the aggregate amount of approximately \$82 billion pursuant to a Fiscal Agency Agreement (the “FAA Bonds”). Ex. 1: 2d Cir. Op., at 4, 7. The Republic defaulted on the FAA

Bonds in 2001. Ex. 1:² 2d Cir. Op., at 3. In the eleven years since its default, the Republic has not made payments under the FAA Bonds. Moreover, in 2005 the Republic enacted Law 26,017 (the “Lock Law”), which expressly prohibited any further payments under the FAA Bonds.³ Ex. 1: 2d Cir. Op., at 6. The Lock Law has prohibited the Republic’s courts from enforcing numerous judgments entered in respect of the FAA Bonds, and the holders of the bonds have had difficulty attaching the Republic’s foreign assets to satisfy such judgments. Ex. 1: 2d Cir. Op., at 9. As recently as this week, numerous government officials including the President, Cristina Fernández de Kirchner, have stated publicly that they have no intention of paying even “one dollar” to holders of the FAA Bonds including the Plaintiffs. Ex. 2.

B. The Exchange Offers

In 2005 and 2010, the Republic initiated exchange offers pursuant to which the holders of FAA Bonds, including the Plaintiffs, were permitted to replace them with new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar (the “Exchange Bonds”). Ex. 1: 2d Cir. Op., at 5-6. The vast majority of FAA Bond holders elected to participate in these exchange offers. Ex. 1: 2d Cir. Op., at 9. By the conclusion of the 2010 exchange offer, holders of over 91% of the par value of the original FAA Bonds had agreed to allow the Republic to restructure approximately \$74.5 billion worth of debt, incurring discounts of over 70 cents on the dollar (the “Exchange Bond Holders” or “EBHs”). Ex. 1: 2d Cir. Op., at 6-8. To date, the Republic has fully honored its obligations under the Exchange Bonds. Ex. 1: 2d Cir. Op., at 8.

C. The Republic’s Payment Mechanism

The mechanism the Republic uses to make payments on the Exchange Bonds is set forth in the Trust Indenture between the Republic and the Bank of New York as Trustee dated June 2, 2005 (the “Indenture”). Ex. 3, ¶ 3. The Trustee is a fiduciary of the EBHs and is *not* an agent of

² All Exhibits cited are attached to the Declaration of Sean F. O’Shea dated November 16, 2012.

³ The Lock Law was briefly suspended in 2010 to enable Argentina to make an exchange offer, but it has since been reinstated. Ex. 1: 2d Cir. Op., at 7.

the Republic.⁴ Ex. 3, ¶ 4. Pursuant to the Indenture, the Republic makes principal and interest payments on the Exchange Bonds to the Trustee, which receives them *in trust for the EBHs*. Ex. 4, § 3.1. Once money has been paid to the Trustee, *it is the property of the EBHs*, “and the Republic shall have no interest whatsoever in such amounts.” Ex. 4, § 3.5; *see also* Ex. 3, ¶ 4. The Republic has paid all amounts due under the Exchange Bonds to the Trustee outside the United States in Argentina. Ex. 3, ¶ 4.

D. Gramercy’s Status as an EBH

Beginning with its launch in 1999, Gramercy Emerging Markets Fund has, at various times, held an interest in FAA Bonds. Declaration of Robert S. Koenigsberger dated November 16, 2012 (“Koenigsberger Dec.”) ¶ 2. Gramercy organized the 2010 Argentine debt restructuring, and tendered approximately \$2.7 billion in face value of debt in connect therewith. *Id.* ¶ 3. In agreeing to accept a significant discount on the face value of its FAA Bonds in 2010, Gramercy relied on the Republic’s willingness and ability to make payments on its Exchange Bonds. *Id.* ¶ 4. Currently, various Gramercy entities hold significant interests in Exchange Bonds with par values exceeding \$400 million. *Id.* ¶ 8-9.

E. Other EBHs

Other large EBHs are members of the EBG. MFS and its affiliates hold nearly \$392 million in Exchange Bonds; Brevan Howard and its affiliates hold nearly \$237 million in Exchange Bonds; and SW and its affiliates hold approximately \$12 million in Exchange Bonds. *See* Declaration of Robin A. Stelmach dated November 16, 2012 ¶¶ 1-3; Taylor Dec. ¶ 3; Declaration of David C. Hinman dated November 16, 2012 ¶ 2. The EBHs comprise a wide swath of the investing public, including such diverse organizations as pension funds, charitable foundations, and endowments. Koenigsberger Dec. ¶ 7. The interests of the EBHs, amounting to over **\$20 billion**, are at risk if the Injunction is not modified or vacated. Consequently,

⁴ The Trustee was originally The Bank of New York (“BNY”), later The Bank of New York Mellon (“BNYM”). Ex. 3, ¶ 3.

numerous EBHs have expressed an interest in joining the EBG on this brief, but time has not permitted them to do so. Taylor Dec., ¶ 2.

ARGUMENT⁵

I. THE COURT SHOULD MODIFY OR REMOVE § 2(e) OF PLAINTIFFS' PROPOSED INJUNCTION TO AVOID IMPOSING UNFAIR AND UNREASONABLE BURDENS ON EXCHANGE BONDHOLDERS.

The Second Circuit has not affirmed the portion of the Plaintiffs' requested injunction (§ 2(e)), which prohibits the BNYM from remitting the EBHs' property to them, but rather has directed this Court to consider the impact of the injunction on innocent non-parties:

Our concerns about the Injunctions' application to third parties do not end [with intermediary banks]. Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged order will apply to third parties generally. Consequently, we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable. Accordingly, we remand . . . for such further proceedings as are necessary to address the Injunctions' application to third parties

Ex. 1: 2d Cir. Op., at 28 (emphasis added). In its conclusion, the Court directed further proceedings as necessary to address the impact of the injunction on "third parties and intermediary banks."⁶

⁵ Not for the first time, Plaintiffs' brief seeks to silence the EBHs and deprive the Court of their views. NML 11/13/12 Brief, at 24-26; Ex. 5; Ex. 6: 11/9/12 Hearing, T31:24-32:9. However, the Court has already ruled that it will consider the EBHs' arguments (Ex. 6: 11/9/12 Hearing, T24:18-20; T33:1-6), and the Second Circuit has clearly instructed this Court to consider the impact of the proposed injunction on "third parties generally" (Ex. 1: 2d Cir. Op., at 28). Thus, the Court is acting well within its discretion in considering the EBHs' views as interested non-parties. See, e.g., *Aurelius Capital Partners, LP v. Argentina*, 584 F.3d 120 (2d Cir. 2009) (approving submissions by interested non-party without intervention because "[t]he district court acted well within its discretion to consider arguments presented by the Administration to secure a full understanding of the jurisdictional issues"); *Krimstock v. Kelly*, 464 F.3d 246 (2d Cir. 2006) (district court allowed submissions by interested non-parties); *Granite Enterprises Ltd. v. Virgoz Oils & Fats Pte. Ltd.*, Nos. 09-cv-4534, 09-cv-4750, 09-cv-4751, 2011 WL 4072146 (S.D.N.Y. Sept. 13, 2011) (releasing funds frozen by court order on interested non-party's motion to vacate).

A. Plaintiffs' Proposed Injunction is Unreasonable in its Inevitable Effect on the EBHs' Property.

The Second Circuit's discomfort with the third party impact of the injunction is well-founded. The law prohibits injunctions that place an unreasonable burden on third parties. *See Cook Inc. v. Boston Sci. Corp.*, 333 F.3d 737, 743-44 (7th Cir. 2003) (modifying injunction in contract case to excise portion preventing defendant from using information at issue to seek regulatory approval on medical device because the language impermissibly affected non-parties; injunction "violate[d] the principle that in determining the appropriate scope of an injunction the judge must give due weight to the injunction's possible effect on third parties."); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1141-42, 1144 (D.C. Cir. 2009) (in context of RICO violation, vacating injunction causing "a potentially serious detriment to innocent persons not parties to or otherwise heard" where defendant's third party retailers would potentially lose substantial revenue: "Even though not explicitly bound by the terms of an injunction on pain of contempt, third parties may be so adversely affected by an injunction as to render it improper."); *United States v. Zang*, 703 F.2d 1186, 1195 (10th Cir. 1982) ("The untainted interests which may exist and the interests of innocent third parties should be protected") (in context of RICO violation, remanding order of forfeiture); *Cf. Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930) (L. Hand, J.) ("no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.") (holding that injunction cannot bind third party who is not legally identified with enjoined party and does not seek to abet enjoined party in committing an act forbidden under injunction); *see also General Bldg. Contractors Assoc., Inc. v. Penn.*, 458 U.S. 375, 399-400 (1982) (invalidating injunction requiring co-defendants who were not found liable to incur expenses). As explained in greater detail below, the conscription

⁶ As the structure and language of its opinion makes clear, and contrary to Plaintiffs' suggestion that the injunction "inevitabl[y] bars payments to the EBHs" (NML 11/13/12 Brief, at 25), the Court of Appeals was drawing a distinction between intermediary banks and all other third parties affected by the Injunction.

of the EBHs' property into the service of collecting a civil contract judgment for entirely unrelated parties (the Plaintiffs), to whom the EBHs owe nothing and have done no harm, is an unsupported exercise of judicial power.

Plaintiffs' proposed modification to § 2(e) of the injunction is grossly unfair, unprecedented, and unreasonable in its application to EBHs.⁷ There is no dispute that the EBHs are entitled to full and timely payments under the Exchange Bonds, or that those payments, once transferred from the Republic to BNYM in Argentina,⁸ are the legal and exclusive property of the EBHs. *See* Facts, *supra*, Section C. It is further beyond serious dispute that the Republic is not going to pay the Plaintiffs. The Court (and the Second Circuit) has repeatedly and emphatically acknowledged as much,⁹ and Plaintiffs' latest brief convincingly demonstrates that the Republic will never pay them. NML 11/13/12 Brief, at 1-2. This is unfortunate, but due in absolutely no part to the actions of the innocent EBHs. Given the Republic's position, there are only two realistic responses by the Republic to the injunction Plaintiffs seek.

The first scenario is that the Republic pays the amount due to the EBHs to the Trustee, but refuses to pay Plaintiffs. Under Plaintiffs' proposed order, the EBHs' funds – their *undisputed property* – will be then be frozen at BNYM indefinitely.¹⁰ This result will obtain despite the fact that the EBHs – many of whom have investors that include the pension plans of public employees (including police officers and firefighters) and charitable foundations – (i) are

⁷ Plaintiffs cite no case granting an injunction comparable to what they seek.

⁸ Plaintiffs dispute whether the EBHs are paid via transfers to BNYM Argentina as opposed to BNYM New York. NML 11/13/12 Brief, at 11 n.6. Although the EBHs understand this is wrong, it is irrelevant in any event. The salient point is that payments by the Republic to BNYM at *any* location are the property of the EBHs.

⁹ *See* Ex. 6: 11/9/12 Hearing, T10-16; Ex. 7: 2/23/12 Hearing, T3-4, 15, 31, 48-49; Ex. 8: 2d Cir. Hearing, T13-14, 23, 26-27, 78-79.

¹⁰ The genesis of § 2(e), according to Plaintiffs, was to prevent BNYM from “aiding and abetting” the Republic's ongoing violations. Of course, as the Court has already recognized, BNYM has a contractual and fiduciary duty to remit the EBHs' property to them, and doing so does not “aid and abet” anything other than the satisfaction of the Trustee's legal obligations as the EBHs' fiduciary (and certainly not the Republic's payment, which is already accomplished at the time BNYM receives the funds). Ex. 7: 2/23/12 Hearing, T7:13-8:5.

plainly without fault, (ii) owe no obligation of any kind to the Plaintiffs, and (iii) have already taken a massive discount on their original investment in order to facilitate the type of restructuring that has become critical to the global economy.

The only other plausible response to the injunction by the Republic is a refusal to pay BNYM the amount due to the EBHs. If that occurs, the injunction will have turned a relatively minor default into a *cataclysmic* default that will further unsettle the already fragile global economy, (*see* Choi Dec. ¶¶ 8-22) and unquestionably spur an avalanche of follow-on litigation involving the EBHs, multiple banks, and the Republic, which may be the intended consequence of Plaintiffs' motion.¹¹ Plaintiffs will therefore be successful in their efforts to goad this Court into "solving" a \$1.3 billion problem affecting fewer than 0.92% of the original foreign denominated Bondholders (Ex. 7: 2/23/12 Hearing, T26:5-8), by creating a potential over \$20 billion problem affecting 100% of the Republic's Bondholders (to say nothing of the collateral effects on the skittish and frail international markets).¹²

B. Plaintiffs' Proposed Injunction is Unreasonable Because It Attempts to Use the Property of the Innocent Non-Party EBHs to Collect a Judgment for Plaintiffs.

The Court's initial reaction to Plaintiffs' injunction request went beyond deep skepticism, to outright rejection:

- THE COURT: Now, look, [the proposed injunction] would indeed be a mechanism for enforcement but it also presents a *very serious problem*. So let me ask you this. Is there any legal authority, is there any legal basis for me to *use the pari passu clause to interfere with the payment to the exchangers?* . . . Now, if I entered this order, this would impose an obligation on the banks and it might *impose an impediment* upon the banks *with respect to the exchange offer people which does not exist now*. They get the

¹¹ As Plaintiffs are reportedly trading credit default swaps betting on an Argentine default (a bet that directly contradicts their representations to this Court that the injunction they requested would lead to payment by the Republic), they presumably welcome default. *See* Choi Dec. ¶ 18; Ex. 12. Whatever the chaos that would ensue, Plaintiffs are playing both sides of the litigation and stand to profit whatever the outcome.

¹² In a 2004 amicus brief filed in a related case before this Court, the Federal Reserve predicted that the Plaintiffs' holdout status would allow them to "terrorize" lawful sovereign restructurings. Ex. 10, at 13. With the current injunction, that prediction has now become the unfortunate reality.

money and presumably they pay the exchangers. There is no condition, no impediment. ***This would obviously present an impediment, a condition. Is there any legal basis for doing that?*** Ex. 7: 2/23/12 Hearing, T7:2-6, T7:24-8:5 (emphasis added).

- THE COURT: ***[T]he exchange offers were lawful, people subscribed to them and have rights under them, the exchange offer provides for payments*** Ex. 7: 2/23/12 Hearing, T11:2-4 (emphasis added).
- THE COURT: ***I don't understand the pari passu clause or my order to mean that the Republic is forbidden to pay the exchange offers unless they pay NML.*** Ex. 7: 2/23/12 Hearing, T11:25-12:2 (emphasis added).
- MR. OLSEN: So we are saying to Argentina you must, if you are going to pay the one, you have to pay the other, and we are telling you in an order from this court that you must do that and your agents and subordinates and people acting with you must not assist in evading that order.
THE COURT: ***I really don't agree with that. The rights of the exchangers were not conditional on NML getting paid under the pari passu clause.*** Ex. 7: 2/23/12 Hearing, T13:5-12 (emphasis added).
- THE COURT: If you had a normal law-abiding, asset-holding [debtor], that would be enforceable; ***you wouldn't have to interfere with the rights of the first people.*** Ex. 7: 2/23/12 Hearing, T15:1-4 (emphasis added).
- THE COURT: ***I am sticking to my position. I think that I cannot interfere with the rights of the exchange offers by putting conditions on them or impediments on them.*** Ex. 7: 2/23/12 Hearing, T15:25-16:2 (emphasis added).

Nevertheless, the Court, although correct in its view that the Republic would not pay the Plaintiffs, brushed aside its concern for the EBHs' rights in favor of the Plaintiffs' interests as paramount in the hope that the injunction would finally force the Republic to pay the Plaintiffs:¹³

THE COURT: - . . . The facts of life are this, that there is a pari passu clause in the documents. We do not have a normal situation. We don't have a situation where you have an honest debtor with assets available that can be subjected to the normal processes of the court. We don't have it. We have litigation that goes on and on.

What the plaintiffs here are trying to do is to see if there is yet another device which might get them their just payments and end the litigation. ***It has a lot of problems***, but Mr. Olson and his colleagues, they know their problems. They are not poor law students. But ***they are trying to do something which is intended to overcome the lawlessness of the Republic.***

I am going to sign this order. It's not the first time that a court has signed an order that may have problems. But to me ***the bigger overriding problem is the lawlessness of the Republic.*** When I say lawlessness I mean the deliberate, continued failure to honor the most clear-cut obligations in the debt instruments, the most clear-cut assurances in the

¹³ Plaintiffs have falsely suggested that the EBHs can get the Plaintiffs paid simply by demanding it of the Republic. NML 11/13/12 Brief, at 26. The EBHs have ***no control whatsoever*** over this issue. Koenigsberger Dec., ¶ 6.

debt instruments. Those have been turned into a dead letter by the Republic. Well, they were not a dead letter in this courtroom.

I fully recognize that there are problems with the order that the plaintiffs present and I am sure this will go very quickly to the Court of Appeals and *there are problems on appeal. There are problems.* . . . Ex. 7: 2/23/12 Hearing, T48:12-49:10 (emphasis added).

To be sure, a judicial mousetrap designed to secure a remedy for the Plaintiffs is entirely appropriate. But the EBHs' lawful and exclusive property cannot and should not be used as the cheese.¹⁴ Even before the instant appeal, the Second Circuit recognized the EBHs' rights, and it directed this Court to "take care to craft attachment orders so as to avoid interrupting Argentina's regular payments to [exchange] bondholders." *Capital Ventures Int'l v. Republic of Argentina*, 282 Fed. Appx. 41, 42 (2d Cir. 2008). Yet Plaintiffs' proposed injunction ignores this clear admonition, which may well be why the Second Circuit remanded expressly for consideration of non-parties' rights before ruling on whether the injunction's application to them is "reasonable." Ex. 1: 2d Cir. Op., at 28.

While this litigation has been extraordinary and caused the Court justifiable frustration, Plaintiffs, at base, are ordinary civil litigants with an ordinary judgment on an ordinary contract. Ex. 1: 2d Cir. Op., at 16. Their debtor happens to be a sovereign nation (a fact obviously known when Plaintiffs acquired their bonds), and that status has frustrated their efforts to pursue successfully the usual methods of collection. Consequently, like thousands of others civil litigants, they have a judgment that has not been and may never be satisfied. That is unfortunate, but it is also the hard reality of our legal system. *See FG Hemisphere Assocs., LLC v. Democratic Rep. of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) ("a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment;" and absent property subject to FSIA immunity exceptions, "a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment."). The proper

¹⁴ Even Plaintiffs' counsel has admitted that the injunction engrafts a "condition" on the EBHs' ability to enjoy their own property that otherwise does not exist. Ex. 7: 2/23/12 Hearing, T5:12-17.

solution is not to allow the disappointed minority of unimpaired FAA Bondholders to shift the consequences of that reality onto the vast majority of heavily discounted EBHs. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (“In general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders.”) (Holmes, J.). Rather, the correct approach is the one the Court cogently understood and expressed at the outset – vigilantly and aggressively pursue all remedies available to Plaintiffs *without compromising the property rights of innocent non-parties*. Indeed, at the November 9th hearing, the Court repeatedly admonished the Republic that the Court has ample means available to enforce its judgments. Ex. 6: 11/9/12 Hearing, T18:3-14. Plaintiffs should pursue those remedies, but they cannot do so at the expense of the innocent EBHs.¹⁵ Accordingly, the Court should reject Plaintiffs’ proposed injunction and strike § 2(e).¹⁶

II. THE SECOND CIRCUIT’S OPINION PRECLUDES ANY DIVISION OR DIVERSION OF PAYMENTS MADE BY THE REPUBLIC TO BNYM.

At the November 9 hearing, certain of the Court’s comments suggested that it might take some action to apportion sums paid by the Republic to the EBH Trustee, and divert them to Plaintiffs. Ex. 6: 11/9/12 Hearing, T30:20-22. Such an action, however contravenes the Second Circuit’s opinion. Specifically, in rejecting the Republic’s argument that the injunction violates New York trust or attachment law because it “execute[s] upon” funds that do not belong to the Republic, the Court of Appeals found that “[n]othing in the Injunctions suggests that plaintiffs would ‘execute upon’ any funds, *much less those held in trust for the exchange bondholders*.” Ex. 1: 2d Cir. Op. at 25 n.14 (emphasis added). Apart from the impropriety of seizing the EBHs’ property and giving it to the Plaintiffs, any such action would be exceedingly improvident, as it

¹⁵ Plaintiffs’ brief suggests that the EBHs are somehow in league with the Republic in seeking to ensure that Plaintiffs do not get paid. NML 11/13/12 Brief, at 8. That is false. (Koenigsberger Dec., ¶ 5.) The EBHs simply believe that their property cannot be used as leverage to achieve any objective of the Plaintiffs.

¹⁶ Plaintiffs may argue that such a modification makes the Injunction ineffective, but that only serves to underscore their use of improper “leverage” at the expense of the EBHs.

could trigger an immediate and much wider default, as well as litigation by the EBHs against the Republic.

III. ENTRY OF § 2(e) OF PLAINTIFFS' PROPOSED INJUNCTION WOULD DENY DUE PROCESS AND EFFECT AN UNLAWFUL TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

A. Plaintiffs' Proposed Injunction Violates the Due Process Clause.

As demonstrated in Point I, *supra*, the effect of Plaintiffs' Proposed injunction is to use the private property of the non-party EBHs for the private benefit of the Plaintiffs. It thus violates the Due Process Clause of the Fifth Amendment. "[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). *See also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand . . . scrutiny . . . ; it would serve no legitimate purpose of government and would thus be void"). Indeed, Supreme Court authority holds that State action which places any significant imposition on the private property of one for the private use of another is a core violation of fundamental due process rights.¹⁷ *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-80 (1937) (striking down state administrative order requiring majority of private gas producers to curtail desired production and purchase shortfall from minority of private gas producers with no available market); *Chicago, St. Paul, Minn. & Omaha Railway Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (order requiring railroad to build underground pass for private benefit of private landowners violated due process); *Missouri Pac. Ry. Co. v. Nebraska Bd. of Trans.*, 164 U.S. 403, 417 (1896) (order requiring private railroad to allow private party to construct elevator on its property for private use violated due process).¹⁸

¹⁷ The market's reaction proves that the EBHs' property is encumbered by the injunction – Exchange Bond prices have plummeted in the wake of the Second Circuit's decision. Choi Dec., ¶¶ 15-18

¹⁸ The Supreme Court cited both *Thompson* and *Missouri* in *Kelo*, a 2005 decision, *see* 545 U.S. at 500, and thus both cases remain good law.

See also *United States v. Ambrosio*, 575 F. Supp. 546, 551-52 (E.D.N.Y. 1983) (assets of defendant corporation not accused of RICO violations could not be restrained even though 30% interest was owned by co-defendant facing RICO charges; restraint would unconstitutionally deprive corporation of property rights under due process principles).

Further, judicial orders can (and often do) qualify as “state action” for purposes of Constitutional provisions limiting governmental power. See, e.g., *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Env’tl Protection*, 130 S. Ct. 2592, 2601-02 (2010) (“It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary.”); *Shelly v. Kraemer*, 334 U.S. 1, 18 (1948) (“[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials...[I]t has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch of the state government.”); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) (“It is doubtless true that a State may act through different agencies, – either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.”); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (court enforcement of promissory estoppel principles was state action for purposes of Fourteenth Amendment); *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968) (“There can now be no doubt that the application by the judiciary of the state’s common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government.”) (Skelly Wright, J).

As Justice Kennedy recognized in *Stop the Beach*, a judicial intrusion on a private party’s property violates their due process rights:

If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. . . . It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights

When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision. “Given that the constitutionality” of a judicial decision altering property rights “appears to turn on the legitimacy” of whether the court’s judgment eliminates or changes established property rights . . . the more appropriate constitutional analysis arises under general due process principles

The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is “arbitrary or irrational” under the Due Process Clause.

130 S. Ct. at 2614-15 (citations omitted).

This Court recognized the inevitable impact of its order on the property rights of the EBHs, and the lack of legal authority for it (see Point I, *supra*), but nevertheless (perhaps out of sheer frustration) entered an injunction that would use the EBHs’ property as a fulcrum in attempting to collect an ordinary contract judgment for the Plaintiffs. But this would constitute a State seizure of private property for private, not public, purposes – a result forbidden by the law. As noted above, it would constitute an “arbitrary and irrational” deprivation of private property under long-standing due process principles.

B. Plaintiffs’ Proposed Injunction Would Constitute an Unlawful Taking.

In *Stop the Beach*, a plurality of the Supreme Court expressly recognized a cause of action for a “judicial taking.” 130 S. Ct. at 2601-02. The remaining Justices either expressed a preference for a Due Process Clause remedy, or did not reach the issue, but none rejected the concept outright. *Id.* at 2614-15, 2618-19. As noted in Point I, *supra*, although the EBHs’

property is not being seized outright by the government, the practical outcome of the proposed injunction will inevitably be, at a minimum, a “significant restriction . . . placed upon [the EBHs’] use of [their] property,” *Maine Educ. Ass’n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) – clearly a “taking.” *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“[T]here will be instances when government actions . . . affect and limit [property] use to such an extent that a taking occurs.”); *Amchem Products, Inc. v. Costle*, 481 F. Supp. 195, 199 (S.D.N.Y. 1979) (disclosure of company’s research data mandated by federal statute stated claim for taking that was “not absolute but consist[ed] instead of a severe diminution of the value of plaintiff’s property”).

And the possibility that the EBHs may lose their property rights indefinitely also does not change the fact that the property is being taken by the injunction. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987) (even “‘temporary’ takings . . . are not different in kind from permanent takings”); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (government’s wartime year-to-year use of laundry business constituted compensable temporary taking of, *inter alia*, laundry’s “opportunity to profit from its trade routes,” since “[t]here was nothing [laundry] could do, therefore, but wait”); *Cienega Gardens v. United States*, 331 F.3d 1319, 1353 (Fed. Cir. 2003) (owners of low-income apartments stated compensable takings claim where federal statute indefinitely suspended their contractual right to prepay their mortgages; “a taking need not be permanent to be compensable”). *See also Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70, 76 (2012) (noting that temporary interference with contractual right can be a taking).¹⁹ The proposed injunction thus results in a taking that violates the Fifth Amendment, and should be vacated.

¹⁹ If the Court were to order outright that the EBHs’ money be given to the Plaintiffs, as it suggested at the November 9th hearing might occur (Ex. 6: 11/9/12 Hearing, T30:20-22), that would be a “taking” in the most prototypical sense of the concept.

IV. THE INJUNCTION MUST BE VACATED UNDER FED. R. CIV. P. 60(b)(4) FOR FAILURE TO PROVIDE MOVANTS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE IT WAS ENTERED.

Pursuant to Fed. R. of Civ. P. 60(b)(4), a judgment is void “if the court that rendered it ... acted in a manner inconsistent with due process of law.” *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 193 (2d Cir. 2006) (internal quotations and citations omitted) (granting Rule 60(b)(4) motion brought by nonparty). Nonparties may bring a motion under Rule 60(b)(4) where their interests are adversely affected. *Id.* at 188. Procedural due process requires that parties with an interest in the proceedings be provided with adequate notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, although the Court recognized the EBHs’ rights were at stake (see Point I, *supra*), no steps were taken to give the EBHs notice prior to an opportunity to be heard at the February 23, 2012 hearing; rather, the Proposed Order drafted by Plaintiffs was signed, unaltered, on the same day as the hearing. Even if the EBHs had actual notice of the Plaintiffs’ motion for injunctive relief, the absence of formal service invalidates the order. *See Orix Financial Services v. Phipps*, No. 91-CV-2523, 2009 WL 2486012, at *3 (S.D.N.Y. Aug. 14, 2009) (granting 60(b)(4) motion, in part, because “[t]he Second Circuit has rejected the argument that ‘actual notice’ is sufficient to cure improper service”) (citation omitted); *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385-86 (S.D.N.Y. 1986) (granting Rule 60(b)(4) motion and vacating default judgment where defendants were not properly served, notwithstanding any constructive or actual notice defendants had); *In re Metzger*, 346 B.R. 806, 818 (Bankr. N.D. Cal. 2006) (applying Rule 60(b)(4) to void fourteen-year-old sale order for defective notice even though creditor had actual notice of bankruptcy proceedings; creditor had no duty to investigate and inject himself into the proceedings).

The absence of notice and an opportunity to be heard renders the injunction void. *See Dial Corp. v. Skinner & Assocs.*, 180 Fed. Appx. 661, 664, 2006 WL 1307892, at **3 (9th Cir. May 12, 2006) (judgment based on defendant’s indemnification claim against co-defendant who was earlier released from action which was only mentioned “near the end of trial and without any

prior notice” was void under Rule 60(b)(4)); *In re Aztec Supply Corp.*, 399 B.R. 480, 492-494 (Bankr. N.D. Ill. 2009) (granting Rule 60(b)(4) motion where party affected by bankruptcy proceedings was not given notice); *Nature’s First Inc. v. Nature’s First Law, Inc.*, 436 F. Supp. 2d 368, 374-77 (D. Conn. 2006) (granting Rule 60(b)(4) motion and vacating default and permanent injunction where defendant had not been served);²⁰ *Local 78 v. Termon Constr., Inc.*, No. 01-CV-5589 (JGK), 2003 WL 22052872, at *5 (S.D.N.Y. Sept. 2, 2003) (granting motion to vacate default judgment pursuant to Rule 60(b)(4) where valid service of process was not effected on defendant). As in *Dial*, the possibility of an injunction restraining the funds of the EBHs and their trustee was not addressed until the February 23, 2012 hearing, whereas the litigation prior to that time concerned only the contractual rights between Plaintiffs and the Republic.

Given these due process issues, the Court should revisit the injunction in its entirety and afford the EBHs an adequate opportunity to be heard, including a reasonable briefing schedule and evidentiary hearings as appropriate. *See Fengler v. Numismatic Am., Inc.*, 832 F.2d 745, 747-48 (2d Cir. 1987) (parties bound by injunctions are entitled to evidentiary hearing). The three days granted the EBHs to reply to Plaintiffs’ November 13, 2012 brief is insufficient for this purpose.²¹ Plaintiffs’ proposed injunction directly affects billions of dollars legally owed to the EBHs. The Second Circuit directed “such further proceedings as are necessary to address the Injunctions’ application to third parties ... including intermediary banks ...” Ex. 1: 2d Cir. Op., at 28. The Court of Appeals did not order expedition. Nor did it direct a resolution prior to the scheduled December payments to the EBHs. Indeed, implicit in its directive is *careful and*

²⁰ As the court noted in *Nature’s Promise*, a heightened standard of due process applies for a permanent injunction. 436 F. Supp. 2d at 375 (“Given the Second Circuit’s preference for resolution of suits on the merits and the prejudice resulting to defendants if the default judgment and permanent injunction are not vacated, the procedural posture is of paramount importance.”).

²¹ *See In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) (granting Rule 60(b)(4) motion where one day’s notice of hearing to junior secured party in bankruptcy proceeding did not satisfy due process).

deliberate consideration. While it may be *Plaintiffs'* goal to rush these issues past the Court so as to seize the EBHs' property for their private purposes, a highly compacted schedule frustrates the Second Circuit's objective in remanding on the issue of third party impact. It will also be impossible for many other EBHs that wish to be heard to appear within the short timeframe allowed. Taylor Dec., ¶ 2. With EBHs (and the third-parties) having three days to respond to Plaintiffs' brief, no hearings, and little opportunity to present fact and expert testimony, there is a grave risk that the remanded issue of impact on third parties cannot be given full and deliberate consideration as the Court of Appeals must have contemplated.²²

V. THE INJUNCTION MUST BE VACATED FOR FAILURE TO JOIN THE EXCHANGE BONDHOLDERS AS NECESSARY PARTIES.

The EBHs are necessary parties to this action due to the injunction's confiscatory impact on their right to payment under the Exchange Bonds, and their absence at the time the injunction was entered requires modification of the order as it applies to them. Under Federal Rule of Civil Procedure 19, a party is "necessary" if

. . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest

Fed R. Civ. P. 19(a)(1)(B). Even without expressly invoking Rule 19, courts have denied or vacated injunctions directed "against [non-parties] who are innocent of misconduct and are strangers to the district court." *Doctor's Assocs., Inc. v. Reinert & Dupree, P.C.*, 191 F.3d 297, 306 (2d Cir. 1999) (partially vacating injunction barring nonparty franchisees from commencing separate state court actions against franchisor); *see also Pediatric Specialty Care, Inc. v.*

²² Moreover, there is no reason why the EBHs' rights should be trampled upon in order to push through the final form of an injunction in this case, which has been ongoing for over a decade. That is particularly so because, as this Court has found, the Republic has sufficient assets to pay both the Plaintiffs and the EBHs. Ex. 7: 2/23/12 Hearing, T32:12-33:5. Furthermore, the December payments to the EBHs do not represent a final payment. In fact, those income streams run out as far as 25 years into the future. Ex. 1: 2d Cir. Op., at 4.

Arkansas Dep't. of Human Servs., 364 F.3d 925, 933 (8th Cir. 2004) (reversing injunction as to federal agency that “was not a party to the underlying action and did not actively participate” in proposed budget cutbacks that plaintiffs were suing to enjoin); *Leblanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1249 (S.D.N.Y. 1991) (denying plaintiffs’ application to enjoin local election where officials managing election were not named defendants and stating that “[a] party to be enjoined must be before the court”).

Under the foregoing standards, a party is necessary under Rule 19(a) when its contractual or property rights would otherwise be adjudicated in the party’s absence, especially where those interests are being threatened with an injunction. *See, e.g., Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-701 (2d Cir. 1980) (necessary to join third party where defendant’s counterclaims sought to enjoin third party’s merger agreement with plaintiff); *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1013 (3d Cir. 1987) (factory owner was indispensable party where industry association moved to enjoin owner from closing factory, as “preservation of such a *status quo* would obviously defeat any prospects that [owner] might have to develop the property ... [Plaintiff] as a part of its relief, seeks to restrict, limit, and affect [owner’s] rights and/or interests in the property”); *Freedom N.Y., Inc. v. United States*, No. 86-CV-1363, 1986 WL 6163, at *1 (S.D.N.Y. May 27, 1986) (winning bidder for government contract was necessary party in losing bidder’s action to enjoin government’s performance under contract, because injunction would have “as a practical matter an equally decisive impact on [winning bidder’s] interests”).

In the present case, as shown in Point I, the proposed injunction substantially impacts the EBHs’ right to payment under the Exchange Bonds, a property right that indisputably belongs solely to them. Further, the proposed injunction would effectively leave the EBHs with no remedy. If the Republic chooses to pay only the EBHs, then their payments will be frozen at BNYM indefinitely. If the Republic chooses not to pay BNYM, the EBHs will, from a practical standpoint, have no recourse other than to “stand in line” with the Plaintiffs. Simply put, this is a classic situation where two wrongs (the Republic’s refusal to pay Plaintiffs and an injunction that

almost certainly will lead to failure to pay the EBHs) do not make a right; rather, they make a bad situation worse.

Given the Court's recognition at the February hearing that the proposed injunction could affect the rights of absent parties (see Point I, *supra*), the necessity of joining them should have been considered. See *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543, 548 (S.D.N.Y. 2008) ("Although neither party has moved for joinder, courts frequently do—**and indeed should**—consider the issue *sua sponte* because a primary purpose of Rule 19 is to protect the rights of an absentee party.") (emphasis added). "An injunction entered in the absence of an indispensable party should be vacated." *Edward G. Bashian & Sons v. Am. Nat'l. Bank & Trust Co. of Chicago*, No. 96-CV- 6021, 1997 WL 337434, at *6 (N.D. Ill. June 16, 1997) (partially vacating injunction for failure to join bank as necessary party at time injunction was entered, because bank held interest in subject matter of lawsuit); see also *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234-35 (9th Cir. 1975) *overruled on other grounds by Stahl v. Gibraltar Fin. Corp.*, 967 F.2d 335 (9th Cir. 1992) (vacating preliminary injunction restraining voting of defendant corporation's stock entered before corporation was party to suit, because corporation "clearly was an indispensable party" under Rule 19 standard). Accordingly, the injunction here should be dissolved, and a reasonable schedule for presentation of evidence, hearings, and briefing.

VI. PLAINTIFFS ARE NOT ENTITLED TO PREFERENTIAL TREATMENT AT THE EXPENSE OF EXCHANGE BONDHOLDERS.

A. The Injunction Inequitably Fails to Account for the Losses Already Suffered by the Innocent EBHs as a Result of the Republic's Default.

The Court of Appeals ordered remand "to address the operation of the payment formula." Ex. 1: 2d Cir. Opp., at 28-29. Accordingly, if the Court were to find that the injunction was properly entered, the "operation of the payment formula" still must be addressed. Basic considerations of fairness and equity require rejecting Plaintiffs' proposal to enter an equitable remedy that requires the Republic immediately to pay 100% of the face value of Plaintiffs FAA Bonds, plus significant amounts of interest totaling more than the full face value, before it can

make payment due to the EBHs under the Exchange Bonds. NML 11/13/12 Brief, at 12. *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) (“in deciding whether to grant injunctive relief a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts”). Plaintiffs’ formula is inequitable because it completely ignores that the EBHs hold securities derived from FAA Bonds that have already incurred discounts of over 70 cents on the dollar. *See* Facts, Section B, *supra*. These discounts—which were granted by the holders of 92% of all FAA Bonds and provided tens of billions of dollars in debt relief to the Republic — are a major reason the Republic has sufficient foreign currency reserves to honor its obligations to anyone — including Plaintiffs.²³ Moreover, a significant fraction of the EBHs are not only successors in interest to the FAA Bondholders, but individually participated in the 2005 and 2010 exchange offers and incurred large discounts. *See* Facts, Section C, *supra*. While Plaintiffs were within their rights in refusing to accept discounts on the FAA Bonds, it would stand equity on its head to have the Republic reallocate the sacrifices made by the EBHs (and their predecessors in interest) so that the most aggressive and litigious holdouts can receive over 200 cents on the dollar.

Accordingly, equity and fairness require that, the Ratable Payment formula should recognize that the EBHs have already suffered losses as a result of the Republic’s default. The adjustment should ensure that if Plaintiffs receive Ratable Payments on their FAA Bonds, they do not profit from debt relief provided by the EBHs (or their predecessors in interest) or receive more preferable treatment than the EBHs, but rather receive payments in proportion to Plaintiffs’ holdings as a fraction of the Republic’s total defaulted debt. Thus, if Plaintiffs hold FAA Bonds with a face value of \$428 million, and the Republic defaulted approximately \$46.6 billion were FAA Bonds subject to a *pari passu* clause, the Court should require a Ratable Payment to Plaintiffs of no more than 0.92% (\$428 million / \$46.6 billion) of the amount of any given

²³ Indeed, Argentina’s total reserves of foreign exchange and gold amounted to just \$46.35 billion in December 2011. *See* <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2188rank.html>. So tens of millions of dollars was a material contribution.

payment to the EBHs. Proceeding in this manner will accord with basic principles of equity and ensure fair treatment for Plaintiffs and the EBHs.

B. At a Minimum, the Injunction Should Be Modified to Provide for More Equitable Treatment of the EBHs.

Alternatively, the Court should at a minimum address basic principles of fairness in interpreting the formula as currently drafted. The Injunction provides, in relevant part: “Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic’s 2005 or 2010 Exchange Offers ... the Republic shall ... make a ‘Ratable Payment’ ... to NML.” Ex. 9: Feb. 23 Order at 3-4. “Ratable Payment” is defined as “an amount equal to the ‘Payment Percentage’ ... multiplied by the total amount currently due to NML in respect of the bonds at issue ... including pre-judgment interest” Ex. 9: Feb. 23 Order at 4. “Payment Percentage” is defined as “the fraction calculated by dividing the amount actually paid ... under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.” As the Second Circuit noted, the definition of “Payment Percentage” leaves it ambiguous whether “the total amount then due under the terms of the Exchange Bonds” refers to the amount due at that particular moment in time, or total principal and interest outstanding. Ex. 1: 2d Cir. Op., at 11.

The phrase should be interpreted to mean total principal and interest outstanding. Doing so will ensure the EBHs are treated equitably and their rights to incremental payments from the Republic are not made conditional on the full satisfaction of all obligations due to Plaintiffs under the FAA Bonds. Contrary to Plaintiffs’ assertion (*see* NML 11/13/12 Brief, at 15), enjoining the payment of \$3.3 billion due to the EBHs under the Exchange Bonds unless the Republic pays Plaintiffs \$1.43 billion is not “wholly consistent with the equities.” The EBHs represent 92% of the victims of Argentina’s default, and have already lost tens of billions of

dollars. Plaintiffs hold FAA Bonds that account for less than 1% of the debt on which the Republic defaulted in 2001.²⁴

VII. PLAINTIFFS HAVE FAILED TO SHOW ANY BASIS TO CHANGE THE STAY ALREADY ENTERED BY THE COURT, AND RELIED UPON BY THE SECOND CIRCUIT.

Plaintiffs misleadingly urge the Court to “[d]ecline to [e]xtend” the stay of the Proposed Injunction it entered on March 5, 2012 (the “Stay”). NML 11/13/12 Brief, at 20; Ex. 11: Stay. In fact, there is no need for an “exten[sion]” because the Stay’s express terms already provide that it applies “until the ... Second Circuit has issued its *mandate disposing of the Republic’s appeal* of the [Proposed Injunction].” Ex. 11: Stay ¶ 1 (emphasis added). The Second Circuit has issued no “mandate,” much less one “disposing” of the appeal. Instead, the Court of Appeals entered an “Order” directing supplemental proceedings under *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), with the express aim of “further consider[ing] ... the merits of the remedy”—in particular as it affects third parties. *See* Docket Entry 387 (the referenced document is marked merely as a “Certified Copy” of the Opinion, and is not stamped as a “Mandate”). By proceeding in this manner, the Court of Appeals retained jurisdiction over this case. *Jacobson*, 15 F.3d at 22 (noting the Second Circuit’s authority to “seek supplementation of the record while retaining jurisdiction, *without a mandate issuing* or the need for a new notice of appeal”).²⁵ Plaintiffs’ invitation to tamper with the Stay entered by this Court would do violence

²⁴ It is the EBG’s understanding that Plaintiffs have not offered any formula to support their interest calculations, which total nearly \$1 billion. If the Court elects to proceed with requiring a ratable payment from the Republic, further proceedings will be necessary to verify Plaintiffs’ calculations.

²⁵ The Second Circuit also stated that, “[o]nce the district court has conducted [supplemental] proceedings[,] the mandate should automatically return to [the Court of Appeals] ... without need for a new notice of appeal.” Ex. 1: 2d Cir. Op., at 28-29. This is consistent with an alternative procedure set forth in *Jacobson*, under which the Second Circuit may “direct that a mandate issue forthwith and that [it] state the conditions that will restore jurisdiction to [the Court of Appeals].” *Jacobson*, 15 F.3d at 22. Whichever procedure the Second Circuit intended to follow, there is in fact no applicable “Mandate” in the Second Circuit case file, as there would have to be if a mandate had actually issued. And the Court of Appeals’ opinion is crystal clear that it has not yet spoken its last word on the Injunction. This Court’s intent in issuing the stay

to the Second Circuit’s direction that this Court should supplement the record before the Court of Appeals further evaluates the Injunction.²⁶

The consequences of vacating the Stay cannot be exaggerated—if it is lifted, and the Republic defaults as the market expects, the Second Circuit’s review of the merits of the Proposed Injunction will be rendered moot.²⁷ Choi Dec. ¶¶ 8-22. In effect, Plaintiffs will have succeeded in performing an end run around the Second Circuit and rushing this case to its conclusion while trampling the very third-party interests about which the Court of Appeals expressed “concerns.” Ex. 1: 2d Cir. Op., at 28. There is no reason the process needs to be hurried in a way that could ultimately frustrate the further appellate review that the Second Circuit expressly contemplates. The Second Circuit did not indicate any need for expedition, or any particular concern about the Republic’s scheduled December payments to the EBHs. The Exchange Bonds do not mature for many years,²⁸ and Plaintiffs will have ample opportunity to recover money owed to them regardless of whether the Second Circuit deems it necessary to take additional steps to protect the interests of the EBHs. Ex. 1: 2d Cir. Op., at 4. Moreover, if the stay were lifted and Plaintiffs were paid billions of dollars, there is no assurance that they would be able to repay the money if, for example, an appeal finally determines that the FSIA bars enforcement § 2(e) of the Injunction. If Plaintiffs were paid, because they are investment funds they will no doubt distribute that recovery immediately to their shareholders; the Plaintiff funds also could dissolve themselves; in either case obtaining repayment of the money would be difficult or impossible if this Court is later reversed. This is true irreparable injury, and it would

seems clearly to have been that the stay would remain in effect until the appeal was finally “dispos[ed] of.”

²⁶ Because the Stay has already been entered, Plaintiffs’ lengthy explication of reasons why it should not be *re*-entered is irrelevant. See NML 11/13/12 Brief, at 21-24.

²⁷ Lifting the stay would be particularly problematic if, notwithstanding the Second Circuit’s Opinion, this Court were to modify the proposed injunction to enable Plaintiffs to execute their judgment using funds paid to the EBHs Trustee. Ex. 1: 2d Cir. Op., at 5; Point II, *supra*.

²⁸ The relevant maturity dates are 2017, 2033, 2035, and 2038. Koenigsberger Dec. ¶ 10.

be suffered by the EBHs (or the Republic). Accordingly, the Stay should remain in effect, as this Court provided, until the Court of Appeals has “issued its mandate disposing of the Republic’s appeal[.]”

CONCLUSION

For the foregoing reasons, the Court should vacate § 2(e)the Injunction, reject Plaintiffs’ proposed injunction (particularly with respect to proposed § 2(e)) and schedule further proceedings consistent with the EBHs’ Due Process rights.

Dated: November 16, 2012
New York, New York

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EXHIBIT J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X		
NML CAPITAL, LTD.,	:	
	:	
Plaintiff,	:	08 Civ. 6978 (TPG)
	:	09 Civ. 1707 (TPG)
v.	:	09 Civ. 1708 (TPG)
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----X		
AURELIUS CAPITAL MASTER, LTD.	:	
and ACP MASTER, LTD.,	:	
	:	
Plaintiff,	:	09 Civ. 8757 (TPG)
	:	09 Civ. 10620 (TPG)
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----X		
AURELIUS OPPORTUNITIES FUND II,	:	
LLC and AURELIUS CAPITAL MASTER,	:	
LTD.,	:	
	:	
Plaintiffs,	:	10 Civ. 1602 (TPG)
	:	10 Civ. 3507 (TPG)
	:	10 Civ. 3970 (TPG)
v.	:	10 Civ. 8339 (TPG)
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----X		

(captions continue on following page)

OPPOSITION BRIEF OF
INTERESTED NON-PARTY FINTECH ADVISORY INC.

-----	X	
BLUE ANGEL CAPITAL I LLC,	:	
	:	
Plaintiff,	:	10 Civ. 4101 (TPG)
	:	10 Civ. 4782 (TPG)
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----	X	
OLIFANT CAPITAL, LTD.,	:	
	:	
Plaintiff,	:	10 Civ. 9587 (TPG)
	:	
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----	X	
PABLO ALBERTO VARELA, et al.,	:	
	:	
Plaintiffs,	:	10 Civ. 5338 (TPG)
	:	
v.	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
-----	X	

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Pursuant to Judge Griesa's Oral Decision of November 9, 2012, Fintech Advisory Inc. ("Fintech"), an interested non-party,¹ respectfully submits this brief and the Declaration of Andres Lederman in Support of the Opposition of Interested Non-Party Fintech Advisory Inc., dated November 16, 2012 ("Lederman Decl."), in opposition to the Brief of Plaintiffs in Response to the Remand from the Court of Appeals, dated November 13, 2012 (the "Brief"), which seeks entry of an order that adversely affects Fintech.

PRELIMINARY STATEMENT²

In both 2005 and 2010, Fintech made a great contribution and gave up \$698.9 million of the \$1.052 billion it was owed pursuant to bonds issued by the Republic of Argentina (the "Republic") to permit the Republic to manage a country of 40 million people and meet debt obligations consistent with its means and economic ability. The Republic and Fintech entered into a new contractual arrangement by which the Republic agreed to pay Fintech this greatly reduced amount. Plaintiffs in these cases now seek an order from this Court (the "Proposed Order", Exhibit A to the Brief) which will "reward" Fintech's prior contribution by preventing Fintech from being paid under its separate and reduced value bond contracts with the Republic. If accepted, Plaintiffs' Proposed Order would *require* the Republic to breach its entirely separate contracts with the Exchange Bondholders such as Fintech if the Republic continues to defend its position against the Plaintiffs. The Proposed Order would also effectively restrain a fiduciary (the Bank of New York) from causing Fintech's property to be distributed to Fintech. In sum, the Proposed Order will result in a breach of contract by the Republic as to the Exchange

¹ Because Fintech's interests are affected by the outcome of the Court's ruling on the issues addressed herein, it respectfully submits this opposition brief. See Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120 (2d Cir. 2009) (holding that non-parties have standing to appeal where interests are directly affected by district court's orders). See also Nov. 9, 2012 Tr. 5:7-10 ("People can file briefs -- I am sure there will be more briefs than just the plaintiff's and the Republic's -- as long as all that briefing is concluded by a week from today . . .").

² Any capitalized terms not defined in the Preliminary Statement are defined below.

Bondholders as well as potential breaches by the Bank of New York as to the Exchange Bondholders. There is no basis for any order to cause such a result.

It is no answer for Plaintiffs to argue that as long as the Republic meets its contractual obligations to pay them the Republic can meet its obligation to pay Exchange Bondholders such as Fintech. The Exchange Bondholders have no say in whether the Republic breaches its separate contract with the Original Bondholders, and there is no basis whatsoever to impact the Exchange Bondholders in any way based upon what the Republic does with respect to Plaintiffs. Moreover, as Plaintiffs themselves have conceded, there is no reason to believe that the Republic will pay Plaintiffs as a result of the Proposed Order. Thus, Plaintiffs' Proposed Order likely will have the unprecedented impact of causing great harm to complete strangers to Plaintiffs' dispute with the Republic while yielding *no* benefit to Plaintiffs themselves.

It is also not an answer for Plaintiffs to say that Fintech can sue the Republic if the Republic does not pay the monies due to Fintech on the Exchange Bonds. First, there may be an issue as to whether Fintech has a claim against the Republic if the Republic transfers money for the benefit of Fintech to the Bank of New York, where the funds would be subject to restraint. The Republic may argue, rightly or wrongly, that it met its contractual obligation by distributing funds to the Bank of New York as trustee. In any event, Fintech years ago made its decision to accept a new contract and not litigate with the Republic, and Plaintiffs have absolutely no right to use their breach of contract claim to cause the Republic to breach others' contracts and then suggest that these parties also sue the Republic.

With due respect, while the Court may have clear frustration with the Republic, it is entirely inappropriate and unprecedented to craft a remedy to coerce the Republic to act as to Plaintiffs which puts non-parties to this action, such as Fintech, in harm's way. As the Court has

recognized the interests of non-parties in prior rulings in this action, Fintech respectfully requests that the Court refuse to enter any order which jeopardizes the payment to Fintech of monies to which it is indisputably entitled.

BACKGROUND

A. Fintech’s Holdings of Exchange Bonds Represent a Significant Discount From Its Holdings of the Original Bonds

Fintech is an investment management firm organized under the laws of Delaware with its principal place of business in New York. Lederman Decl. ¶ 2. When the Republic issued debt securities in 1994, Fintech was among the Republic’s original bondholders. *Id.* ¶ 3. Fintech later purchased approximately \$834 million face value of bonds issued pursuant to a Fiscal Agency Agreement, in which the coupon rates ranged from 3.0% to 15.5% and the dates of maturity ranged from April 2002 to September 2031 (the “Original Bonds,” and purchasers thereof, the “Original Bondholders”). *Id.* The Republic defaulted on these Original Bonds on December 24, 2001. In 2005 and again in 2010, the Republic underwent voluntary debt restructuring and offered the Original Bondholders the option to exchange their defaulted bonds for new, unsecured, subordinated bonds at a substantially reduced exchange rate (separately, the “2005 Exchange Bonds” or the “2010 Exchange Bonds,” collectively, the “Exchange Bonds,” and the holders thereof, the “Exchange Bondholders”). Fintech was one of the largest participants in the 2005 exchange, and decided to participate because it realized that the only way the Republic would recover from a distressed economic situation was by a reduction in aggregate liabilities that would allow the economy to grow and restore a minimum level of creditworthiness to the Republic. *Id.* ¶¶ 5, 6.

The principal value of the Original Bonds Fintech elected to exchange in 2005 totaled roughly \$638 million. *Id.* ¶ 7. When Fintech participated in the 2005 exchange, the new bonds

it received were valued at 28% of the face value of its Original Bonds, resulting in a 72% reduction in principal.³ Id. Additionally, the Republic owed Fintech no less than \$108 million in past due interest payments on the defaulted Original Bonds, for which Fintech received no additional consideration.⁴ Id. Accordingly, although Fintech finally began receiving regular interest payments in 2005 pursuant to the new contractual arrangements entered into with the Republic through the 2005 Exchange Bonds, these distributions were considerably less than had been owed to Fintech under the Original Bonds due to the deeply discounted nature of the 2005 Exchange Bonds.

In 2010, the Republic offered the Original Bondholders another opportunity to exchange their non-performing Original Bonds. Lederman Decl. ¶ 10. Fintech again opted to participate in the Republic's voluntary debt restructuring, and offered the balance of its Original Bonds to the Republic. Id. The principal amount on the Original Bonds Fintech elected to exchange in 2010 was \$196 million, the balance of the Original Bonds held by Fintech. Id. ¶ 11. It received new bonds equal to 33.7% of the total face value of the Original Bonds, resulting in a 66.3% reduction in principal of the 2010 Exchange Bonds. Id. ¶ 13. In addition, the Republic owed Fintech no less than \$110 million in past-due interest on the Original Bonds exchanged in 2010 for which there was no separate consideration. Id. As such, the aggregate haircut on the 2010 Exchange Bonds totaled 83% of the value of the total amount that had been owed to Fintech under the Original Bonds. Id. ¶ 14.

³ These figures do not take into account the collateral payments that the Republic made to Fintech pursuant to the Original Bonds. Id. ¶ 9.

⁴ The Republic also provided Fintech with Gross Domestic Product ("GDP") warrants. However, these warrants do not allow Fintech to receive a fixed income on the Exchange Bonds and have had an average market value of 10% of the face value of the Original Bonds. Id. ¶ 9 n.1.

In sum, Fintech's Original Bonds were worth approximately \$834 million face value with past-due interest payments of no less than \$218 million due in 2005 and 2010. *Id.* ¶¶ 7, 9, 11, 13. In good faith and for the benefit of the Argentine economy, which at the time was in a state of financial distress, Fintech accepted a reduction of roughly two-thirds of the face value of the Original Bonds in exchange for payment from the Republic pursuant to the terms of the Exchange Bonds. *Id.* ¶ 15. By 2010, Fintech was among the 91% of the Original Bondholders that became Exchange Bondholders and took a significant loss on their original investment. *Id.* ¶ 16.

B. The Court's Prior Protection of Non-Parties' Rights

As this Court well knows, in 2010, NML, an Original Bondholder, filed a motion for partial summary judgment and sought injunctive relief precluding payments to the Exchange Bondholders unless NML was paid in full on its un-restructured debt. Brief at 5. NML, which is among the 9% that chose not to exchange its bonds in 2005 or 2010, has not been paid on its debt since 2001. During the September 28, 2011 hearing on NML's motion, the Court gave significant consideration to the position of the Exchange Bondholders and denied NML's motion for injunctive relief because it would have interfered with the Republic's payments to the Exchange Bondholders. As the Court acknowledged, an injunction requiring the Republic to pay Plaintiffs ratably upon payment to the Exchange Bondholders "might interfere with an exchange offer" and "would prejudice the rights and opportunities of the people who want to make exchanges." *See* Sept. 28, 2011 Hearing Tr. at 40:9-14. Respectfully, the Court should again reject NML's Proposed Order to the extent it interferes with the separate, contractual rights granted to the Exchange Bondholders. *See EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005) (affirming this Court's rejection of NML's attempt to block the Republic's

Exchange Offer because it was “obviously of critical importance to the economic health of a nation”). In light of the Court of Appeals’ decision on October 26, 2012 (the “October 26 Decision”), NML cannot now be permitted under the Proposed Order to do what it previously was not permitted to do, namely, alter the systematic payments the Exchange Bondholders have been receiving from the Republic under separate contractual agreements, which already reflect substantial monetary and contractual concessions made by the Exchange Bondholders.

C. The Impact of the Proposed Order on Fintech

As a result of participating in the Republic’s debt restructurings of 2005 and 2010, Fintech, as a beneficial owner of Exchange Bonds, has received regular interest payments from the Republic since June 2005. Lederman Decl. ¶¶ 19-21. These monies apparently are paid in Argentina and are held in trust by The Bank of New York, as the trustee for the Exchange Bondholders (the “Trustee”). As Fintech understands it, the general flow of funds ultimately distributed to the beneficial owners such as Fintech originate with the Republic and are first transferred in Argentina to the Trustee, then to the registered owners such as the Depository Trust & Clearing Corporation (“DTC”), then to the participant banks including J.P. Morgan and Citibank, and finally to the beneficial owners such as Fintech. *Id.* ¶ 21. The Proposed Order prevents the Republic’s “agents and participants,” including specifically the Trustee and DTC, from disbursing the monies rightfully owed to the Exchange Bondholders pursuant to the contracts they entered into as a result of voluntarily participating in the Republic’s debt restructurings unless the Republic also paid the Original Bondholders under separate and distinct contracts. The Exchange Bondholders are powerless to determine whether the Republic will or will not pay the Original Bondholders. As a result, the Exchange Bondholders’ right to receive

monies from the Republic, which becomes the Exchange Bondholders' money when transferred to the Trustee, is placed in serious jeopardy.

ARGUMENT

I. The Proposed Order Significantly Threatens the Contractual and Property Rights of Non-Parties

A. The Rights of the Exchange Bondholders Improperly Becomes Contingent

The entry of the Proposed Order would threaten the contractual rights of the Exchange Bondholders to be paid monies due to them by the Republic, which are separate and distinct from obligations owed by the Republic to the Original Bondholders under separate contracts. If the Proposed Order is entered, the Exchange Bondholders' right to receive payments due under their contracts with the Republic becomes contingent upon whether the Republic makes payments under entirely separate contracts to the Original Bondholders. This would profoundly alter the Exchange Bondholders' rights. The Exchange Bondholders bargained for significant Fiscal concessions when they accepted the exchanges in 2005 and 2010; they did not agree to make their rights, years later, retroactively dependent upon how the Republic does or does not deal with other parties to whom the Exchange Bondholders owe no duties whatsoever. Quite simply, the Original Bondholders have no rights to convert default on their debt into default on the Exchange Bondholders' debt.

B. An Award of Injunctive Relief In Favor of the Original Bondholders Should Be Narrowly Tailored to Protect Non-Parties⁵

This Court should not enter an injunction that has the effect of infringing upon separate, contractual rights of non-parties with the Republic, *i.e.*, Fintech’s right to payment from the Republic. See Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir. 1979) (recognizing that courts may not enjoin the world at large); New York ex rel. Vacco v. Operation Rescue Nat’l, 80 F.3d 64, 70 (2d Cir. 1996) (stating that the party seeking to enforce the injunction bears the burden of proving the third party is within the scope of the injunction and a court may not enjoin the world).⁶ “[C]ourts should not adjudicate [the rights of third persons not parties to the litigation] unnecessarily” Singleton v. Wulff, 428 U.S. 106, 113 (1976). Fintech and the Exchange Bondholders should remain unaffected by any remedy crafted by the Court regarding payment by the Republic to the Original Bondholders pursuant to the *pari passu* clause. See Parker v. Ryan, 960 F.2d 543, 546 (5th Cir. 1992) (“if a nonparty asserts an independent interest in the subject property and is not merely acting on behalf of the defendant, then rule 65(d) does not authorize jurisdiction over the party”) (citing, *inter alia*, Heyman v. Kline, 444 F.2d 65 (2d Cir. 1971)).

⁵ Plaintiffs’ Proposed Order sweeps far too broadly. Plaintiffs propose to enjoin all non-parties who “assist the Republic in fulfilling its payment obligations under the Exchange Bonds,” thereby deeming any institution that assists the Republic in making its interest payments in “active concert” with the Republic. Brief at 17. This argument puts the cart before the horse. Actions that “aid and abet in violating the injunction must occur after the injunction is imposed for the purposes of Rule 65(d)(2)(C), and certainly after the wrongdoing that led to the injunction occurred.” Blockowicz v. Williams, 630 F.3d 563, 568 (7th Cir. 2010). “The law is clear that a court may not enforce an injunction against a non-party who act[s] independently of the enjoined party.” E.A. Renfroe & Co., Inc. v. Moran, 338 Fed. App’x 836, 840 (11th Cir. 2009) (citations and quotations omitted).

⁶ The impact on third parties can be a basis for denying injunctive relief altogether. See B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 548 (1st Cir. 2006) (“[w]hen rescission or specific performance might have a detrimental impact on an absent person, money damages may prove to be an appropriate alternative”) (citations omitted); Stilp v. Contino, 629 F. Supp. 2d 449, 467 (M.D. Pa. 2009) (public interest factor in the injunction analysis requires “focus” on “specific, tangible effects on third parties”).

Accordingly, the Proposed Order must be narrowly drawn so as to avoid an impact on third parties such as the Exchange Bondholders. See United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1150 (D.C. Cir. 2009) (“we also vacate the remedial order as it regards point-of-sale displays and remand for the district court to make due provision for the rights of innocent third parties”); Indiana ex rel. Zoeller v. Pastrick, 696 F. Supp. 2d 970, 993-994 (N.D. Ind. 2010) (following holding in Philip Morris). See also Cook Inc. v. Boston Sci. Corp., 333 F.3d 737, 744 (7th Cir. Ill. 2003) (“In determining the appropriate scope of an injunction the judge must give due weight to the injunction’s possible effect on innocent third parties”) (citing Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791, 797 (7th Cir. 1995); Kasper v. Board of Election Commissioners, 814 F.2d 332, 340 (7th Cir. 1987) (same)).⁷

C. The Exchange Bondholders Hold Ownership
Of the Trust Funds Which Should Not Be Disturbed

The Proposed Order, which would restrain funds transferred to and held in trust by the Trustee for the Exchange Bondholders’ benefit, impermissibly restrains funds that belong to the non-party Exchange Bondholders such as Fintech and that do not belong to the Republic or to the Trustee. The monies to be distributed to the Exchange Bondholders are held in trust by the Trustee for the Exchange Bondholders’ benefit after transfers by the Republic to the Trustee. See Trust Indenture, Section 5.5. Since June 2005, the Republic has effectuated regular interest payments to the Exchange Bondholders by transferring the required funds to the Trustee. Once the funds are in possession of the Trustee, it holds those amounts for the benefit of the beneficial

⁷ In the context of injunctive relief, courts are even more protective of the rights of non-parties. See generally Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110-12 (1969) (court cannot enjoin non-party). As the Seventh Circuit stated in Duct-O-Wire Co. v. U.S. Crane, Inc., 31 F.3d 506, 509 (7th Cir. 1994), “[t]he court must also consider the public interest in terms of the consequences of granting or denying the injunction to non-parties.” See also Eli Lilly & Co. v. Premo Pharmaceutical Laboratories, Inc., 630 F.2d 120, 136 (3rd Cir.), cert. denied, 449 U.S. 1014 (1980) (third party interests are one of four major considerations in granting an injunction); Forry, Inc. v. Neudorfer, Inc., 837 F.2d 259, 262 (6th Cir. 1988); Loenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554, 561 (D.D.C. 1985) (a court must consider “whether issuance of the requested relief will substantially harm other parties, and the public interest”).

owners of the Exchange Bonds, including Fintech. Id. Therefore, the funds held by the Trustee in the United States (or elsewhere) are no longer the property of the Republic, but rather are property held in trust for the Exchange Bondholders. See In re Carrozzella & Richardson, 278 B.R. 691, 694-95 (Bankr. D. Conn. 2001) (“It is axiomatic that funds held in trust by one entity for another do not constitute the beneficial property of the former. Rather, title to the trust property is held by the former as trustee for the benefit of the latter”) (citing Restatement (Second) of Trusts § 2 (1959)); Henning v. Rando Mach. Corp., 207 A.D.2d 106, 108, 620 N.Y.S.2d 867 (4th Dep’t 1994) (beneficiaries of express trust hold equitable claim to trust property). The trust beneficiaries, such as Fintech, hold equitable title to trust property and are the “real owners” of the trust property. See Wellpoint, Inc. v. Comm’r, 599 F.3d 641 (7th Cir. 2010); Goodrich v. Briones (In re Schwarzkopf), 626 F.3d 1032 (9th Cir. 2010); United States v. Coluccio, 51 F.3d 337, 341-42 (2d Cir. 1995); In re Gans, 1987 Bankr. LEXIS 1002, at *44-45 (Bankr. S.D.N.Y. 1987). Accordingly, the Proposed Order cannot be entered because it would restrain the Exchange Bondholders from receiving their own property. See Coluccio, 51 F.3d at 341-42 (“If she were the beneficiary of such a trust, then she would be “the equitable owner” of those funds”).

II. The Exchange Bondholders Should Not Be Used To Make the Republic Pay the Original Bondholders

Fintech was among the Original Bondholders holding over 91% of the Republic’s defaulted debt that chose to exchange its non-performing bonds in 2005 and 2010 at the cost of a significant haircut. The Proposed Order in effect nullifies the monetary concessions Fintech made to the Republic and attempts to use debt it owes the Exchange Bondholders as a mechanism to force the Republic to pay monies to the Original Bondholders. The Exchange Bondholders, however, have no input as to what the Republic does as to the Original

Bondholders. The Proposed Order penalizes the non-parties that already have made significant concessions and puts their abilities to receive payments indisputably due to them at the whim of whether the Republic makes a payment under an unrelated contract. Such a result would be inequitable to Fintech and provide a basis for future creditors in struggling economies such as Greece and Spain to reject voluntary debt restructurings. The Proposed Order could also destabilize restructurings that already have taken place in other countries.

Plaintiffs claim that non-parties such as Fintech are only submitting briefs to this Court in an effort to delay enforcement of this Court's orders. That assertion is inaccurate and the Exchange Bondholders are entitled to be heard because of their significant interests at stake. Moreover, Plaintiffs admit they "understand the desire of the beneficial holders of the Exchange Bonds to be paid pursuant to the terms of their contract with Argentina, as they have been paid for years." Brief at 25. The Court's suggestion at the November 9, 2012 conference that the way to ensure that the Republic continue to pay the Exchange Bondholders is for them to "talk to the Republic." Nov. 9, 2012 Tr. 28:6-11. But the Exchange Bondholders did exactly that in 2005 and 2010 when the Republic offered the Original Bondholders the opportunity to receive payments on their defaulted bonds, and it resulted in new contracts between the Exchange Bondholders and the Republic upon which the Exchange Bondholders now "have been paid for years." Brief at 25. To now use these contracts as a lever to persuade the Republic to pay the Original Bondholders unfairly affects the scheduled payments that the Exchange Bondholders "have a legal right to." Nov. 9, 2012 Tr. 29:20-30:25. As this Court acknowledged, "[t]hat is money that they are being deprived of that they are entitled to." *Id.* Accordingly, Fintech does not submit this brief as a delay tactic; rather, it seeks to protect the payment of monies it is "entitled to."

III. The Proposed Order Should Not Enjoin The Alleged Agents and Participants of the Republic

Plaintiffs claim that the registered owners and the clearing corporations are not “intermediary banks,” and thus the Court can lawfully prevent Exchange Bondholders like Fintech, as beneficial owners, from receiving payments owed to them under the Exchange Bonds. That assertion is incorrect.

First, U.C.C. § 4-A-104 defines “intermediary bank” as “a receiving bank other than the originator’s bank or the beneficiary’s bank.” But the scenario Plaintiffs depict at page 19 of their Brief illustrates that the registered owners and clearing corporations are in fact “intermediary banks.” See Navalmar (U.K.) Ltd. v. Welspun Gujarat Stahl Rohren, Ltd., 485 F. Supp. 2d 399, 408 (S.D.N.Y. 2007) (intermediaries are in “temporary possession” of the funds, which are “subject to [the] rights of another” “to possess, use, and enjoy”) (citations omitted); Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd., 585 F.3d 58, 67 (2d Cir. 2009) (describing Bank of New York, through which funds were transferred, as “intermediary bank”). “Article 4–A approaches each funds transfer not as a single payment order, but rather as a series of transactions each of which involves only the parties to the individual payment order.” Grain Traders, Inc. v. Citibank, N.A., 960 F. Supp. 784, 789 (S.D.N.Y. 1997), aff’d, 160 F.3d 97 (2d Cir. 1998). Indeed, “[f]or any given funds transfer, there can be only one originator, originator’s bank, beneficiary, and beneficiary’s bank, but there can be several senders and receiving banks, one of each for every payment order required to complete the funds transfer.” Grain Traders, Inc. v. Citibank, N.A., 160 F.3d 97, 100 (2d Cir. 1998) (citing U.C.C. § 4-A-103).

Second, Plaintiffs have acknowledged in their Brief that through the flow of funds from the Republic to the Exchange Bondholders, certain “unnamed banks may act as intermediary banks.” Brief at 19. Similarly, Fintech believes that receipt of its funds flows through at least

one intermediary bank. See p. 6, supra; Lederman Decl. ¶ 21. And Plaintiffs concede that intermediary banks may not be enjoined by the court. See Brief at 19 (citing Grain Traders, 160 F.3d at 102). See also NML Capital, Ltd. v. Republic of Argentina, 12-105 (L), 2012 WL 5275014 (2d Cir. Oct. 26, 2012) (“the Injunctions, which by their terms apply to “indirect facilitators” of payments on the Exchange Bonds . . . violate the U.C.C., which prohibits injunctive relief against “intermediary banks” responsible for processing fund transfers”) (citing U.C.C. § 4-A-503 cmt.).

Lastly, Plaintiffs fail to recognize that “[a] court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.” U.C.C. § 4-A-503. “Except for the beneficiary’s bank, nobody can be enjoined from paying a payment order, and no receiving bank can be enjoined from receiving payment from the sender of the order that it accepted.” Id. cmt.

Accordingly, this Court should not enjoin the intermediate transferees and prohibit Fintech and the Exchange Bondholders from receiving their scheduled payments.

IV. Entry of the Proposed Order May Result in Breaches of the Trust Indenture if the Trustee Fails to Pay the Exchange Bondholders

If the Proposed Order is entered and the Republic elects not to or cannot distribute funds to the Exchange Bondholders, this automatically will trigger an event of default pursuant to the Trust Indenture. See Trust Indenture Art. 4. The Exchange Bondholders will not only have a potential claim for breach of contract, but may also have a claim for the breach of fiduciary duty as well. See BNP Paribas Mortg. Corp. v. Bank of Am., N.A., 778 F. Supp. 2d 375 (S.D.N.Y. 2011) (after an event of default, the indenture trustee’s fiduciary duties expand by operation of New York common law, such that fidelity to the terms of an indenture does not immunize an indenture trustee against claims that the trustee has acted in a manner inconsistent with his or her

fiduciary duty of undivided loyalty to trust beneficiaries, and the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture). Thus, the Proposed Order should be rejected because it is highly likely to cause litigation involving current non-parties, including the Trustee.

CONCLUSION

For the reasons set forth herein, Fintech respectfully requests that the remedy the Court fashions in furtherance of the October 26 Decision not present any possible disruption to payments due and owing by the Republic to the Exchange Bondholders.

Dated: New York, New York
November 16, 2012

Respectfully submitted,

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EXHIBIT K

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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	:	
NML CAPITAL, LTD.,	:	08-cv-6978 (TPG)
	:	09-cv-1707 (TPG)
Plaintiff,	:	09-cv-1708 (TPG)
	:	
-against-	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	

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AURELIUS CAPITAL MASTER, LTD. and	:	09-cv-8757 (TPG)
ACP MASTER, LTD.,	:	09-cv-10620 (TPG)
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	

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**BRIEF OF NON-PARTY BANK OF NEW YORK MELLON,
AS INDENTURE TRUSTEE, ADDRESSING THE ISSUES
RAISED ON REMAND FROM THE COURT OF APPEALS**

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AURELIUS OPPORTUNITIES FUND II,	:	10-cv-1602 (TPG)
LLC and AURELIUS CAPITAL MASTER,	:	10-cv-3507 (TPG)
LTD.,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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AURELIUS CAPITAL MASTER, LTD. and	:	10-cv-3970 (TPG)
AURELIUS OPPORTUNITIES FUND II,	:	10-cv-8339 (TPG)
LLC,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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BLUE ANGEL CAPITAL I LLC,	:	10-cv-4101 (TPG)
	:	10-cv-4782 (TPG)
Plaintiff,	:	
	:	
-against-	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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PABLO ALBERTO VARELA, et al., 10-cv-5338 (TPG)
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Plaintiffs, :
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-against- :
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THE REPUBLIC OF ARGENTINA, :
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Defendant. :
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:
OLIFANT FUND, LTD., 10-cv-9587 (TPG)
:
Plaintiff, :
:
-against- :
:
THE REPUBLIC OF ARGENTINA, :
:
Defendant. :
:
----- X

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Non-party The Bank of New York Mellon, as Indenture Trustee, by and through its attorneys, Reed Smith LLP, respectfully submits this Memorandum of Law addressing certain issues raised on remand from the United States Court of Appeals for the Second Circuit.

I. Introduction

Plaintiffs maintain that non-party The Bank of New York Mellon (“BNY Mellon”) – in its capacity as indenture trustee under a Trust Indenture (the “Indenture”) executed for the benefit of holders (the “Exchange Holders”) of certain debt securities issued by the Defendant Republic of Argentina in 2005 and 2010 – is a “third party” subject to this Court’s February 23, 2012 Injunction (the “Injunction”) because it is Argentina’s “agent” or because it otherwise would “aid or abet” Argentina in any violation of this Court’s Injunction. Plaintiffs are wrong – as a matter of fact and law. BNY Mellon’s duties as indenture trustee run to the Exchange Holders, and Argentina has no control over BNY Mellon in carrying out those duties. And, as indenture trustee, BNY Mellon has no control over Argentina and no involvement in Argentina’s performance of any obligations to Plaintiffs. Plaintiffs’ efforts to threaten an indenture trustee with an extraordinary citation of contempt go too far.

BNY Mellon is not a party to this controversy. Its only arguable link to this litigation is through an Indenture that is unrelated and unconnected to the securities held by Plaintiffs. The Indenture sets forth the duties that BNY Mellon, as indenture trustee, owes to the Exchange Holders and obligates BNY Mellon to act for their benefit. In that capacity, BNY Mellon is not Argentina’s “agent” – its relationship to Argentina is at arm’s length and its duty of loyalty runs to the Exchange Holders. By the same token, BNY Mellon has no say or involvement in whether Argentina makes a “Ratable Payment” (or any other payment) under Argentina’s separate, unrelated obligations to Plaintiffs. BNY Mellon likewise has no obligation to make any payment to Argentina’s other creditors, with which BNY Mellon has no contractual or other

relationship, and BNY Mellon cannot compel Argentina to make payments to others. As a result, any attempt to hold BNY Mellon in contempt for Argentina's failure to follow the Court's Injunction would punish BNY Mellon for conduct in which it played no role, which it could not aid or abet, and which it cannot control. Punishment by contempt in such circumstances would contravene Rule 65, case law applying the Rule, and fundamental notions of fairness.

To that end, courts do not enter injunctions to punish non-parties with contempt where the non-parties cannot cure the violation or prevent it from happening in the first place. Indeed, when Plaintiffs suggested to the Second Circuit that this was their primary strategy – to bind BNY Mellon because they believed Argentina would flout the Injunction and any ensuing contempt order – Judge Raggi observed that in her mind courts do not “enter injunctions primarily for the purpose of taking action against third parties.” (July 23, 2012 Tr. at 56:12-14). Case law supports this conclusion. To threaten BNY Mellon with contempt in this instance would unhinge this extraordinary power from its Constitutional moorings. BNY Mellon accordingly urges this Court to hold that it is not a “third party” within the scope of the Injunction.

If this Court takes a different route and decides that the Injunction applies to BNY Mellon, then it should provide necessary guidance as to how BNY Mellon should handle any funds received from Argentina under the Indenture for the benefit of the Exchange Holders in the event Argentina does not make a “Ratable Payment” to Plaintiffs. BNY Mellon cannot be forced to distribute funds to Plaintiffs, with whom it has no relationship, and Argentina's failure to do so does not change the terms of the Indenture that obligates BNY Mellon to make a payment to the Exchange Holders. Simply put, BNY Mellon could be subject to multiple conflicting obligations, with a threat of contempt, on the one hand, and a claim for breach of the Indenture,

on the other. This Court's March 5, 2012 stay of the Injunction accordingly should remain in place until those obligations can be sorted out by this Court or by other avenues of judicial relief.¹

II. Discussion

A. **BNY Mellon, As An Indenture Trustee, Owes Only Those Duties Set Forth In The Indenture And Those Duties Run To the Exchange Holders, Not Argentina.**

Unlike a regular trustee, which has common law duties beyond those set out in the trust agreement, the duties and conduct of an indenture trustee are governed exclusively by the terms of the Indenture. Here, the Indenture is explicitly intended for the benefit of the Exchange Holders, and BNY Mellon's duties are owed directly to those Exchange Holders, not to Argentina.²

"The trust indenture is a device by which a corporation or governmental entity borrows money from the general public or large institutional investors to issue securities." Landau and Peluso, Corporate Trust Administration and Management (6th ed. 2008) at 35. The trust indenture is a contract among the issuer (here Argentina), the indenture trustee (here BNY Mellon), and the holders of the securities issued by the issuer (here the Exchange Holders). *Id.* at 42; see also Greenwich Financial Services Distressed Mortgage v. Countrywide Financial Corp., 654 F. Supp. 2d 192, 196 (S.D.N.Y. 2009) ("A bond indenture is a 'contract between the

¹ The Court of Appeals for the Second Circuit issued its limited remand of this case on October 26, 2012, and BNY Mellon attended the subsequent conference held on November 9, 2012, with this Court's permission. BNY Mellon is participating in these proceedings on the expedited schedule set by the Court due to the substantial threat of litigation that it faces should it be found to be subject to the Injunction. Nonetheless, BNY Mellon believes that it is entitled to a full hearing and to receive this Court's guidance before it is exposed to that threat.

² A true and accurate copy of the Indenture is attached to the November 16, 2012 Declaration of Kevin F. Binnie of The Bank of New York Mellon Regarding the Payment Process for Global Bonds Issued Pursuant to that Certain Trust Indenture Dated as of June 2, 2005, and the First Supplemental Indenture Dated as of April 30, 2010 (the "Binnie Decl.") as Exhibit A.

borrowing company and the trustee (usually a bank) or trustees representing the bondholders.”) (quoting *ENCYCLOPEDIA OF BUSINESS FINANCE* 313 (Prentice Hall, Inc. 1960)).

In defining the scope of these relationships, the Court of Appeals for the Second Circuit has emphasized the importance of limiting the duties of indenture trustees to those explicitly set out in the applicable indentures:

An indenture trustee is not subject to the ordinary trustee’s duty of undivided loyalty. Unlike the ordinary trustee, who has historic common-law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement. *See Hazzard v. Chase National Bank*, 159 Misc. 57, 287 N.Y.S. 541 (Sup. Ct. N.Y. Cty. 1936), *aff’d*, 257 A.D. 950, 14 N.Y.S.2d 14 (1st Dep’t 1939), *aff’d*, 282 N.Y. 652, 26 N.E.2d 801 (1940), *cert. denied*, 311 U.S. 708, 61 S.Ct. 319, 85 L.Ed. 460 (1940).

Meckel v. Cont’l Res. Co., 758 F.2d 811, 815-16 (2d Cir. 1985); *see also Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (It is “well established under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture”) (citations omitted); *AG Capital Funding Partners, L.P. v. State Street Bank & Trust Co.*, 11 N.Y.3d 146, 156 (2008) (“The trustee under a corporate indenture . . . has his rights and duties defined . . . exclusively by the terms of the agreement.”) (citations omitted).³

The limited duties owed by an indenture trustee are a recognition of the indenture trustee’s special role under an indenture. As the Court observed in *Meckel*, “[t]rust indentures

³ Under controlling law, an indenture trustee has only two extra-contractual duties: avoiding conflicts of interest and performing ministerial tasks with due care. *See LNC Invs., Inc. v. First Fidelity Bank, Nat’l Ass’n*, 935 F. Supp. 1333, 1347 (S.D.N.Y. 1996); *see also Lorenz v. CSX Corp.*, 736 F. Supp. 650, 656 (W.D. Pa. 1990) (“Unlike the typical trustee whose rights and duties are grounded in the common law, the obligations of the Indenture Trustee are circumscribed by the terms of the Indenture. His duties are defined by contract, and he owes the debenture holders no fiduciary duties beyond those provided by the Indenture.”), *aff’d*, 1 F.3d 1406 (3d Cir. 1993); *Harriet & Henderson Yarns, Inc. v. Castle*, 75 F. Supp. 2d 818, 830-31 (W.D. Tenn. 1999) (“the leading authorities make clear that, unlike those of an ordinary trustee, the duties of an indenture trustee are generally defined by and limited to the terms of the indenture.”).

are important mechanisms for servicing corporate debt and banks play an essential role in the process that brings corporate financings to the public market.” Meckel, 758 F.2d at 815. That observation reflects indenture trustees’ important role in protecting and enforcing the rights of bondholders, as also recognized by Congress in enacting the Trust Indenture Act of 1939 (“TIA”). See Trust Indenture Act § 302(a), 15 U.S.C. § 77bbb(a)(1) (“[T]he national public interest and the interest of investors in . . . bonds . . . which are offered to the public, are adversely affected . . . when the obligor fails to provide a trustee to protect and enforce the rights and to represent the interests of such investors”); see also Elliott Assocs., 838 F.2d at 71 (“In view of the foregoing, it is no surprise that we have consistently rejected the imposition of additional duties on the trustee in light of the special relationship that the trustee already has with both the issuer and the debenture holders under the indenture.”).⁴

In this case, the Indenture makes it clear that BNY Mellon acts independently of, and owes no duties to, Argentina. As indenture trustee, BNY Mellon acts “for the equal and proportionate benefit of the Holders” Indenture at p. 1, Binnie Decl., Ex. A.⁵ More specifically, BNY Mellon holds all monies paid to it under the Indenture “in trust” for itself and the Exchange Holders, id. at §§ 3.1, 3.5(a), 5.5, 11.2, and Argentina has “no interest whatsoever in such amounts,” id. at § 3.5(a). Accord EM Ltd. v. Republic of Argentina, 865 F. Supp. 2d 415, 2012 WL 1028109, at *7-8 (S.D.N.Y. March 28, 2012) (citing NML Capital Ltd. v. Banco Central de la Republica Argentina, 652 F.3d 172 (2d Cir. 2011); Brown v. Morgan & Co., Inc., 265 A.D. 631, 40 N.Y.S.2d 229 (1st Dep’t 1943), aff’d, 295 N.Y. 867, 67 N.E.2d 263 (1946)).

⁴ Although the Indenture is not subject to the Trust Indenture Act, the terms of the TIA “are broadly important since they also are adopted in the drafting of indentures that are not subject to the TIA.” J. Gadsden, Introduction to the Annotated Trust Indenture Act, 67 Bus. Law. 979, 982-93 (Aug. 2012).

⁵ BNY Mellon serves as trustee only for those bonds that are expressly governed by the Indenture. In this regard, BNY Mellon does not serve as trustee for all of the bonds issued in the 2005 and 2010 exchanges.

In addition, BNY Mellon alone has authority over any trustee paying agent as defined in the Indenture. Indenture at § 3.5(a), Binnie Decl., Ex. A. (“[A]ny trustee paying agents appointed pursuant to this Indenture shall be agents solely of the Trustee, and the Republic shall have no authority over or any direct relationship with any such trustee paying agent or agents.”).⁶

In the event Argentina defaults on payments to the Exchange Holders, the Indenture provides for BNY Mellon to exercise remedies against Argentina and for the benefit of the Exchange Holders. This includes the right to:

- declare the entire indebtedness under the Notes immediately due and owing, id. § 4.4(a);
- institute proceedings “in its own name and as trustee of an express trust” for all amounts unpaid under the Notes and all costs of collection, id. at § 4.4(c), (d); and
- pursue any available remedy to collect amounts owed by Argentina, id. at § 4.6.

Pursuant to the Indenture, the Exchange Holders direct BNY Mellon with regard to the exercise of rights or remedies against Argentina. Id. at §§ 4.8.

To summarize, BNY Mellon, as indenture trustee, holds funds received from Argentina in trust for payment to the Exchange Holders. BNY Mellon is obligated to protect the interests of the Exchange Holders in accordance with the terms of the Indenture. At the same time, the Indenture imposes no such duties on BNY Mellon for the benefit of Argentina. As indenture trustee, BNY Mellon does not act for or with Argentina.

⁶ Currently, BNY Mellon acts as the trustee paying agent. While BNY Mellon and its affiliates perform various roles under the Indenture in relation to the Exchange Holders, the rights and obligations ascribed to each of these roles are exclusively subsumed by and defined in the Indenture.

B. BNY Mellon Should Not Be Subject To The Injunction Because Its Limited Duties Run To The Exchange Holders, Not Argentina, And It Cannot Control Whether Argentina Complies With The Injunction.

In its carefully circumscribed role as indenture trustee, BNY Mellon plainly does not come within Rule 65's limited reach to non-parties. As a result, BNY Mellon does not properly fall within the scope of this Court's Injunction and cannot be subjected to contempt proceedings.⁷

To begin, the Supreme Court has long recognized the general principle that an injunction binds only parties to the underlying action. See, e.g., Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)) (“It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).

⁷ As a preliminary matter, Plaintiffs' standing to seek any sanctions as against BNY Mellon is questionable. It is axiomatic that in order to bind a non-party to an injunction the party seeking the injunction must have standing to obtain the underlying relief. Plaintiffs' claim for injunctive relief is predicated on a breach of the *pari passu* covenant in the 1994 Fiscal Agency Agreement between Argentina and Bankers Trust Company. See Amended Complaint [Dkt. 344]. Under the Fiscal Agency Agreement, an Event of Default arises if Argentina fails to comply with a covenant, “which default is incapable of remedy or is not remedied within 90 days after written notice of such default shall have been given to the Republic by the Fiscal Agent.” See 1994 Fiscal Agency Agreement at ¶ 12(b), Amended Complaint [Dkt. 344] Ex. A.

Because a breach of the *pari passu* covenant may be remedied, the breach is actionable only if Argentina fails to cure after proper notice from the Fiscal Agent (the Bankers Trust Company). Plaintiffs' Amended Complaint does not allege that any notice was given and, accordingly, Plaintiffs have failed to satisfy a condition precedent to enforcement of the *pari passu* covenant. This is an express limitation on Plaintiffs' rights. Cf. NML Capital, Ltd. v. The Republic of Argentina, --- F.3d ---, 2012 WL 5275014 (2d Cir. Oct. 26, 2012) (express limitations on remedies respected). Plaintiffs therefore lack standing to seek to extend the Injunction to non-parties such as BNY Mellon. See, e.g., Akanthos Cap. Mgmt., LLC v. Compucredit Holdings Corp., 677 F.3d 1286 (11th Cir. 2012) (no-action clause strictly construed, even where plaintiffs hold a majority of the securities); In re Enron Corp. Sec., Derivative & “ERISA” Litigation, 2008 WL 744823 (S.D. Tex. 2008) at *12, citing Friedman v. Chesapeake and Ohio R. Co., 261 F. Supp. 728, 730 (S.D.N.Y. 1966) (noteholders must plead and prove compliance with conditions precedent in order to maintain an action). While Argentina may have waived such a requirement, assuming it may be waived, BNY Mellon is not a party to this litigation and it has not waived any rights or defenses.

Because BNY Mellon is not a party to this proceeding, it cannot be subject to contempt sanctions unless, while acting in its capacity as indenture trustee, (1) it is “legally identified” with Argentina, *i.e.*, Argentina’s agent; or (2) it is aiding and abetting Argentina’s violation of the Injunction. Explaining these exceptions in his seminal opinion on this subject, Judge Learned Hand emphasized that a non-party may be punished only when he has helped to bring about *an act of a party*:

[N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. ***Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party.*** This means that the respondent must either abet the defendant, or must be legally identified with him.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (emphasis added).

Rule 65 is a codification of this long-standing principle, extending a court’s injunctive powers over only (1) the parties before it; (2) the “officers, agents, servants, employees, and attorneys” of the parties; and (3) “other persons who are in *active* concert or participation with” the parties or the parties’ “officers, agents, servants, employees, and attorneys.” Fed. R. Civ. P. 65(d)(2) (emphasis added); see also Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945) (“[Rule 65(d)] derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.”).

Under the plain language of Rule 65 and applicable law, BNY Mellon cannot be brought within the scope of this Court’s Injunction because, as indenture trustee, it is neither Argentina’s agent nor is it actively aiding and abetting Argentina in a violation of this Court’s Injunction. Plaintiffs’ conclusory assertion that the Indenture somehow places BNY Mellon within the scope of Rule 65(d)(2) lacks factual or legal support. Payments made pursuant to the Indenture, from funds held in trust for Exchange Holders, cannot create an agency relationship with Argentina and do not aid or abet Argentina in its failure to meet different obligations to different creditors. In its role as indenture trustee, BNY Mellon is not Argentina’s agent and it cannot aid and abet any perceived violation of the Injunction by Argentina. Therefore, no contempt sanction is possible.

1. BNY Mellon Is Not Argentina’s Agent.

Although Plaintiffs refer to BNY Mellon as Argentina’s agent, the Indenture and New York law demonstrate that this is not so. “Under New York law, an agency relationship ‘results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act.’” Steinbeck v. Steinbeck Heritage Found., 400 F. App’x 572, 575 (2d Cir. 2010) (quoting N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.), 266 F.3d 112, 122 (2d Cir. 2001)); see also Restatement (Third) of Agency § 1.01 (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”). “The element of control often is deemed the essential characteristic of the principal-agent relationship.” In re Parmalat Sec. Litig., 375 F. Supp. 2d 278, 278 (S.D.N.Y. 2005). Even where an agency relationship is established, “[a]n injunction issued against a corporation or association binds the agents of that organization [only] to the extent they are acting on behalf of the

organization.” People ex rel. Vacco v. Operation Rescue Nat’l, 80 F.3d 64, 70 (2d Cir. 1996) (citation omitted).

The Indenture, governing BNY Mellon’s relationship with Argentina and the Exchange Holders, demonstrates that no agency relationship exists here: Argentina did not consent to BNY Mellon’s acting on Argentina’s behalf, BNY Mellon did not agree to act on Argentina’s behalf, and Argentina exercises no control over BNY Mellon in connection with its functions as indenture trustee. Indeed, the opposite is true. Under the Indenture, Argentina has no control over BNY Mellon’s activities as indenture trustee. Rather, in that capacity, BNY Mellon explicitly agreed to act on behalf, for the benefit, and at the direction of the Exchange Holders – not Argentina. This includes holding all funds received from Argentina in trust for the benefit of the Exchange Holders and protecting the rights of the Exchange Holders *vis-à-vis* Argentina before and after any default.

Moreover, as this Court acknowledged in EM Ltd., it is established New York law that an indenture trustee does not hold funds as an agent of the issuer – here Argentina – but, rather, as the trustee for the bondholders:

The case of Brown v. Morgan & Co., Inc., 265 A.D. 631, 40 N.Y.S.2d 229 (1st Dep’t 1943), aff’d, 295 N.Y. 867, 67 N.E.2d 263 (1946) is relevant to the court’s analysis in this case. In Brown, the plaintiff sought to attach funds held in an account at the defendant bank for the bondholders of an Italian corporation. The Appellate Division reversed the order of attachment, holding that ***the bank held the funds, not as agent for the company, but as trustee for the bondholders for whom the funds in the account were earmarked.*** Id. at 635, 40 N.Y.S.2d 229. In particular, the court noted that ***the company “lost all control over this fund” when it placed money in the account.*** Id.

2012 WL 1028109 at *7 (emphasis added); see also Rogers Locomotive & Mach. Works v. Kelley, 43 Sickels 234, 88 N.Y. 234 (N.Y. 1882) (where an issuer deposited money with brokers to meet interest due on bonds, the transaction was an irrevocable appropriation, and the money was received in trust for the bondholders, not in agency for the issuer). There is no legal or

factual basis on which to find that BNY Mellon is Argentina's agent and, accordingly, the Injunction cannot be extended to BNY Mellon on a purported agency theory.

2. BNY Mellon Is Not Aiding And Abetting Argentina By Performing Under The Indenture.

Plaintiffs' conclusory assertion that BNY Mellon aids and abets Argentina's violation of the Injunction as a necessary corollary to its status as indenture trustee is unsupported by any evidence or law. The Injunction enjoins Argentina from making a payment to the Exchange Holders without making a Ratable Payment to Plaintiffs. Under the terms of the Indenture and pursuant to applicable law, BNY Mellon functions independently from Argentina, pursuant to an arm's length contract, to protect the Exchange Holders. During its February 23, 2012 hearing regarding the Injunction, the Court recognized that BNY Mellon's performance of its obligations as an indenture trustee does not aid and abet Argentina's failure to pay Plaintiffs:

THE COURT: *The banks wouldn't be aiding and abetting.* The banks only pay the exchange offer people. That's what they do. Now, if I entered this order, this would impose an obligation on the banks and it might impose an impediment upon the banks with respect to the exchange offer people which does not exist now. They get the money and presumably they pay the exchangers. There is no condition, no impediment. This would obviously present an impediment, a condition. Is there any legal basis for doing that?

MR. OLSON: Because the bank will be acting as an *agent* of Argentina

(Feb. 23, 2012 Tr. at 7:22-8:25) (emphasis added). The Court's unqualified observation is on point (and, again, BNY Mellon is not Argentina's agent). BNY Mellon could not aid or abet a violation of the Injunction by Argentina for two independent reasons: (1) BNY Mellon has no power to influence or support Argentina's violation of the Injunction; and (2) BNY Mellon has an independent interest in the funds that Argentina must pay to the Exchange Holders.

First, extension of an injunction to third parties based on aiding and abetting is conditioned upon "active concert or participation" with the parties or their agents. See Rule

65(d)(2)(C). BNY Mellon's connection with Argentina's failure to pay Plaintiffs, far from being active, is non-existent.

It is well settled that aiding and abetting liability requires a showing of "substantial assistance," in committing the violation of the injunctive order. See Alemite Mfg., 42 F.2d 832, 832 (2d Cir. 1930) (one who "knowingly assists a defendant in violating an injunction" subjects himself to contempt proceedings."); see also SEC v. DiBella, 587 F.3d 553, 566 (2d Cir. 2009); In re Sharp Int'l. Corp., 403 F.3d 43, 49 (2d Cir. 2005); Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2d Cir. 2002). "Substantial assistance may only be found where the alleged aider and abettor 'affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.'" In re Sharp Int'l. Corp., 403 F.3d at 50 (quoting Kaufman v. Cohen, 307 A.D.2d 113, 760 N.Y.S. 157, 169 (2008)). "Inaction on the part of an aider and abettor is not sufficient to satisfy the substantial assistance prong of the standard unless 'it was designed intentionally to aid the primary fraud or it was in conscious or reckless violation of a duty to act.'" SEC v. Treadway, 430 F. Supp. 2d 293, 339 (S.D.N.Y. 2006) (quoting Armstrong v. McAlpin, 699 F.2d 79, 91 (2d Cir. 1983)).

Measured against this standard, there is no basis to find that BNY Mellon is aiding and abetting Argentina in its underlying decision to pay or not to pay Plaintiffs. BNY Mellon's receipt of funds on behalf of the Exchange Holders is not active concert or participation in Argentina's failure to pay Plaintiffs. It is not an action taken to help, benefit, or assist Argentina, Alemite Mfg., 42 F.2d at 833, nor can it rise to the level of "affirmative assistance" or "concealment" of Argentina's separate failure to pay Plaintiffs that would lead to a finding of

aiding and abetting that failure, In re Sharp Int'l. Corp., 403 F.3d at 50.⁸ BNY Mellon's ministerial actions under the Indenture have nothing to do with whether Argentina complies with the Injunction.

Second, where a non-party has an independent interest in the subject property, it cannot be punished for acting in accordance with that interest:

Rule 65(d) does not grant a court power so broad "as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." Regal Knitwear[], 324 U.S. at 13]; see also, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 112[] (1969). "It is not the act described which the decree may forbid, but only that act when the defendant does it." Alemite Mfg.[], 42 F.2d [at] 833 [].

Heyman v. Kline, 444 F.2d 65, 65-66 (2d Cir. 1971). As explained above, BNY Mellon indisputably is acting in furtherance of such an independent interest, as it has an independent contractual duty to the Exchange Holders to act in their best interests. See, e.g., Indenture at p. 1 and § 3.1 (Argentina is to make all payments to BNY Mellon, and BNY Mellon is to hold such payments in trust for itself and the Holders.).

Argentina retains no control over any funds paid to BNY Mellon, see, e.g., EM Ltd., 2012 WL 1028109 at *7-8 (citations omitted). BNY Mellon acts solely for itself and the Exchange Holders in the subsequent distribution of funds to the Exchange Holders, and payment to the Exchange Holders has nothing to do with whether Argentina makes a concurrent payment

⁸ Indeed, it is temporally impossible for BNY Mellon to aid and abet Argentina in circumventing an injunction entered in 2012 by BNY Mellon's performance under an arm's length agreement executed in 2005, six years before Plaintiffs first sought injunctive relief. See, e.g., Paramount Pictures Corp. v. Carol Publishing Group, Inc., 25 F. Supp. 2d 372, 375 (S.D.N.Y. 1998) (citing United Pharmaceutical Corp. v. United States, 306 F.2d 515, 517 (1st Cir. 1962); Herlein v. Kanakis, 526 F.2d 252, 254-55 (7th Cir. 1971)); see also O & L Associates v. Del Conte, 601 F. Supp. 1463, 1464-65 (S.D.N.Y. 1985) (where a non-party had acquired from defendants the "universal right, in perpetuity" to use a name before defendants were enjoined from using the name in any manner, the court found that "an arm's length transaction involving totally distinct entities" and occurring eight months prior to the entry of the court's order failed to demonstrate that the nonparty acted in concert with defendants).

to Plaintiffs that is unrelated to the Indenture. There is simply no basis to impose upon BNY Mellon an independent duty to reject payments in which BNY Mellon has an independent interest.

The cases Plaintiffs cite are readily distinguishable. Unlike in Reliance Insurance Co. v. Mast Construction Co., 84 F.3d 372 (10th Cir. 1996), where the enjoined party's bank aided and abetted his withdrawal of funds in violation of an injunction, BNY Mellon is not Argentina's bank and it is not holding enjoined funds. The bank in Reliance, as the enjoined party's own bank, was able to actively assist the enjoined party in diverting the enjoined funds. By contrast, BNY Mellon has no control over funds which Argentina is to pay to Plaintiffs. BNY Mellon is an indenture trustee that receives funds in trust for the Exchange Holders. As Plaintiffs readily admit – and this Court consistently has found – Plaintiffs have no interest in the funds that BNY Mellon holds in trust for the Exchange Holders and therefore cannot seek to enjoin use of such funds. This Court's contempt power cannot extend to payment of funds that are not enjoined, that cannot be enjoined due to Plaintiffs' lack of any interest in them, and in which BNY Mellon has an independent interest.

Goya Foods, Inc. v. Wallack Management Co., 290 F.3d 63 (1st Cir. 2002), similarly is inapposite. In Goya Foods, a series of non-parties aided and abetted the enjoined party's violation of an order enjoining her from selling an apartment. Unlike BNY Mellon here, each of the aiders and abettors in Goya Foods actively assisted or even directed the enjoined party in violating the order, listing the apartment, locating a purchaser, and executing an indemnity agreement to induce others to approve the transaction. Again, BNY Mellon has no such ability to assist Argentina here and, in its capacity as indenture trustee, BNY Mellon accepts unenjoined funds in trust for an unenjoined non-party – the Exchange Holders.

Given BNY Mellon's detachment from any violation of the Injunction by Argentina, use of the contempt power to punish it for Argentina's violation would unhinge contempt from its Constitutional moorings. Where the extraordinary contempt power is invoked, due process concerns are addressed by the express limitations embodied in Rule 65(d) – the scope of an injunction must be confined only to those legally identified with an enjoined defendant or aiding and abetting that defendant in the enjoined conduct. See, e.g., Microsystems Software, Inc. v. Scandinavia Online AB, 226 F.3d 35, 42-43 (1st Cir. 2000) (“A nonparty who has acted independently of the enjoined defendant will not be bound by the injunction, and, if she has had no opportunity to contest its validity, cannot be found in contempt without a separate adjudication.”). Extension of the Injunction to bind BNY Mellon's independent conduct on behalf of itself and the Exchange Holders would take the power of contempt where it does not belong and produce results that the contempt power should not engender.⁹ Punishing an innocent third party to try to obtain compliance from an enjoined party goes beyond any legitimate purpose for contempt. That is particularly true when, as here, the party who would be punished – BNY Mellon – has no ability to compel the enjoined party – Argentina – to comply.

C. If The Court Subjects BNY Mellon To The Injunction, It Should Provide BNY Mellon With Guidance On How It Should Proceed Or Continue The Stay To Allow BNY Mellon To Pursue Its Judicial Options.

If the Court nevertheless concludes that BNY Mellon is bound by the Injunction and Argentina subsequently fails to make a Ratable Payment, BNY Mellon will face a potential

⁹ See also Regal Knitwear, 324 U.S. at 13 (A Court may not enter an injunction that is “so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.”); Chase National Bank v. City of Norwalk, Ohio, 291 U.S. 431, 437 (1934) (It is improper “to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law.”); Scott v. Donald, 165 U.S. 107, 117 (1897) (“The decree is also objectionable because it enjoins persons not parties to the suit.”). This principle is based on the ““deep-rooted historic tradition that everyone should have his own day in court.”” Taylor, 553 U.S. at 892-93 (quoting Richards v. Jefferson County, 517 U.S. 793, 798 (1996)).

conflict between its obligations to the Exchange Holders under the Indenture and its obligations to the Court. In that instance, BNY Mellon needs judicial guidance as to its duties and responsibilities. BNY Mellon should not be forced by Argentina's independent violation of the Injunction to choose between exposing itself to the risk of contempt, on the one hand, or the risk of claims from Exchange Holders for breach of the Indenture, on the other. A path to avoid this conflict is charted by the Indenture, but BNY Mellon fears it cannot traverse it safely without judicial imprimatur.

Plaintiffs recognize in their Brief and in their proposed addition of section 2(i) to the Injunction that non-parties – such as BNY Mellon – may require “clarification” of their duties and Plaintiffs ask the Court to order that “[s]uch clarification will be promptly provided.” Given the potential ramifications for BNY Mellon and others identified in Plaintiffs’ proposed amended order, “such clarification” should be provided before the Court takes any action that may subject a non-party to contempt sanctions for performing its contractual obligations.¹⁰

In this regard, the Indenture contains a wide range of exculpatory provisions, which are designed to protect BNY Mellon from being exposed to liability. For example, the Indenture provides that BNY Mellon cannot be liable for any actions taken in good faith absent gross

¹⁰ Plaintiffs’ proposed addition of a section 2(h), excluding “intermediary banks” as defined in Article 4A of the Uniform Commercial Code, is inadequate, because it leaves institutions such as BNY Mellon, which also serve an intermediary, ministerial function, exposed to contempt sanctions. While the Court of Appeals expressed concern about extending the Injunction to banks acting as pure intermediaries in the process of sending money to holders of the Exchange Bonds, it added: “Our concerns about the Injunctions’ application to third parties do not end here.” NML Capital, 2012 WL 5275014 at *12. Pointing to its decision in Grain Traders, Inc. v. Citibank, N.A., 160 F.3d 97, 102 (2d Cir. 1998), the Court of Appeals recognized that commerce is impeded if a bank faces “a risk of multiple or inconsistent liabilities” or a need to “investigate the financial circumstances and various legal relations” of others. NML Capital, 2012 WL 5275014 at *12. Applying this rationale to the record presented, an indenture trustee such as BNY Mellon should not be subjected to potential contempt sanctions if it performs its ministerial contract obligations. Additionally, even if BNY Mellon is not an intermediary for purposes of Article 4A, that article does not authorize injunctive relief against a person who, like BNY Mellon, does not hold property in which a judgment debtor has no interest. See N.Y. U.C.C. §§ 4-A-502 and 4-A-503.

negligence, see Indenture at §§ 5.1(c), 5.2(vi), Binnie Decl., Ex. A, and that BNY Mellon is not required to expend, advance, or risk its own funds or otherwise incur personal financial liability in the performance of its duties, id. at § 5.1(g). Of particular importance here is Section 5.2(xx), which states:

no provision in this Indenture shall require the Trustee to do anything which may (i) be illegal or contrary to applicable law or regulation; or (ii) cause it to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties or in the exercise of any of its rights, powers or discretions, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not assured to it.

Id. at § 5.1(xx). Additionally, BNY Mellon has “absolute and uncontrolled discretion as to the exercise of its functions,” id. at § 5.2(xxi), and “as between itself and the Holders, the Trustee may determine all questions and doubts arising in relation to any of the provisions of this Indenture,” id. at § 5.2(xxvi).

Consistent with the foregoing, to the extent that the Court extends the Injunction to BNY Mellon, it should make clear that BNY Mellon is under no obligation under the Indenture or otherwise to expose itself to contempt sanctions by paying out any funds delivered by Argentina in the event that Argentina violates the Injunction. BNY Mellon also requests clarification that, consistent with Sections 5.2(vii) and 5.7 of the Indenture, it may rely upon any certificate received from Argentina pursuant to the Injunction and it has no extra-contractual duty to monitor Argentina’s compliance with any Court Orders. Similarly, BNY Mellon requests confirmation that it has no obligation to handle any extra-contractual distributions to Plaintiffs. Finally, the Court should clarify that the Injunction applies only to Argentina’s payments of debt service, *i.e.*, principal and interest, to the Exchange Holders and that it does not alter or affect any other rights or that BNY Mellon may have under the Indenture or applicable law.

If the Court does not believe that this is the proper forum for such a determination, it should continue the stay so that BNY Mellon can pursue appropriate judicial remedies before it is forced to choose between exposure to the risk of contempt or exposure to the risk of a cascade of claims arising from the conduct of another entity. What BNY Mellon ultimately desires – and what is needed for all parties involved here – is certainty as to its obligations as indenture trustee under the terms of the Injunction and the Indenture.

The stay also may be implicated by the timing of this Court's decision. As detailed in the Binnie Declaration, the process for making payments to the Exchange Holders involves multiple steps and multiple intermediaries. Depending upon where payments are in the process, it may be difficult or impossible to intercept the funds or otherwise prevent delivery to the Exchange Holders. If the stay were terminated while funds were in transit, it might be impossible to prevent a technical violation of the Injunction. While this should not give rise to contempt sanctions, BNY Mellon wants to avoid any theoretical risk to itself or any of the other entities involved in the distribution process. With this in mind, BNY Mellon asks that any termination of the stay be made effective only upon ten business days' notice.¹¹

¹¹ Plaintiffs suggest that Argentina may look to alter the flow of funds used to make payments to the Exchange Holders. BNY Mellon has no knowledge of or involvement in any plan that might alter the funds flow.

III. Conclusion

For the foregoing reasons, the Court should amend the Injunction as necessary to clarify that it does not apply to BNY Mellon in its capacity as indenture trustee under the Indenture. To the extent that BNY Mellon is deemed subject to the Injunction, the Court should provide additional clarification as requested above and confirm that BNY Mellon is under no obligation under the terms of the Indenture to make payments to the Holders in the event that Argentina violates the terms of the Injunction.

Dated: New York, New York
November 16, 2012

REED SMITH LLP

By: /s/ Eric A. Schaffer
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*Attorneys for Non-Party The Bank
of New York Mellon, as Indenture
Trustee*

EXHIBIT L

FEDERAL RESERVE BANK *of* NEW YORK

33 LIBERTY STREET, NEW YORK, NY 10045-0001

THOMAS C. BAXTER, JR.

GENERAL COUNSEL AND
EXECUTIVE VICE PRESIDENT

November 16, 2012

BY HAND

Hon. Thomas P. Griesa
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1630
New York, NY 10007-1312

Re: NML Capital, Ltd. v. Republic of Argentina, 08 Civ. 6978, 09 Civ. 1707, 09 Civ. 1708; Aurelius Capital Master, Ltd., et al. v. Republic of Argentina, Nos. 09 Civ. 8757, 09 Civ. 10620, 10 Civ. 1602, 10 Civ. 3507, 10 Civ. 3970, 10 Civ. 8339; Blue Angel Capital I, LLC v. Republic of Argentina, Nos. 10 Civ. 4101, 10 Civ. 4782; Pablo Alberto Varela, et al. v. Republic of Argentina, No. 10 Civ. 5338; Olifant Fund, Ltd. v. Republic of Argentina, 10 Civ. 9587

Dear Judge Griesa:

The Federal Reserve Bank of New York ("New York Fed") respectfully submits this letter to assist the Court in its consideration of the issues remanded by the United States Court of Appeals for the Second Circuit in its October 26, 2012 Opinion in the above-referenced matters. The Second Circuit affirmed in part and remanded in part the Court's Orders issued on February 23, 2012 granting permanent injunctions (the "Injunctions") pursuant to the *pari passu* clause of the Fiscal Agency Agreement ("FAA"). The FRBNY takes no position with respect to the Court's ultimate factual conclusion that the Republic of Argentina (the "Republic") failed to perform its obligations under the *pari passu* clause of the FAA.

The Second Circuit expressed concern "about the Injunctions' applications to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds." (October 26, 2012 Opinion at 27-28.) The New York Fed shares this concern.

The expansive application of the Injunctions urged by Plaintiffs—including the broad definition of "agents and participants" and the suggested possible application to funds transfer systems—is overbroad and could have operational ramifications that impede the smooth and efficient operation of the payments system. The New York Fed thus urges the Court to limit

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the reach of the Injunctions, in accordance with the provisions of Article 4A of the Uniform Commercial Code and Federal Reserve Regulation J, so that they apply only to Argentina and those acting in privity with it.

Background

The New York Fed, together with the other eleven Federal Reserve Banks (collectively the “Reserve Banks”), constitute the operational component of the nation’s central bank. Congress, responding in part to the breakdown of the check-collection system in the early 1900s, made the Reserve Banks active participants in the payments system when it established the Federal Reserve in 1913. From the beginning, the Reserve Banks’ active involvement in payments, and in developing the legal infrastructure supporting payments, has helped to develop key infrastructure that supports the nation’s financial system. For example, in keeping with the Reserve Banks’ role as payments system operators, the Reserve Banks own and operate the Fedwire Funds Service (“Fedwire”) in which more than 7000 financial institutions initiate funds transfers that are immediate, final, and irrevocable when processed. Fedwire and the Clearing House Interbank Payments System (“CHIPS”) funds transfer system are the principal wholesale funds-transfer systems in the United States. See generally, T. Baxter, S. Heller, and P. Turner, Article 4A: Funds Transfers, *The ABCs of the UCC* 12-17 (A.B.A. 2d Ed. 2006).

Reserve Banks routinely act as intermediary banks in the transfers that are sent over the Fedwire system. Funds transfers are typically used by commercial institutions in the financial markets, and for commercial trade, to discharge large-value payment obligations. Financial market participants use Fedwire to handle large-value, time-critical payments, such as payments for the settlement of money-market transactions; the purchase, sale, and financing of securities transactions; the disbursement or repayment of loans; and the settlement of real estate transactions. On an average day in 2011, Fedwire processed about 506,000 transfers, with an aggregate average daily value of \$2.6 trillion.¹

Because of its interest in promoting certainty and finality in the payments system, the New York Fed was involved at an early stage in the process that led to the development of what is now Article 4A of the Uniform Commercial Code (“U.C.C.”) and the ultimate adoption of Article 4A as both federal law and the law of the state of New York. 12 C.F.R. pt. 210 Appendix B; N.Y. U.C.C. Art. 4A. Article 4A of the U.C.C. governs funds transfers in New York and in the 51 other jurisdictions where it has been adopted. For transfers processed over Fedwire, the Board of Governors of the Federal Reserve System has adopted Article 4A as

¹ Fedwire and Net Settlement at <http://www.federalreserve.gov/PaymentSystems/FedWire/default.htm>.

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federal law in its Regulation J. See Federal Reserve System Regulation J, 12 C.F.R. pt. 210 (2007).

Plaintiffs' Proposal Exceeds the Parameters of Article 4A and Regulation J

Plaintiffs' proposed amendments exceed the scope of Article 4A and Regulation J. Plaintiffs propose to include beneficiary banks within the scope of the Injunctions, although under the ordinary operation of the U.C.C., creditors of the originator cannot attach funds by service of process on the beneficiary's bank. See N.Y. U.C.C. § 4A-104(2); § 4-A-502 cmt. 4. Article 4A and Regulation J provide clear guidance to parties seeking to restrain the proceeds of a wire transfer: they may serve process at the originator's bank with respect to creditors of the originator, or at the beneficiary's bank with respect to creditors of the beneficiary. Regulation J and Article 4A, however, do not permit process to restrain a funds transfer at an intermediary bank. 12 C.F.R. pt. 210; N.Y. U.C.C. Art. 4A-503. See also *Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 70-71 (2d Cir. 2009), cert. denied, 130 S. Ct. 1896 (2010).

The Plaintiffs' proposed carve out for "intermediary banks" is thus too narrow and should be rejected. Plaintiffs' proposed amendments would subject beneficiary banks to requirements and potential liability not permitted under applicable law. Pursuant to both federal and state law, the underlying obligation of an originator to pay a beneficiary is discharged by means of a funds transfer when the beneficiary's bank accepts its sender's payment order. See 12 C.F.R. pt. 210, Appendix B; N.Y. U.C.C. § 4A-406. The discharge of the originator's obligation to pay the beneficiary occurs simultaneously with the creation of an obligation of the beneficiary's bank to pay the beneficiary. Until acceptance by the beneficiary's bank, the originator remains indebted to the beneficiary. The law provides that the originator is generally entitled to a refund of any payment that it has made in connection with the funds transfer if the funds transfer is not completed. See 12 C.F.R. pt. 210, Appendix B; N.Y. U.C.C. § 4A-402. An identical refund right exists for each of the banks in the funds transfer chain. This is known among bankers as the money-back guarantee. When a funds transfer is attached at an intermediary bank, the funds transfer cannot be completed and the payment obligation that the originator was attempting to discharge through the use of the funds transfer remains unsatisfied. This can have severe consequences, not only for the party that is subject to the attachment order, but also for wholly unrelated and "innocent" parties.

In lieu of Plaintiffs' proposal, the Court should craft the Injunctions to comport with, and not to exceed, the limits of Article 4A and Regulation J.

The Second Circuit has indicated that Article 4A is "the exclusive means of determining the rights, duties, and liabilities of the affected parties in any situation covered by particular provisions of [Article 4A]." *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 103 (2d Cir. 1998) (quoting Official Comment to U.C.C. § 4A-102). This Second Circuit does not

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recognize claims that “would impose liability inconsistent with the rights and liabilities expressly created by Article [4A].” *Id.* at 103.

This result is supported by strong policy considerations. One of Article 4A’s primary goals is “to promote certainty and finality.” *Grain Traders*, 160 F.3d at 102. Funds transfers under Article 4A are large-value, time-critical payments characterized by their high speed, efficiency, and low cost. *See* Prefatory Note to U.C.C. Art. 4A. To require intermediaries, like the FRBNY,

to investigate the financial circumstances and various legal relations of the other parties to the transfer.... matters as to which an intermediary bank ordinarily should not have to be concerned... would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.

Grain Traders, 160 F.3d at 102.

Plaintiffs’ Suggested Application of the Injunctions to
“Agents and Participants” Is Overly Broad

Plaintiffs have suggested amendments to the February 23 Orders that would apply the Injunctions broadly to Argentina and any “persons and entities who act as the Republic’s agents, or act in active concert or participation with the Republic or its agents, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds.”

Plaintiffs urge a broad definition of covered “agents and participants” that excludes only intermediary banks as defined in Article 4A of the U.C.C. Plaintiffs offer some examples of agents and participants, but their list is not exhaustive and leaves significant questions about who is covered. Plaintiffs propose to include clearing corporations and systems, depositaries, operators of clearing systems and settlement agents for the Exchange Bonds in the definition of “agents” of Argentina. It is unclear whether Plaintiffs intend to include payments systems, such as Fedwire, within this definition.²

To avoid unnecessary confusion and disruption to the smooth and efficient functioning of the payments system, the New York Fed urges the Court to enumerate precisely what persons or entities are covered by the Injunctions, to limit this list only to Argentina and others in direct privity with it, to specifically exempt payments systems such as Fedwire, and to

² As discussed above, Fedwire functions as a payments system when Reserve Banks act as intermediary banks.

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reject Plaintiffs' invitation to broaden the reach of the Injunctions to clearing corporations and systems generally.

Otherwise, under the scheme proposed by Plaintiffs, beneficiary banks (including, in certain instances, the New York Fed) would have to screen all incoming payment orders to attempt to identify funds transfers originated by Argentina or its agents, and then make inquiries of their senders to find out whether the transfer was in payment of amounts owing on the Exchange Bonds or for some other purpose. As the sender is likely to be an intermediary bank with no knowledge of the purpose of the transaction, the inquiry would have to be sent up the chain back to the originator's bank, causing significant delay for legitimate payments. The policy underlying Article 4A is to facilitate "a high-speed electronic environment analogous to an interstate highway. The 'flow of funds-transfer traffic' should not be disrupted by creditor process, just as all automobile traffic on a busy highway should not be stopped so that a single car can be inspected." E. Patrikis, T. Baxter, and R. Bhala, Wire Transfers: A Guide to U.S. and International Laws Governing Funds Transfers 135 (Probus 1993).

What the Second Circuit recognized in Grain Traders, and what is fundamental to commercial law, is the concept that commercial parties should not be expected to look beyond pre-existing contractual relationships that anticipate and allocate risk. It is this concept, contractual privity, which provides the necessary certainty to the payments system:

To allow a party to, in effect, skip over the bank with which it dealt directly, and go to the next bank in the chain would result in uncertainty as to rights and liabilities, would create a risk of multiple or inconsistent liabilities, and would require intermediary banks to investigate the financial circumstances and various legal relations of the other parties to the transfer. *These are matters as to which an intermediary bank ordinarily should not have to be concerned and, if it were otherwise, would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.*

Grain Traders, 160 F.3d at 102 (emphasis added).

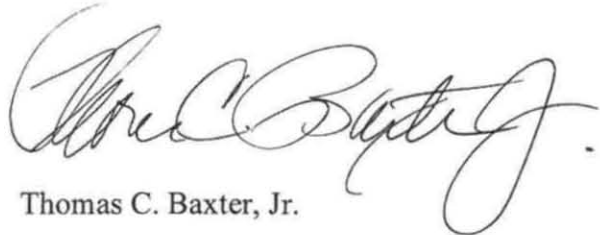
FEDERAL RESERVE BANK *of* NEW YORK

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In light of the foregoing and to prevent the harms discussed above, the New York Fed respectfully urges the Court to construe the Injunctions narrowly, in accordance with the limits of Article 4A of the Uniform Commercial Code and Federal Reserve Regulation J.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas C. Baxter, Jr.", with a stylized flourish at the end.

Thomas C. Baxter, Jr.

cc (via e-mail):

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November 16, 2012

BY HAND

Honorable Thomas P. Griesa
United States District Judge
Southern District of New York
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: NML Capital, Ltd. v. Republic of Argentina and other actions;
08 Civ. 6978 (TPG) and other actions

Dear Judge Griesa:

We represent The Depository Trust Company ("DTC") and its nominee name, Cede & Co. and write to express concerns regarding the proposed injunction as requested by plaintiff NML Capital, Ltd.¹

DTC is a limited purpose trust company organized under the Banking Law of the State of New York and is a member of the Federal Reserve System. DTC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation, whose shareholders are made up of certain of the approximately 525 banks and brokerage houses that constitute what are known as "Participants" of DTC. DTC is a securities depository and a clearing agency registered with the Securities and Exchange Commission ("SEC") for the settlement of trades in corporate and municipal securities on behalf of the financial institutions that constitute its "Participants." *See* 15 U.S.C. §78q-1. Cede & Co., a New

¹ This letter is respectfully submitted concurrently for all of the actions in this Court in which the corresponding request for entry of injunctive relief was made. These are designated by the following civil case numbers: 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG), 09 Civ. 8757 (TPG), 09 Civ. 10620 (TPG), 10 Civ. 1602 (TPG), 10 Civ. 3507 (TPG), 10 Civ. 3970 (TPG), 10 Civ. 8339 (TPG), 10 Civ. 4101 (TPG), 10 Civ. 4782 (TPG), 10 Civ. 5338 (TPG), 10 Civ. 9587 (TPG).

EISEMAN LEVINE
LEHRHAUPT & KAKOYIANNIS

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Hon. Thomas P. Griesa
United States District Judge
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York partnership, has no independent operations and serves solely as the nominee name of DTC.

DTC is the nation's principal securities depository. The bulk of publicly traded securities issued in the U.S. are on deposit at DTC. In 2009, DTC settled transactions worth more than \$299 trillion, and processed 299.5 million book-entry deliveries. DTC retains custody of more than 3.5 million of securities issues worth almost \$34 trillion, including securities issued in the US and more than 120 foreign countries and territories.

In addition to facilitating book-entry transfers for its Participants, DTC also provides numerous other services. One service DTC offers its Participants is to allocate cash payments received in respect of DTC-eligible securities among the Participants who have deposited those securities with DTC. This is referred to as the "P & I Cash Processing" service of DTC. Under this service, cash transfers received by DTC on any given day (prior to a certain time) in respect of a certain security, identified by CUSIP number,² are allocated among the various Participants who have deposited such securities with DTC according to their respective holdings. These Participants receive these P & I payments as part of their overall DTC net settlement at the end of the day. (In the normal course, all transactions among Participants are combined by DTC into one net credit or debit for each Participant and settled at the end of the day through the Federal Reserve System.) In 2011, DTC allocated approximately 4.1 million entitlements totaling over \$2.5 trillion. Once net settlement is done with DTC, it is the Participants' responsibility to account for these payments with their customers, the ultimate beneficial owners of the securities at issue.

The cash transfers sent to DTC as part of this process are sent by "paying agents," not the issuers. DTC takes their instructions and the P & I allocation process is essentially a ministerial act. Allocations of cash entitlements are made by DTC on the same basis as transfers of securities, i.e., only at the Participant level. Allocations made by DTC are only to the Participants who have deposited the respective securities with DTC. It is up to the various Participants to then transfer funds to the proper beneficial owners, as appropriate, who are their customers.

The Republic of Argentina is not a Participant. Argentina has no account at DTC. Argentina can issue no instructions to DTC; nor could DTC take any such instructions if it did. DTC does not take funds directly from Argentina nor transfer funds to Argentina.

² All securities at DTC are identified by CUSIP number, and DTC cannot identify securities that are not identified to it by CUSIP number.

EISEMAN LEVINE
LEHRHAUPT & KAKOYIANNIS

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Hon. Thomas P. Griesa
United States District Judge
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Any instructions issued to DTC in respect of any of the bonds referenced in the proposed injunction would come, if at all, from a duly authorized paying agent who was a part of the DTC system.

From the perspective of DTC and Cede & Co., the proposed injunction presents several practical problems. First, whether the ratable payments formula has been met is completely outside of DTC's ability to judge. DTC does not receive an omnibus payment on the "Exchange Bonds" or the "NML Bonds." DTC will receive a transfer of funds identified with a single, particular CUSIP number. This process would be repeated for each individual bond, identified to DTC in each case only by its CUSIP number. Compliance with these instructions is a largely ministerial, automated task. DTC does not have the ability to compare any particular transfer in respect of any particular CUSIP to any one or more other transfers to determine if other bonds are being paid as required, let alone that the ratable payments formula has been applied correctly. Nor does DTC even have the administrative machinery available to it to do such a thing if it did have the knowledge. In processing the very large number of instructions it receives every day, DTC relies, as it must, on the instructions of the paying agents transferring funds into the DTC system.

As noted above, the Republic of Argentina is not a Participant of DTC and DTC does not deal directly with the Republic of Argentina. The financial institutions with which DTC deals may or may not be agents of the Republic of Argentina, but that does not make DTC equally an agent of the Republic. If it were enough, DTC would be an agent of every one of the thousands of sovereign or corporate issuers of debt that has its securities on deposit in the DTC system – and this is plainly not the case.

In seeking to protect themselves against the perceived desire of the Republic to avoid its obligations as ordered by this Court, plaintiffs have simply cast too wide a net in the proposed injunction. It is a step too far for this Court to designate DTC and Cede & Co. specifically as agents of or acting in concert with the Republic of Argentina. DTC is not privy to the counsels or plans of the Republic of Argentina. It merely takes paying instructions. Many of the bonds at issue in this case – the Exchange Bonds or the earlier ones – were set up to be held at DTC and paid through the DTC system. But this does not put DTC or Cede & Co. into the Republic's orbit.

Indeed, if the picture plaintiffs paint of the Republic is true, it is not beyond imagining that a false certification could be issued. Under the injunction regime proposed by plaintiffs, that would be sufficient. But it would offer no protection to plaintiffs and thus having DTC named in the injunction adds nothing. DTC is not in a

EISEMAN LEVINE
LEHRHAUPT & KAKOYIANNIS

November 16, 2012
Hon. Thomas P. Griesa
United States District Judge
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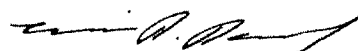
position to determine if a certification is true or false; it must simply follow the instructions of its paying agent. To be clear, DTC does not believe any of the paying agents involved would willfully violate an Order of this Court. DTC is simply noting that it is in no position to police violations of such an Order if it is violated. Thus, the inclusion of DTC and Cede & Co. (which have never been alleged to have done anything wrong) in the injunction as drafted does not create any additional protection against violations of the order.

DTC recognizes that the proposed injunction requires that Argentina certify to the Court that it has satisfied its obligation to make a "Ratable Payment" concurrently with or in advance of making a payment on the Exchange Bonds, and that this certification is presumably to be delivered to DTC. However, this requirement does nothing to further protect plaintiffs. In fact, from DTC's perspective, it potentially will operate to frustrate legitimate payments. Sending a copy of such a certification to DTC will take time and there is no assurance it will be seen by anyone prior to Argentina's paying agent making a transfer to DTC in respect of the Exchange Bonds. The systems, largely automated, that handle the allocation of payments in DTC's P & I function are not set up to review and approve "certifications" on collateral issues. Therefore, transfers from the paying agent, even if legitimate, may sit untouched and undistributed at DTC as a precaution against violating the injunction. Application of the order to the paying agent is sufficient. DTC should be able to rely on the instruction of the paying agent as sufficient representation that the payment should be allocated and made.

The injunction to be entered by this Court should not indicate that DTC or Cede & Co. are agents of or acting in concert with the Republic of Argentina and the specific references to them should be removed from the injunction as proposed.

We are available, of course, to address any questions the Court may have, or to make a more fulsome, formal submission if the Court prefers.

Respectfully submitted,



Eric P. Heichel

cc: All Counsel of Record in the actions
listed in footnote 1 of this letter (by e-mail)

EXHIBIT N



November 16, 2012

By Hand

The Honorable Thomas P. Griesa
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, N.Y. 10007

Re: *NML Capital Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG); *Aurelius Capital Master, Ltd. v. Republic of Argentina*, Nos. 09 Civ. 8757 (TPG), 09 Civ. 10620 (TPG), 10 Civ. 1602 (TPG), 10 Civ. 3507 (TPG), 10 Civ. 3970 (TPG), 10 Civ. 8339 (TPG); *Blue Angel Capital I, LLC v. Republic of Argentina*, Nos. 10 Civ. 4101 (TPG), 10 Civ. 4782 (TPG); *Pablo Alberto Varela. v. Republic of Argentina*, No. 10 Civ. 5338 (TPG); and *Olifant Fund, Ltd. v. Republic of Argentina*, 10 Civ. 9587 (TPG)

Dear Judge Griesa:

The Clearing House Association L.L.C. (“The Clearing House”)¹ respectfully submits this letter in the above captioned matters to aid the Court in considering plaintiffs’ proposed revisions to the Court’s February 23, 2012, orders in light of the concerns expressed by the United States Court of Appeals for the Second Circuit in its October 26, 2012 opinion.

¹ Established in 1853, The Clearing House is the United States’ oldest banking association and payments company and represents the interests of its member banks on a variety of systemically important banking issues. The Clearing House is owned by the world’s largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits. An affiliate of The Clearing House, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost \$2 trillion daily and representing nearly half of the automated clearinghouse, funds-transfer and check-image payments made in the U.S. One of those services is the Clearing House Interbank Payments System (“CHIPS”), a real time, final payment funds transfer system that serves 52 U.S. and foreign banks and that processes each day, on average, over 375,000 payment orders. CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal funds-transfers systems in the United States.

In light of the expedited briefing schedule and because many of the experts at our member banks with whom we would normally consult have been occupied with maintaining their operations in the aftermath of the weather emergencies of the past few weeks, The Clearing House respectfully informs the Court that the views expressed in this letter must necessarily be preliminary and may be subject to additional explanation and clarification. We have also confined our comments to certain systemic problems that could arise from the application of plaintiffs' proposed orders to funds-transfer systems, beneficiary's banks, and other parties to funds transfers. Securities clearing agencies, trustees, and similar organizations may very well face additional substantial issues stemming from the proposed orders; however, such issues are not discussed in this letter.

The plaintiffs have suggested an expansive injunction applying not only to Argentina and its agents but to any "persons and entities who act as the Republic's agents, or act in active concert or participation with the Republic or its agents, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds." While plaintiffs' proposed orders specify that certain named parties involved in the transactions at issue are to be bound, the proposed orders identify such parties only after the word "including," which clearly indicates that the list is not exhaustive and that other parties, not named or defined with any specificity, fall within their scope. Only intermediary banks as defined in Article 4A of the Uniform Commercial Code are specifically excluded from plaintiffs' proposed orders.

The Clearing House submits that any order issued by the Court should be crafted not to apply to beneficiary's banks, funds-transfer systems, or other parties in a funds transfer. Such limitations would have no impact on the overall effectiveness of the Court's orders and, as discussed in greater detail below, would ensure that the Court's orders do not unduly burden legitimate payments unrelated to the transactions at issue here.

A funds transfer is a series of transactions involving instructions ("payment orders") from senders to receiving banks to pay or cause another bank to pay an amount of money to a beneficiary. N.Y. U.C.C. § 4-A-104(1). These payment orders are typically sent between banks through a funds-transfer network, such as the Clearing House Interbank Payments System ("CHIPS"). The formats for payment orders used by all of these systems are closely related to allow mapping of data from one system to another so that a funds transfer may be processed rapidly and efficiently by computer, without intervention by individuals. The format typically identifies the sender and receiving bank and originator, originator's bank, instructing bank, intermediary bank, beneficiary's bank, and beneficiary.² There are also fields for parties to send additional information to other parties (e.g., the bank-to-bank information field or the originator-to-beneficiary information field), but these are optional and not used in many cases.

² Although different names are used in the formats to distinguish the various parties, the instructing bank, sender, and receiving bank may also be intermediary banks within the meaning of Article 4A, but the beneficiary's bank would not be an intermediary bank.

The plaintiffs' proposed carve out for "intermediary banks" as defined in UCC Article 4A does not extend far enough, because that term is defined in the UCC to exclude both the originator's bank and the beneficiary's bank. N.Y. U.C.C. § 4-A-104(2). Ordinarily beneficiary's banks would be protected from the burdens outlined below because creditors of the originator cannot attach funds by service of process on the beneficiary's bank. *Id.* § 4-A-502 cmt. 4 ("The creditor of the originator cannot reach any . . . funds [other than funds at the originator's bank before the transfer is initiated] because no property of the originator is being transferred."). Beneficiary's banks would, however, be significantly burdened, and legitimate payments would inevitably be disrupted, if beneficiary's banks are included in the scope of the injunction.

Consider the position of any party that is not Argentina or one of its direct agents that receives a payment order that simply lists an originator (which could be Argentina, one of its agents, or some other party), an originator's bank,³ a beneficiary, and (if the receiving bank is not the beneficiary's bank) a beneficiary's bank. The payment order will also list an amount to be paid and may or may not have any additional information as to the purpose of the payment. If the receiving bank is the beneficiary's bank, even if it knows that the payment was originated by Argentina or a known agent of Argentina, it will often not know whether the payment is for the Exchange Bonds or for some other purpose not covered by the injunction without having to make an inquiry of its sender nor will it know whether the Republic has made payments to the plaintiff bondholders. Thus if beneficiary's banks are included in the injunction, they too would have to screen their in-coming payment orders to identify funds transfers originated by Argentina or its agents and then often make inquiries of their senders to find out whether the transfer was in payment of amounts owing on the Exchange Bonds or for some other purpose. As the sender is likely to be an intermediary bank with no knowledge of the purpose of the transaction, the inquiry would have to be sent up the chain back to the originator's bank (which itself may not know the purpose of the payment), causing significant delay for legitimate payments and a costly diversion of resources from reconciling other discrepant or potentially illegal (e.g., Iranian) payments. It is no answer to suggest that the numerous potential beneficiary's banks around the world could check whether they have received a certificate of compliance from Argentina, as the certificates would presumably be issued at or around the time of the payment and dissemination would take some time. Payment systems are designed to work automatically, but banks might be forced to hold many potentially noncompliant payments until the issue could be sorted out, delaying the payment process and undermining participants' expectations of real-time payment processing.

A second concern with the plaintiffs' proposed wording of the injunction is the possible inclusion of payment systems,⁴ such as CHIPS, in the injunction and the broad

³ If the originator is a bank, it is the originator's bank as well as the originator, see N.Y. U.C.C. § 4-A-104(4), but given the duplicative roles, only one of these fields would normally be used.

⁴ Plaintiffs propose including "clearing corporations and systems, depositories, operators of clearing systems, and settlement agents for the Exchange Bonds (including, but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear system)." It is not clear how plaintiffs intend the term "clearing corporations and systems" to be defined.

extension of the injunction to “agents” of Argentina or its instrumentalities. Under N.Y. U.C.C. § 4-A-206, funds-transfer systems are deemed to be the agent of the sender of a payment order. While under any scenario contemplated by the plaintiffs,⁵ the funds-transfer systems would receive payments only from—and thus be agents only of—intermediary banks that would be exempt from the injunction, the broad wording of the proposed injunction and in particular the specific reference to “clearing corporations and systems, . . . operators of clearing systems, and settlement agents,” leaves substantial ambiguity about whether payment systems would be bound by the order and would be required to attempt to implement screening measures to ensure that no improper payment got through. That ambiguity presents serious concern, because even more than beneficiary’s banks, funds-transfer systems would have great difficulty attempting to identify particular payments for a particular purpose, and the injunction would therefore similarly result in disruption of payment systems and delays in processing legitimate payments. In the case of CHIPS and other Clearing House payment systems, for example, The Clearing House has no ability to screen payment orders to block individual transactions: once a payment order is cleared by the CHIPS release algorithm, which merely determines whether the conditions for release as determined by the CHIPS rules have been met, it is automatically released to the receiving participant. The Clearing House holds no money for any party, but merely manages a settlement account the balance of which is a debt owed to the participating banks. If CHIPS or other payment systems like it were to be included in the injunction, there would be no practical way to identify payments in violation of the injunction in real time before they are sent to the receiving bank.

Delay of legitimate payments and the burdens on third-party banks are among the reasons that the framers of Article 4A—the law in every state and the District of Columbia—exempted intermediary banks from attachments, restraining orders, and injunctions. The terms of the proposed injunction present the same concerns, but because the injunction lacks other safeguards that apply to UCC-compliant restraining notices and attachments, the injunction needs to be carefully crafted to avoid these threats to the payment systems. We therefore urge the Court to draw its injunction narrowly to exclude funds-transfer systems, beneficiary’s banks, and other parties to funds transfers.

There may very well be additional issues respecting the processing of payments that the proposed order raises. Given the limitations referred to above, we have not had sufficient time to explore all of the proposed orders’ ramifications.

All of the examples given are securities clearing organizations rather than funds-transfer systems. CHIPS, however, is a “clearing organization” as defined in 12 U.S.C. § 4402(2).

⁵ See Plaintiffs’ brief at 10-12.

The Honorable Thomas P. Griesa

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November 16, 2012

If you have any questions, please contact me at 212-612-9234 or
joe.alexander@theclearinghouse.org.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Joseph R. Alexander", followed by a horizontal flourish line.

Joseph R. Alexander
Senior Vice President, Deputy General
Counsel, and Secretary

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EXHIBIT O

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)

United States Court of Appeals

for the

Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs-Appellees,
(continued on inside cover)

— v. —

REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF DEFENDANT-APPELLANT THE REPUBLIC OF ARGENTINA

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RULE 35(b) STATEMENT

Defendant-appellant the Republic of Argentina (the “Republic”) petitions for panel rehearing and rehearing *en banc* of the panel’s October 26, 2012 decision (the “Decision” or “Dec.”). The Decision affirmed the district court’s unprecedented orders restraining the Republic from making payments outside the United States to the holders of over 91% of its defaulted debt who participated, at a significant discount, in the Republic’s debt restructuring, unless the Republic makes an undefined “Ratable” payment to plaintiffs on their defaulted debt with funds also located outside the United States that are categorically immune from attachment and restraint under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1609–1611 (“FSIA”).

This petition presents questions of exceptional importance, because the Decision conflicts with *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983), and interprets a boilerplate provision contained in agreements governing trillions of dollars of New York debt in a manner that is inconsistent with market understanding, and will exacerbate future sovereign debt crises by making voluntary debt restructuring essentially impossible. *See* Fed. R. App. P. 35(a)(2). For these reasons it has sparked widespread consternation in the marketplace, which recognizes that, if unremedied, the Decision will cause a seismic change in the landscape of sovereign debt restructuring. *See* Jonathan Stempel & Guido

Nejamkis, *U.S. court rejects Argentina's debt fix*, Reuters, Oct. 26, 2012 (“There is no way a government can restructure its debt and be shielded from litigation, apart from exercising sovereign immunity. . . . Argentina’s shield now seems to have a hole in it, and this ruling signals that every sovereign’s shield could now have a hole in it.”); Robin Wigglesworth & Joseph Cotterill, *Creditors weigh up Argentina debt ruling*, Financial Times, Nov. 4, 2012, (“Experts say the judgment significantly expands the right of private sector creditors of governments, leading to potentially far-reaching implications for ‘official sector’ lenders” in debt restructurings).

First, the panel incorrectly found that the injunctions, which restrain the Republic from making scheduled interest payments – outside the United States – to the trustee for holders of its restructured debt, do not violate the FSIA’s sovereign property immunities. That ruling raises an issue of vital importance regarding the scope of a U.S. court’s ability to interfere with a foreign state’s use of its property outside the United States, was opposed by the United States (whose views on this issue the panel did not discuss), and conflicts with the principle set forth in *S&S Machinery* and its progeny that courts “may not grant, by injunction, relief which they may not provide by attachment.” 706 F.2d at 418. The panel stated that its ruling was consistent with *S&S Machinery* because the injunctions do not result in the district court’s exercise of “dominion or control” over the Republic’s property,

Dec. at 25, but that is precisely what the injunctions accomplish. Accordingly, the first question presented for panel rehearing and rehearing *en banc* is:

Under the FSIA, which provides the sole basis for obtaining jurisdiction over, and enforcing a judgment against, a foreign state, may a court, in order to enforce a monetary claim, issue an injunction restraining a foreign state's use of its property outside the United States and thus beyond the scope of enforcement contemplated by the FSIA?

Second, the panel erred in affirming an unprecedented “ratable payment” remedy based on its incorrect conclusion that a *pari passu* clause¹ prohibits a debtor from paying any of its other bonds unless it also pays the bonds governed by the *pari passu* clause, Dec. at 18, which in the sovereign context amounts to an inconceivable promise never to restructure the state's debt regardless of the financial and economic necessity to do so. In making this finding, the panel ignored the tide of authority – set forth in the briefs of the United States and the New York Clearing House Association, as well as previous statements by the Federal Reserve Bank of New York, the Bank of England Financial Markets Law Committee, and numerous practitioners – concluding that this idiosyncratic “interpretation” runs counter to market understanding. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) (boilerplate terms “must be given a consistent,

¹ The *pari passu* clause at issue states that: “The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (as defined in this Agreement).” A-157.

uniform interpretation” to avoid the creation of “enduring uncertainties . . . [that] would decrease the value of all debenture issues and greatly impair the efficient working of capital markets”). The panel also ignored plaintiffs’ and its own acknowledgment that the clause itself does not require “ratable payment.” Dec. at 19 n.10. Accordingly, the second question for rehearing and rehearing *en banc* is:

May a court create an unprecedented remedy – here, barring payment on performing debt unless a “ratable payment” is made to plaintiffs on their defaulted debt – based on a boilerplate *pari passu* clause that neither the market nor plaintiffs understand to require “ratable payments”?

REASONS FOR GRANTING REHEARING

A. In Upholding Unprecedented Injunctions Restraining The Republic’s Use Of Its Property Outside The United States, The Decision Conflicts With Second Circuit Precedent, The Text And Purpose Of The FSIA, And The Position Of The United States

The panel’s Decision is the first time a U.S. court has upheld enjoining a sovereign’s use of its own property *outside* the United States – where it is indisputably immune from attachment and execution under the FSIA – and directly contradicts this Court’s holding in *S&S Machinery* that courts “may not grant, by injunction, relief which they may not provide by attachment,” 706 F.2d at 418, and the consistent line of authority applying that ruling, *see, e.g., Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229–30 (2d Cir. 1996) (order directing foreign state to pay pre-answer security requirement violates FSIA; “the prohibition against attachments should apply broadly”); *Weston Compagnie de Finance et*

D'Investissement, S.A. v. La Republica del Ecuador, 823 F.Supp. 1106, 1115–16 (S.D.N.Y. 1993) (denying injunction directing sovereign to return to New York funds located abroad). In reaching this unprecedented conclusion, the panel failed even to address the position of the United States, which, in addition to noting that the injunctions run afoul of *S&S Machinery*, pointed out that they contravene the purpose and structure of the FSIA, and harm the foreign relations of the United States. U.S. *Amicus* Brief, Dkt. #238 (“US Br.”) at 22–30.

This Court held in *S&S Machinery* that courts may not side-step the FSIA’s property immunities by achieving through injunction what they are prohibited from doing under their limited FSIA execution authority. 706 F.2d at 418. Those immunities render presumptively immune from attachment and restraint all sovereign property that is not located in the United States and used for a commercial activity here. *See* 28 U.S.C. §§ 1609–1611; *see also Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131–32 (9th Cir. 2010) (sovereign property located in France is “immune from execution” under the FSIA because it is not “property in the United States”); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) (rejecting idea of extraterritorial restraints: “We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction.”). *S&S Machinery* instructed that courts may not render the FSIA’s property immunity “meaningless” and

“eviscerate its protections . . . by denominating their restraints as injunctions against the . . . use of property rather than as attachments of that property,” and that “any other means to effect the same result” as an attachment “could only . . . result[] in the disingenuous flouting of the FSIA[’s]” immunity. 706 F.2d at 418.

Notwithstanding the clear holding of *S&S Machinery*, the panel affirmed the Injunctions that have both the effect and the expressed intention of flouting the FSIA’s execution immunities by restraining the Republic’s use of property upon which plaintiffs cannot execute in order to compel the Republic to turn over to plaintiffs other property upon which plaintiffs are likewise barred from executing. *See* US Br. at 24–25 (“If plaintiffs were to reduce their claims to money judgment, they would be prevented from seeking to attach the funds utilized to pay the exchange bonds under the FSIA’s strictures on enforcement of judgments[.] . . . Presumably in an effort to avoid these restrictions, plaintiffs-appellees chose instead to move for equitable relief that purports to constrain Argentina’s use of such property.”); Dec. at 25 (suggesting Republic pay plaintiffs with Central Bank reserves, which this Court has twice declared immune, *see* Dec. at 9 n.5). The Decision thus directly conflicts with *S&S Machinery*, because although the Injunctions “do not formally effectuate a transfer of property interests, [they] have the practical effect of requiring Argentina to transfer funds amounting to the balance of principal and interest owed to plaintiffs[] on the next occasion that it makes a

payment on the exchange bonds,” US Br. at 25 – a result that courts are prohibited from achieving in the exercise of their limited execution authority under the FSIA. The Court effectively commandeered immune Republic assets to pay plaintiffs, and ordered the Republic not to use equally immune assets to pay other legitimate debts unless it submitted to this commandeering. A greater affront to sovereignty and sovereign immunity is harder to imagine.

The panel tried to square its ruling with *S&S Machinery* by reasoning that the Injunctions “direct Argentina to comply with its contractual obligations” and “do not operate as attachments,” Dec. at 24–25, because they “can be complied with without the court’s ever exercising dominion over sovereign property,” *id.* at 25; *see also id.* (“[T]he injunctions do not transfer any dominion or control over sovereign property to the court. Accordingly, [they] do not violate § 1609.”). But the Injunctions *do* subject the Republic’s property to the “control” of the court – at all times they restrain the Republic from using its funds to pay holders of its restructured debt. That the Republic can use its designated funds for other purposes or avoid the effect of the improper restraint by making a “ratable” payment to plaintiffs does not change the fact that the court’s injunctions prevent the Republic from using its funds as it wishes, and thereby subject the funds to the court’s dominion in the most blatant possible way. Indeed, the court’s “dominion” over the funds used to pay the restructured debt holders is patent from the fact that the

Injunctions purport to restrain those specific funds in the hands of all banks through which they might subsequently flow. SPA-39–40. When a similar attempt was made to restrain funds used to pay other bondholders, the district court properly vacated as violative of the FSIA *ex parte* attachments and restraining orders interfering with those payments, *EM Ltd. v. Republic of Argentina*, 2012 WL 1028109, at *8–9 (S.D.N.Y. Mar. 28, 2012), but neither the district court nor the panel saw the anomaly of doing the exact opposite here.

Apart from their conflict with *S&S Machinery*, as the United States explained, US Br. 22–28, the Injunctions cannot be reconciled with the text and purpose of the FSIA, which sets forth the “sole, comprehensive scheme” for obtaining and enforcing a judgment against a sovereign state. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130–31 (2d Cir. 2009) (restraining orders violated FSIA because targeted property not “used for a commercial activity” in the United States); *Aurelius Capital Partners, LP v. Republic of Argentina*, 2010 WL 768874, at *4 (S.D.N.Y. Mar. 5, 2010) (funds in Argentina are not “in the United States” and are thus “immune from attachment, restraint and execution” under FSIA). Outside the narrow exceptions to immunity, “a plaintiff must rely on the government’s diplomatic efforts, or a foreign sovereign’s generosity, to satisfy a judgment.” *FG Hemisphere Assocs., LLC v.*

Democratic Republic of Congo, 637 F.3d 373, 377 (D.C. Cir. 2011); *see also Peterson*, 627 F.3d at 1128 (“Congress fully intended to create rights without remedies, aware that plaintiffs would often have to rely on foreign states to voluntarily comply with U.S. court judgments.”) (*citing Autotech*, 499 F.3d at 749).

The FSIA’s broad grant of immunity, which includes “[s]overeign property located outside of the United States,” “reflect[s] a deliberate policy choice on the part of Congress” to strictly limit interference with foreign state property because “at the time it enacted the FSIA, ‘enforcement [of] judgments against foreign state property remain[ed] a somewhat controversial subject in international law.’” US Br. at 23–24 (citation omitted). There is no indication that Congress meant for those immunities to protect certain sovereign property from attachment and execution on the one hand, but to expose that same property to “equitable” restraints that effectively function as execution devices on the other. As the United States noted:

[P]arties cannot avoid the limitations deliberately imposed by Congress on judicial execution authority and expand the scope of remedies available to them in an action against a sovereign simply by refraining from asking the court to reduce their claims to judgment. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep sections 1609–1611 by seeking an injunction that restrains the sovereign’s use of immune assets until a judgment is satisfied, rather than an order of execution against those same assets. *Id.* at 28.

The United States also urged reversal because the Injunctions are “particularly likely to raise foreign relations tensions,” as the laws of many nations do not even allow a court to enter an injunction against a foreign state, let alone one

that “not only purport[s] to exercise jurisdiction over foreign state property, but also ha[s] the effect of dictating to a sovereign state the implementation of its sovereign debt policy within its own territory.” *Id.* at 29. Although the United States’ views regarding the foreign policy implications of particular exercises of a court’s jurisdiction under the FSIA are accorded special deference by courts, *see id.* at 28, the panel ignored them entirely.

B. The Decision’s Pari Passu Clause Interpretation Is Contrary To Market Understanding, And Its “Ratable Payment” Remedy Threatens Future Sovereign Debt Restructurings

In holding that a boilerplate pari passu clause prevents a sovereign from paying holders of other bonds – including restructured debt – unless it also pays on bonds subject to the clause, Dec. at 18, the panel effectively held that the provision is a promise by a sovereign to never restructure its debt. This dangerous interpretation represents a “dramatic and disruptive departure” from market understanding, Clearing House *Amicus* Brief, Dkt # 237 (“CH Br.”) at 4–5, and defies common sense: no sovereign debtor or creditor would ever agree to such a prohibition, which would prevent a sovereign from ever emerging from a financial crisis, and keep *all* bondholders from receiving payments in the event of default. The Decision is thus erroneous under basic principles of contract law, and represents a significant – and improper – shift in the legal rights of the holders of the “trillions

of dollars of outstanding unsecured debt obligations governed under New York law” that contain *pari passu* clauses. *Id.* at 9.

As the Republic, joined by the United States and the Clearing House, made clear, the *pari passu* clause is a “boilerplate” contract provision, US Br. at 5, that has been understood for decades to prevent the issuing debtor from creating other debt that ranks senior to the debt subject to the *pari passu* clause. *See* US Br. at 11; CH Br. at 2.² The market plainly does *not* understand the *pari passu* clause to prevent a debtor from paying one group of creditors, and not others. *See* US Br. at 12 (“[M]arket understanding has consistently reflected that a ‘borrower does not violate [the *pari passu*] clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations’” subject to this clause); CH Br. at 4 (such an interpretation is inconsistent with “how credit markets have negotiated and understood these clauses to operate for many decades”). As a leading New York sovereign debt practitioner stated:

² The Argentine “Lock Law”, the sole legislative enactment referred to by the panel, could not have subordinated plaintiffs’ debt under the *pari passu* clause even if it did “bar[] [the Republic’s] courts from recognizing plaintiffs’ judgments,” Dec. at 20: that does not and could not constitute a “subordination” of plaintiffs’ rights under New York law or in U.S. courts. *See Allied Bank Int’l v. Banco Credito de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) (refusing to recognize as valid directives of the Costa Rican government purporting to affect right to payment under New York law-governed debt instruments). The Lock Law prevents the Executive from re-opening the 2005 Exchange Offer, or otherwise settling with holdout creditors without Congressional approval, reserving for Congress the power to deal with holdouts. A-436. Congress has delegated that power when it considers it necessary to do so, for example when it suspended the Lock Law to allow the 2010 Exchange Offer to go forward. A-440.

Never in my [40 year career] did a creditor involved in [a debt] transaction[], whether as draftsman or negotiator, take the position . . . that a *pari passu* provision . . . require[d] that all of the creditors of a sovereign debtor be paid simultaneously on a pro rata basis. . . . this construction would have appeared inconceivable and unworkable to the lawyers actually drafting the transaction documents . . . whether from the perspective of prospective lenders, or the sovereign borrowers itself. . . . In my experience, the *pari passu* provision has never been intended in any sense to affect the timing of payment as such.

A-1852; *see also* A-1919 (leading English practitioner stating: “[N]obody would ever agree to such an impracticable prohibition. Established professional markets do not habitually require clauses which are unworkable or which might invite lender liability,” and an interpretation that prohibits payment to some creditors unless others are paid “would give the clause a more draconian impact than normal fraudulent preference statutes[.]”). The Federal Reserve and the Financial Markets Law Committee, among others, were in accord. A-1795; A-1848.

Despite this weight of authority, the panel improperly dismissed the universal market understanding as inconclusive and “arguably biased.” Dec. at 16–17. The panel then held, in a ruling without precedent by a United States court, that the *pari passu* clause at issue both prevents the Republic from formally subordinating the FAA bonds by issuing superior debt, *and* “prohibits Argentina . . . from paying on other bonds without paying on the [] bonds [subject to the clause],” Dec. at 18. This ruling was doubly wrong.

First, the panel’s reading of the *pari passu* clause runs afoul of Circuit precedent requiring that boilerplate provisions be given a consistent meaning, which

here is the universal market understanding, regardless of minor variances in wording. *Sharon Steel Corp.*, 691 F.2d at 1048 (“[B]oilerplate must be distinguished from contractual provisions which are peculiar to a particular indenture and must be given a consistent, uniform interpretation”). The panel based its finding that the provision prevents payment on other bonds on the use of the phrase “payment obligations” in the second sentence of the pari passu clause (dubbed the “Equal Treatment Provision” by the panel), which states that “[t]he payment obligations . . . shall rank at all times at least equally with all its other present and future unsecured and unsubordinated [debt].” Dec. at 18–19. But “market participants [have] uniformly confirmed” that the inclusion of words like those are *not* a “conscious attempt” to vary the market understanding of the clause. Stephen J. Choi & Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1136–37 (2006) (A-1929–30) (“[Over] a dozen versions of the clause” exist, but the “differences are more idiosyncratic than due to any purposeful intent to change the . . . clause to favor (or disfavor) holdouts. A court attempting to read meaning into such differences runs a risk of misinterpreting the clause.”).

Second, the panel’s reading of the “Equal Treatment Provision” to require the *prohibition* of payments on other bonds is entirely unsupported by the provision’s text, which simply states that the “payment obligations . . . shall at all times rank at least equally.” Dec. at 18. As even the district court recognized, the plain language

of the provision does not *prevent* the Republic from paying any of its other debt, but is only an affirmative statement that the bonds will “*rank*” equally with it. *See* A-2300-1 (district court: “I don’t understand the *pari passu* clause . . . to mean that the Republic is forbidden to pay the exchange offers unless they pay NML.”).

Based on this erroneous interpretation, the panel affirmed the district court’s “ratable payment” remedy even though the panel concluded that the *pari passu* clause itself does not entitle plaintiffs to “ratable payments”. Dec. at 19 n.10 (stating that “ratable payments” were a “*remedy* for Argentina’s breach of the Provision”) (emphasis in original). Although the panel stated that its Decision will not allow creditors to disrupt sovereign debt restructurings because so-called “collective action clauses” – which allow a super-majority of bondholders to force the remaining debt holders to accept a restructuring – effectively eliminate holdout litigation, that assertion is factually wrong and legally irrelevant. Dec. at 27. As an initial matter, it ignores that there is at least \$68.5 billion dollars of sovereign debt outstanding that is *not* subject to such clauses. *See* NML Br. at 53.

Moreover, it fails to acknowledge that the Decision eliminates the incentive to participate in debt restructurings in the first place – if every creditor thinks that it can decline to restructure, and then obtain injunctive relief that compels the sovereign to pay the full amount of its defaulted debt, there will never *be* any super-majority to “cram down” the remainder. Finally, it neglects the fact that

much of the debt subject to collective action clauses does not provide for aggregating super-majorities across bond issuances, and thus holdout creditors can buy up blocking stakes of a single bond series, and seek to enjoin payments to creditors who restructure other issuances.³

CONCLUSION

The Court should grant the Republic's petition.

Dated: New York, New York
November 13, 2012

Respectfully submitted,

CLEARY GOTTlieb STEEN & HAMILTON LLP

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³ The panel's broad pari passu ruling also throws into doubt the validity of customary, and essential, preferential payments to lenders of last resort, such as the IMF, a conclusion specifically highlighted by the United States. US Br. at 19–22. The panel did not reach this issue, Dec. at 21, but nothing in its holding or analysis would exclude these payments from its pari passu interpretation.

EXHIBIT P

1

CB9HNMLA

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 NML CAPITAL, LTD,

4 Plaintiff,

4 v.

08 CV 6978 (TPG)

09 CV 1708 (TPG)

6 THE REPUBLIC OF ARGENTINA,

6

7 Defendant.

7 -----x

New York, N.Y.

November 9, 2012

11:30 a.m.

10 Before:

11 HON. THOMAS P. GRIESA

12 District Judge

13 APPEARANCES

14 DECHERT LLP

14 Attorneys for NML Capital Ltd.

15 BY: ROBERT A. COHEN

15 -and-

16 GIBSON, DUNN & CRUTCHER LLP

16 BY: THEODORE B. OLSON

17 MATTHEW D. MCGILL

17 MISHA TSEYTLIN

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1 Appearances (Continued)

2 FRIEDMAN KAPLAN SEILER & ADELMAN LLP

2 Attorneys for Aurelius Capital Partners LP
3 and Blue Angel

3 BY: EDWARD A. FRIEDMAN

4 DANIEL B. RAPPORT

4

5 GOODWIN PROCTER

5 Attorneys for Olifant Fund Ltd

6 BY: ROBERT D. CARROLL

6 -and

7 SIMON LESSER, P.C.

7 BY: LEONARD F. LESSER

8

8 MILBERG LLP

9 Attorneys for Varela

9 BY: MICHAEL C. SPENCER

10

10 CLEARY GOTTSLIEB STEEN & HAMILTON LLP

11 Attorneys for The Republic of Argentina

11 BY: CARMINE D. BOCCUZZI

12 MONA M. WILLIAMS

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13 REED SMITH LLP

14 Attorneys for The Bank Of New York Mellon

14 BY: ERIC A. SCHAFFER

15 EVAN FARBER

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16 O'SHEA PARTNERS, LLP

16 Attorneys for Gramercy Funds Management

17 BY: SEAN F. O'SHEA

17 MICHAEL E. PETRELLA

18

19

20

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23

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25

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1 (In open court)

2 THE DEPUTY CLERK: NML Capital v. Republic of
3 Argentina.

4 THE COURT: I know that the parties have applications,
5 but I would like to start with the obvious, and that is, this
6 court must comply with the Court of Appeals direction. I am
7 not going to try to repeat what the Court of Appeals ruled, but
8 obviously the Court of Appeals affirmed the basic rulings of
9 the district court and asked the district court to have further
10 proceedings to deal with the question of the amount to be paid
11 to the plaintiffs and then the effect on third parties. We
12 should schedule proceedings to comply with those directions of
13 the Court of Appeals.

14 The plaintiffs have submitted a letter and I guess a
15 proposed order, but really, I can't act on that letter. This
16 is a matter that has to have some briefing and hearing and so
17 forth. I think it can be done promptly, and I would just like
18 to set a schedule.

19 I think that it would assist the court to have a brief
20 from the plaintiffs that goes beyond the letter. Obviously the
21 Republic and perhaps other people will want to reply to that.
22 When could the plaintiffs have a brief? Maybe all you want to
23 do is repeat what is in the letter, I don't know, but I think
24 the matter deserves somewhat fuller discussion.

25 MR. OLSON: Your Honor, Theodore Olson on behalf of
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1 the NML parties. We can have a brief on file that complies
2 with what you just said on Monday, two days from now, three
3 days from now.

4 THE COURT: Then when could the Republic reply?

5 MR. BOCCUZZI: Your Honor, we would like to have, we
6 can have a brief -- I don't have a calendar with me, but the
7 second week in December. So 30 days from then.

8 THE COURT: That is too long.

9 MR. BOCCUZZI: Then could we have 20 days?

10 THE COURT: Too long.

11 MR. BOCCUZZI: I mean there are substantial issues,
12 your Honor, to be briefed.

13 THE COURT: If the plaintiffs can do it quickly, the
14 Republic can do it quickly.

15 MR. BOCCUZZI: Then ten days --

16 THE COURT: How about the end of next week?

17 MR. BOCCUZZI: Could we have at least a week, your
18 Honor?

19 THE COURT: The end of next week we will receive your
20 brief.

21 MR. BOCCUZZI: So Friday, November 16th.

22 THE COURT: Exactly.

23 All right. Now what needs to be done in the way of a
24 hearing after that we will have to see.

25 MR. O'SHEA: Your Honor, Sean O'Shea for Gramercy

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1 Funds Management, one of the exchange bondholders. I think,
2 your Honor, in fairness, we should have a seat at the table.
3 We should be allowed to at least file an amicus brief if not
4 intervene, because of the effects that are going to be had both
5 against Gramercy Funds Management and many other existing bonds
6 holders. So we would request --

7 THE COURT: People can file briefs -- I am sure there
8 will be more briefs than just the plaintiff's and the
9 Republic's -- as long as all that briefing is concluded by a
10 week from today. A week from today. This is not an issue
11 which requires a long time.

12 Now I would like to ask as far as timing, when is the
13 next payment scheduled to be made on the exchange offers?

14 MR. BOCCUZZI: Your Honor, there are three payments to
15 be made or three payment dates in December: On December 2nd,
16 December 15th and December 31st.

17 THE COURT: What do the three relate to?

18 MR. BOCCUZZI: Various of the restructured bonds. The
19 December 2nd payment -- just to -- I will finish that and then
20 give you more context.

21 THE COURT: December 2. How much money?

22 MR. BOCCUZZI: The December 2nd payment is on global
23 par bonds maturing in 2017, and I understand it is an interest
24 payment of approximately \$42 million.

25 THE COURT: December 2nd.

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1 MR. BOCCUZZI: Correct.

2 THE COURT: OK. And that pertains to the exchange
3 offer, an exchange offer.

4 MR. BOCCUZZI: The exchange bonds, yes, correct.

5 THE COURT: Interest of what, 42 million.

6 MR. BOCCUZZI: Yes, your Honor.

7 THE COURT: All right. And then what is the next one?

8 MR. BOCCUZZI: December 15th. These are payments on
9 the so-called GDP-linked notes. There are four series. One is
10 denominated in yen and one is in euros. I think it roughs out
11 to around \$3 billion.

12 THE COURT: All right.

13 MR. BOCCUZZI: That is a rough number.

14 THE COURT: And then the third?

15 MR. BOCCUZZI: On December 31st, on the discount
16 bonds -- your Honor, I don't have the total on the bottom. It
17 is in the range of, let's just call it around 100 million to
18 200 million.

19 THE COURT: All right.

20 MR. BOCCUZZI: And then, your Honor, there are other
21 scheduled payments obviously that follow from that. There is
22 one in March of next year, another series. Then there are
23 other payments in June, and then in December again.

24 THE COURT: Now any lawyer responds to this -- you all
25 know this -- but there is, as I understand it, under the

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1 instruments of the exchange offers, there is a method of
2 handling the payments. What are those provisions? Is anybody
3 able to describe that?

4 MR. BOCCUZZI: I can describe it generally, your
5 Honor. I don't have the record cites, but there was a
6 declaration the last round that explained it. The Republic
7 pays, in Argentina, the Bank of New York in Argentina. The
8 Bank of New York is the trustee for the bondholders. The
9 bondholders who hold exchange debt.

10 Bank of New York gets that money. Once they have the
11 money, it is their money in trust for those bondholders and
12 then they transfer the money into the payment system, i.e.,
13 they have to pay the so-called registered holder, who could be
14 the Depository Trust Company or its nominee Cede & Co. or else
15 the Euroclear system. So there may be a step, a few steps in
16 between, but sort of that is the general big picture payment to
17 the trustee in Argentina.

18 That money is in trust for the plaintiffs and then it
19 needs to get to the registered holder of the bonds, who then
20 pays downstream so it ends up in the account of any given
21 beneficial owner.

22 THE COURT: Does the money come into the United
23 States?

24 MR. BOCCUZZI: Excuse me?

25 THE COURT: Does the money come into the United
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1 States?

2 MR. BOCCUZZI: Yes, at some point it has to come into
3 the United States. Some of it does because it has to hit DTC
4 or its nominee Cede & Co. and then it gets paid to
5 participants -- they are like broker-dealers -- and then into
6 the accounts of whoever the ultimate beneficial holder may be.

7 THE COURT: Just go a little slower.

8 MR. BOCCUZZI: Yes.

9 THE COURT: Bank of New York in Argentina.

10 MR. BOCCUZZI: Yes.

11 THE COURT: Then go a little slower.

12 MR. BOCCUZZI: Then they have to pay the money, get
13 the money into New York or into Euroclear, the Euroclear
14 system, which pays to holders who hold in that system. That
15 money gets paid, transferred from Bank of New York in
16 Argentina, and I just don't know the exact step, but then it is
17 going to hit the registered holder, DTC or Cede & Co. in New
18 York.

19 THE COURT: The registered holder, what are those
20 initials?

21 MR. BOCCUZZI: DTC, the Depository Trust Company over
22 on Water Street.

23 THE COURT: Right.

24 MR. BOCCUZZI: And they have a nominee called Cede &
25 Co., who actually may be the actual, quote-unquote, registered

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1 holder of the global bonds. Remember, these are global bonds.
2 So those are the registered holders, and then the money has to
3 go basically down the chain -- I know it is a metaphor, but to
4 participants. DTC has participants. They are usually the big
5 financial institutions we all know -- JP Morgan, Citi, etc. --
6 and then the money continues down so it gets to whoever the
7 ultimate beneficial owner is of the interest in the global
8 note.

9 THE COURT: Let me see if I repeat it correctly. The
10 money is paid to the Bank of New York in Argentina.

11 MR. BOCCUZZI: Correct.

12 THE COURT: And then the Bank of New York forwards the
13 money to the Depository Trust Company or some entity connected
14 with it and then the Depository Trust Company or the other
15 entity will pay the money to certain registered holders.

16 MR. BOCCUZZI: Or their participants. Technically the
17 registered holder is DTC or Cede. But they have on their books
18 the next level down of people who have interest in these global
19 notes.

20 THE COURT: In an order of February 23, 2012, there is
21 a paragraph 4 which reads: "The Republic is permanently
22 prohibited from taking action to evade the directives of this
23 order, render it ineffective, or to take any steps to diminish
24 the court's ability to supervise compliance with the order,
25 including, but not limited to, altering or amending the

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1 processes or specific transfer mechanisms by which it makes
2 payments on the exchange bonds without obtaining prior approval
3 of the court."

4 Now, in the letter of November 6, 2012 -- obviously
5 very recent -- Mr. Robert Cohen, on behalf of NML, refers to
6 certain statements allegedly made by the president of the
7 Republic, Cristina Kirchner, by Argentina's minister of economy
8 Lorenzino, and the effect of those statements is that the
9 Republic will not comply with the Second Circuit's decision and
10 that money will be paid to the exchange bondholders but none to
11 the plaintiffs.

12 Now that, of course, is completely contrary to what I
13 ruled and the Second Circuit ruled because the effect of my
14 ruling, affirmed by the Second Circuit ruling, is money cannot
15 be paid to the exchange bondholders without an appropriate
16 payment to the plaintiffs, and the amount of that appropriate
17 payment is to be worked out. I think I am remembering my
18 ruling, and I am reading the Court of Appeals ruling.
19 Otherwise, it would be meaningless. There cannot be a payment
20 to the exchange bondholders without the court-directed payment
21 to the plaintiffs.

22 Now, if we have the president of Argentina and the
23 minister of the economy saying that that will not be complied
24 with, that is a serious matter. I want to address that now,
25 and the court is not helpless in dealing with such positions if

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1 they are taken.

2 Is that the position of the president of the Republic?

3 Is that the position of the economic minister? Mr. Boccuzzi.

4 MR. BOCCUZZI: Thank you, your Honor. The position
5 that they were stating is that -- and just to be clear, your
6 Honor stayed the ruling pending the disposition of the appeal
7 and the appellate process, and so since February we have been
8 paying the performing bondholders without paying plaintiffs.

9 THE COURT: Of course.

10 MR. BOCCUZZI: And as part of that stay, the language
11 you read, you said don't change the payment mechanism, and we
12 have not. BNY remains. That is why I think the lawyers from
13 BNY are here. So you don't have to take my word for it. That
14 mechanism remains in place, and they are here because they want
15 to put in a brief next Friday and say why they want to be able
16 to pay the bondholders the performing debt and they have a
17 fiduciary duty to do that.

18 THE COURT: You are not answering my question at all.

19 MR. BOCCUZZI: I am answering the question. These
20 statements in the press are clear statements by the Republic of
21 Argentina. They continue to appeal the ruling. We are filing
22 our en banc petition today.

23 THE COURT: You are not answering my question.

24 MR. BOCCUZZI: Your Honor, the issue about the
25 ultimate order in this court will depend on what the order

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1 says.

2 THE COURT: You are not answering my question. Did
3 the president of Argentina and the economic minister make these
4 statements? That isn't talking about the stay. It isn't
5 talking about something technical. They are simply saying we
6 will not comply.

7 MR. BOCCUZZI: They didn't say that, your Honor.

8 THE COURT: Oh, they did not.

9 MR. BOCCUZZI: They did not say we would not comply.
10 They had to calm a market that was in a panic that there was
11 going to be a default, and the order that plaintiff submitted
12 to you, that requires a payment of \$1.5 billion by December
13 2nd, to them was clearly, with no stay, with no further
14 possibility of appellate review, is clearly defined to trigger
15 a default.

16 THE COURT: I don't think the president of Argentina
17 is talking about a stay or talking about what you are talking
18 about.

19 MR. BOCCUZZI: She is trying to reassure the markets
20 that they believe in their position in litigation, that we are
21 continuing to litigate and that they will do their best to make
22 sure the debt get serviced.

23 This debt, the performing debt, has spiraled in value
24 since the rulings. The market is panicked. People are
25 suffering losses who have performing debt. The president of

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1 Argentina is permitted to make a statement that they are still
2 fighting the fight, as it were.

3 There is obviously a disagreement between our table
4 and your Honor and this table. We are going through the
5 appropriate avenues. We filed our en banc petition. We are
6 putting in briefs for your consideration next week.

7 THE COURT: You really will not answer my question.

8 MR. BOCCUZZI: I said, your Honor -- I did answer it.

9 THE COURT: No, you didn't.

10 MR. BOCCUZZI: She did not say she will not comply.
11 They are not thumbing their nose at your Honor or the orders.
12 The payment mechanism stays in place.

13 THE COURT: Now look here, obviously the Republic has
14 a right to litigate this, to ask for a rehearing by the Court
15 of Appeals, rehearing en banc, file a petition for cert. That
16 is of course. So if the president of Argentina had said we
17 will continue to litigate this, then no problem, none at all.

18 The reason I bring this up is I have a long experience
19 in this case and press reports have been amazingly accurate,
20 press reports about various things. The financial press in
21 Argentina picks up things quite accurately, and over all these
22 years and various applications and motions, the press reports
23 have been quite reliable.

24 What is quoted here doesn't bear any resemblance to
25 what you are talking about. I just want to say that -- I am

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1 probably repeating myself, but I am repeating myself because I
2 really haven't gotten any answer from the Republic's lawyer.
3 So I repeat. This is from the letter of Mr. Cohen dated
4 November 6th, which I referred to earlier. The letter states:
5 "Argentina's president, Cristina Kirchner, flatly declared, in
6 response to the October 26th decision, that Argentina was
7 'going to pay' the exchange bondholders 'with dollars because
8 we have them,' but would not pay 'one dollar to the vulture
9 funds.'"

10 I am just saying this. The Court of Appeals did not
11 in any way espouse or approve of the idea that these holders of
12 debt are vultures, vulture funds, or anything like that, but
13 the president of Argentina uses her characterization, if she is
14 quoted correctly, but that is -- it doesn't help matters.

15 Going on with the letter: "Argentina's minister of
16 economy Hernan Gaspar Lorenzino announced to the press that
17 'despite any ruling that could come out of any jurisdiction --
18 in this case, New York' -- then another quote, 'Argentina isn't
19 going to change its position of not paying vulture funds.'"

20 The Argentine press, according to the letter, has
21 reported that the Argentine government now is developing
22 various alternatives to evade this court's orders, and the
23 letter quotes the Financial Times as saying: "Since last
24 week's U.S. appeals court ruling went against Argentina, there
25 has been a lot of comment about how the country could try to

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1 change the trustee or payment structure of the bonds which came
2 out of its 2005 and 2010 restructuring."

3 I don't think there is any utility in me going back
4 and forth with Mr. Boccuzzi further. Obviously Mr. Boccuzzi
5 does not really want to say that the Republic is saying what is
6 reported in the press. Obviously the press can be inaccurate,
7 but generally it has not been inaccurate in reporting matters
8 relevant to this case over the years.

9 What I want to say is this, that the Republic has
10 submitted to the jurisdiction of this court in these cases.

11 You may sit down.

12 And obviously that means the Republic has submitted to
13 the jurisdiction of the Court of Appeals in these cases. That
14 means that any order of this court affirmed by the Court of
15 Appeals is binding on the Republic and the Republic has the
16 duty to comply.

17 Now as the Court of Appeals itself noted, the Republic
18 doesn't seem to respect that duty because already there are
19 judgments against the Republic which the Republic refuses to
20 honor, and the Court of Appeals expressly noted that.

21 Now, I don't know the facts. I don't know if the
22 press reports are in fact true. I don't know literally what
23 the intentions of the Republic are. But I have had some modest
24 amount of experience, and that is that the Republic will not
25 comply with the judgments which have been entered against it.

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1 Now if this is any pattern for what is going to go on with
2 respect to the rulings of the Court of Appeals, I think some
3 things have to be said.

4 First of all, it is a good thing to recall that the
5 instruments dealing with the rights and obligations of the
6 Republic with respect to bondholders, those original
7 instruments, provided that the Republic irrevocably submitted
8 to the jurisdiction of a state or federal court in New York
9 City. Irrevocably submitted to the jurisdiction of such a
10 court over any suit to enforce the bonds. And the instruments
11 contain the express language that the Republic agrees that a
12 final, non-appealable judgment in actions to enforce rights
13 under the bonds shall be conclusive and binding upon it and may
14 be enforced in any appropriate court. Conclusive and binding
15 upon it and may be enforced.

16 Now, what has gone on is the Republic has done
17 everything possible to prevent those judgments that have been
18 entered from being enforced. But the agreement is still there.
19 And what has happened over the years is that the Republic as
20 well as plaintiffs have had an enormous amount of service, both
21 from the district court and from the Court of Appeals. There
22 have been, as we know, efforts on the part of plaintiffs in
23 these actions to find ways to recover since the normal,
24 legitimate recovery of judgments was completely frustrated by
25 the Republic as completely as they could do, as the Republic

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1 could do. And obviously there have been devices attempted for
2 recovery which have been unusual and have led to a lot of
3 litigation. In that litigation, the Republic has been treated
4 fairly and has won most of those litigated matters. In certain
5 instances where the plaintiffs won in the district court, the
6 Court of Appeals has reversed the district court.

7 The point I'm making is that the Republic has had the
8 benefit, the service of the district court and the Court of
9 Appeals over many years in many proceedings and has been
10 treated with the utmost fairness and has prevailed in most of
11 these litigated matters.

12 Now the Republic did not prevail here. If the Court
13 of Appeals ruling stands, and it is certainly standing now,
14 this is a ruling by the district court affirmed by the Court of
15 Appeals that is adverse to the position of the Republic.

16 If -- and I emphasize if -- there is any thought on
17 the part of the Republic to defy and evade the current ruling,
18 then that thought should be seriously reconsidered and set
19 aside.

20 I am repeating myself, but I want to repeat myself.
21 For the Republic to engage in litigation in this court for over
22 ten years, and the Court of Appeals for over ten years, and
23 then suddenly, if it is true, decide to evade a ruling against
24 it would be a very large-scale departure from anything
25 approaching an orderly submission to a court of law,

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1 particularly in view of the fact that this is not the first
2 litigated matter. This is one in a long series.

3 I will also say that if it turns out as a fact that
4 the Republic has some intention of evading the Court of Appeals
5 ruling, our courts are not helpless. I think the Republic
6 should realize that the record of defiance of judgments already
7 entered is beginning maybe too late, but it is certainly
8 beginning to be viewed very negatively, and that is certainly
9 evidenced in the Court of Appeals discussion. And steps can be
10 taken, which I will not try to discuss now, but steps can be
11 taken to sanction any misconduct by the Republic of the kind I
12 am talking about, which will not simply amount to allowing the
13 Republic to disobey judgments and rulings. There will be means
14 of dealing with that.

15 Consequently, I would hope that the Republic will get
16 back on the track -- if it has gotten off the track -- it will
17 get back on the track of litigating fairly in our courts and
18 certainly as to this new ruling making sure that it is complied
19 with and that there is no doubt about compliance with it.

20 I think that is all we need to do today unless
21 somebody has some application. We have a schedule for
22 complying with the Court of Appeals ruling. Is there anything
23 else?

24 MR. OLSON: All I would add is that we would like to
25 reply to the Republic's brief.

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1 THE COURT: Sure.

2 MR. OLSON: We will do so by the following Monday
3 which, according to my calculations, would be November 19th.

4 THE COURT: All right.

5 MR. BOCCUZZI: Your Honor, just the other part was
6 just to clarify that the stay remains in effect while we go
7 through these proceedings or certainly until some other
8 application. We are in the Court of Appeals and we are before
9 you on all these issues that we need to follow up on and there
10 is concern about the status of the stay as reported in the
11 press among people in the market.

12 THE COURT: I don't think there is really any question
13 about the fact that the stay has to stay in effect. The matter
14 is just not finished.

15 MR. BOCCUZZI: Thank you, your Honor.

16 MR. OLSON: The terms of your order with respect to
17 the stay specifically said that it was stayed until the United
18 States Court of Appeals for the Second Circuit has issued its
19 mandate, which it has done, and it has come back --

20 THE COURT: It has issued an opinion but it hasn't
21 issued its mandate.

22 Let me say this. The stay was my order. If there was
23 some reason to amend my order, I would amend my order. I think
24 it would be quite anomalous to lift the stay while the matter
25 is still being litigated, as it is being litigated.

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1 The main thing that I want to make sure -- let me just
2 interrupt myself. The stay is contained in the order of --

3 MR. OLSON: I believe it is March 5, 2002.

4 THE COURT: Could I see that, because I have my order
5 of February 23.

6 MR. OLSON: I have marked it.

7 MR. BOCCUZZI: I have a clean one, your Honor.

8 THE COURT: I don't care. Just lend it to me.

9 MR. BOCCUZZI: Yes.

10 THE COURT: Is there an application to lift the stay?

11 MR. OLSON: Well, we believe that the stay expired
12 because what the Court of Appeals said is that the mandate
13 would be returned to it after these proceedings. Therefore,
14 the implication is that the mandate issued is here now, it is
15 not in the Court of Appeals. That is in the second-to-last
16 sentence or the last sentence of the Court of Appeals decision.

17 Now, with respect to that, your Honor, I would simply
18 say that we are coming to this point on December 2nd and
19 December 15th and December 31 where if the stay is in effect,
20 Argentina will disregard the decision of this court, affirmed
21 on the merits by the Court of Appeals on October 26th. So
22 therefore, every aspect of your decision that interpreted the
23 equal treatment provision, found that the Republic had violated
24 it, and that a remedy for violation was appropriate to require
25 compliance by Argentina with this provision when it made these

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1 payments on the dates that are coming up in December. So we
2 will be happy to address the issue of a stay in the brief that
3 we file on Monday and the reply brief that we file the
4 following Monday, but the stay should not be in effect from
5 this court in any event. We mentioned in Mr. Cohen's letter
6 that the Republic can post a bond, the Republic can seek a stay
7 from another court.

8 The Republic is in the position and capable of making
9 these payments and complying with the order. So therefore,
10 your order having been affirmed in all material, substantive
11 respects with respect to violation of the provision, there
12 should not be a stay any longer in effect when December 2nd
13 rolls around.

14 THE COURT: One of the reasons I wanted expedited
15 treatment of the matters that the Court of Appeals wanted to
16 have further dealt with was to try to have my ruling completed
17 in advance of those dates. Give me just a minute to look at
18 the end of the Court of Appeals ruling.

19 (Pause)

20 THE COURT: I had overlooked that language. The Court
21 of Appeals ends up saying: "Once the district court has
22 conducted such proceedings, the mandate should automatically
23 return to this court and to our panel for further consideration
24 of the merits of the remedy without need for a new notice of
25 appeal."

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1 The situation about literally the mandate, I know the
2 Court of Appeals said what it said. I don't want to get into a
3 technical discussion of the meaning of mandate as applies to
4 me. My intention is this, to try to get a ruling on the
5 matters subject to the remand and do it very, very promptly in
6 advance of the 1st of December. Until that time I will just
7 say the stay remains in effect.

8 MR. OLSON: I understand, your Honor.

9 THE COURT: It remains in effect. That is the only
10 way to do it.

11 What happens at the time of my ruling, we will cover
12 that when the time comes.

13 MR. OLSON: Thank you, your Honor. We will address
14 that in the briefs that we file on Monday.

15 THE COURT: Then what happens with the Court of
16 Appeals, that is up to the Court of Appeals. That is really
17 the way I view the stay.

18 The fact is that a very important part of the stay is
19 paragraph 2, the substance of which was in I think an earlier
20 order, but I want to read this again.

21 "To secure plaintiff's rights during the pendency of
22 the Republic's appeals of the February 23, 2012 orders to the
23 Second Circuit, it is ordered that the Republic shall not
24 during the pendency of the appeal to the Second Circuit take
25 any actions to evade the directives of the February 23, 2012

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1 orders in the event they are affirmed, render them ineffective
2 in the event they are affirmed, or diminish the court's ability
3 to supervise compliance with the February 23, 2012 orders in
4 the event they are affirmed, including, without limitation,
5 altering or amending the processes or specific transfer
6 mechanisms by which it makes payments on the exchange bonds
7 without prior approval of the court."

8 Now what I am going to request is an affidavit from
9 the Republic -- not just from Cleary Gottlieb -- from the
10 Republic affirming that that paragraph will be complied with,
11 because I don't think it will be helpful to have further
12 statements to the press and possibly further meetings of this
13 kind to deal with such statements. That should all be put to
14 rest. But I want an affidavit from the Republic assuring that
15 this paragraph will be complied with.

16 With that, we will be adjourned.

17 MR. OLSON: Thank you.

18 MR. BOCCUZZI: Your Honor, one point.

19 THE COURT: OK.

20 MR. BOCCUZZI: We will supply the declaration. Can we
21 have until next Friday? We will put it with our papers.

22 THE COURT: Sure. Of course.

23 MR. BOCCUZZI: I will say to the court now that we
24 have complied with it and the payment mechanisms remain in
25 place and Bank of New York is here because they still have a

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1 dog in this fight as it were. They haven't been fired or
2 anything like that.

3 The only point about the stay, your Honor, is that I
4 understand and appreciate that the stay continues. Having it
5 as of December 1 means there is now uncertainty in terms of
6 December 1 a ruling comes and there is no stay and there is
7 actually a payment due the next day, December 2. That is
8 already going to be incredibly disruptive to the market, the
9 people who are here as the tendering bondholders in the
10 exchange.

11 I would just ask if we can keep the stay open or there
12 as contemplated by your Honor's order and the past practice of
13 this court, which is --

14 THE COURT: Let me interrupt you. Let's look at the
15 calendar. Today is the 9th. The plaintiff's brief is going to
16 come in on the 12th. Right?

17 MR. OLSON: Yes, your Honor.

18 THE COURT: Any opposing briefs, particularly of
19 course the Republic, will come in on the 16th. If there is
20 going to be a little reply, in a day or so.

21 MR. BOCCUZZI: One point, just to be clear. The brief
22 will come on the 12th. The 12th is a court holiday. I would
23 like to get it on the 12th.

24 THE COURT: Make it the 13th.

25 MR. OLSON: We will make it the 13th, but we will get

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1 it to you as promptly as we can.

2 THE COURT: I forgot it was a court holiday. The
3 13th. This schedule is intended to try to have a decision from
4 the district court well in advance -- not obviously a year in
5 advance, but as far in advance of December 2 as I can do it.

6 MR. BOCCUZZI: But, your Honor --

7 THE COURT: That is as much as I can do. Now what are
8 you suggesting?

9 MR. BOCCUZZI: I would suggest two things. Their
10 brief comes in, that is the Monday of Thanksgiving week. So
11 your Honor will have it there during that week, which is a
12 short week. The following week is the lead up to December 1st.
13 If your Honor wants to hear the parties, it is just getting
14 very close, and just as a practical matter it is not a matter
15 of just writing a check to plaintiffs.

16 We would want to be able, and the Court of Appeals
17 contemplates that there would be -- and I think they don't have
18 any idea of dragging things out. But there would be a review
19 of what your Honor does in these two questions, which are two
20 very important questions, because it is not just the interest
21 of the Republic but all the folks they want to restrain and
22 enjoin and the tendering bondholders, the exchange holders.

23 So all I'm saying is your Honor retains jurisdiction
24 over the stay to monitor it, as it says in your order, but just
25 to have it with the expectation that it could go away at the

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1 end of November with the parties fighting over whether it would
2 last or not, that is really going to cause great disruption in
3 the market, hurt bondholders now.

4 I really think the letter that counsel sent to your
5 Honor talking about the stay ending -- for some reason they
6 filed that on the ECF system. It became public, whereas the
7 court system said you don't -- we all know you don't file with
8 the ECF to make them public. If you want to make a motion, you
9 make a motion. I really think that had negative effects on
10 many third parties.

11 If we just keep the stay in place as we have done,
12 there are going to be payments in March, there are going to be
13 payments in June. Give us the due process and the ability to
14 appeal as we have always had them. The stays that your Honor
15 has entered have always remained in effect while people have
16 gone to the Court of Appeals and gone to the Supreme Court. It
17 stayed in effect for them to pursue all their remedies when
18 they lost, and just the uncertainty -- even Bank of New York,
19 in terms of knowing what they will have to do, because one of
20 the main issues that your Honor is going to decide is going to
21 be what is that payment that has to be made to them if other
22 people are getting payments. That issue would be contemplated
23 by the Court of Appeals to be subject of an appeal.

24 I am not trying to drag anything out, your Honor, but
25 I am seeing severe prejudice and delay to third parties, to the

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1 Republic, and no prejudice here to plaintiffs given that we
2 have more scheduled interest payments coming up in March, in
3 June. So the trigger to these payments are there in the
4 future. They are not going anywhere.

5 MR. O'SHEA: Your Honor, on behalf of those people who
6 are being held hostage --

7 THE COURT: You are Mr.?

8 MR. O'SHEA: O'Shea on behalf of the exchange
9 bondholder. Well, on behalf of Gramercy Funds Management, your
10 Honor, one of the exchange bondholders that did the reorg in
11 2010 or restructuring in 2010, I should say.

12 We are the ones being held hostage here, and if the
13 stay isn't in place, we are the ones suffering. In fact, we
14 are already suffering by the value of our bonds falling out in
15 the marketplace. So this is very important.

16 Your Honor, one other thing. What Mr. Olson suggests
17 by having that brief filed the 13th, it gives us four days, and
18 we are absolutely new to the fray, Judge. We want to have a
19 place at the table because we are the ones being held hostage
20 here. So what Mr. Boccuzzi says is absolutely correct.

21 I know you are frustrated with Republic of Argentina,
22 but I think you have to be concerned, and I know your Honor was
23 concerned having just had a chance to look at the February 23rd
24 argument, about the collateral consequences to those people who
25 are absolutely innocent here. Pension funds and endowments

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1 that are our clients who did the exchange are being held
2 hostage here.

3 THE COURT: It doesn't help me to talk about being
4 held hostage. We have some inevitable results of a Court of
5 Appeals ruling. The results are inevitable. Another thing,
6 the Court of Appeals emphasized the Republic doesn't have to
7 stop paying the exchange. They don't have to stop for a minute
8 as long as they make a payment, an appropriate payment to the
9 plaintiffs.

10 Now if you want to get the exchange people paid, talk
11 to the Republic. They can pay you. As far as holding hostage,
12 there are inevitable results of this Court of Appeals ruling.
13 The Court of Appeals didn't say we are holding somebody
14 hostage; they made a ruling.

15 MR. O'SHEA: Your Honor --

16 THE COURT: Excuse me.

17 MR. O'SHEA: Pardon me.

18 THE COURT: That ruling obviously is a very important
19 ruling, and there is still more work to be done. If that
20 ruling had some effect on bond prices, well, court rulings
21 sometimes have effect on securities prices. I don't sit here
22 planning things in order to affect the market, and I will not
23 do that. The market is the market. It reacts to certain
24 things. But my job is not to affect the market intentionally
25 or not.

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1 I have some sympathy with what Mr. Boccuzzi is talking
2 about because we are up against -- if we are talking about
3 getting things done by December 2nd or December 15 or even
4 December 31st, there are two things going on in my mind. Under
5 the Court of Appeals ruling, there should be for all payments
6 hence forth the application of the clause the Court of Appeals
7 is talking about. The Court of Appeals didn't say this is to
8 be put off until March or July or something. It made a ruling.

9 Now, the carrying out of that ruling involves some
10 work and some time. What I thought was I certainly would have
11 the stay in effect until I finish whatever ruling I am going to
12 make, and let's suppose I get all the papers in by the 16th and
13 get to work.

14 MR. BOCCUZZI: They have a reply, your Honor, on the
15 19th.

16 THE COURT: All right.

17 MR. O'SHEA: Your Honor, I think --

18 THE COURT: Just a minute. Please.

19 MR. O'SHEA: Pardon me.

20 THE COURT: One of the things I have in mind is that,
21 subject to what the Court of Appeals has asked, the plaintiffs
22 are entitled to money and they are entitled to money if the
23 legal steps were in order, they are entitled to money out of
24 the December payments. They are entitled to money. And they
25 have been waiting for years to get some money. But they are

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1 entitled to money. And they are going to get something. The
2 Court of Appeals didn't say they are going to get nothing. The
3 Court of Appeals said that the district court should do some
4 more work to resolve how much. But they will get something.

5 Now when should they start? Should they wait until
6 March? That is money that they are being deprived of that they
7 are entitled to. They have a legal right to. What the Court
8 of Appeals is saying is that the Republic has breached these
9 clauses. Breached these clauses. So the plaintiffs are
10 entitled to that money.

11 So what I am saying to all of you is that I will keep
12 the stay in effect until I make my ruling. I will consider
13 continuing the stay while the Court of Appeals does further
14 work. But the Court of Appeals further work is not going to
15 say there is no money coming. It is a matter of how much.

16 So I have to tell you that I will keep the stay in
17 effect until my ruling and at that time I will entertain
18 applications to continue the stay or to dissolve the stay. And
19 obviously to some extent whether it is appropriate to continue
20 the stay depends on what I rule. I am repeating myself for the
21 umpteenth time, but some money is due to the plaintiffs out of
22 those December payments. It's due. How much is a question.

23 That is what I am going to say about the stay and that
24 is all I am going to say about the stay.

25 Anything else?

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1 MR. OLSON: May I just respond very briefly?

2 THE COURT: Yes.

3 MR. OLSON: The first part of the remand, so to speak,
4 was for clarification of what the trial court intended with
5 respect to the payments of the money that you are talking
6 about. It is just for clarification of what you intended in
7 the first instance, which we submit is clearly reflected in
8 your orders in the first place, the colloquy that took place on
9 February 23, and in the orders that you issued. So there
10 shouldn't be a whole lot of time dedicated to that because even
11 the Republic acknowledged what you were saying and we were
12 saying with respect to the manner in which the equal payment
13 provision should be executed. So that is one part of it.

14 With respect to -- and we will move as rapidly as we
15 possibly can to have this thing resolved well before those
16 payments are due. The Republic can post a bond any time it
17 wants with respect to that, to make sure that the plaintiffs
18 receive the money that they are entitled to.

19 With respect to the clarification of the intermediary
20 banks and so forth, that is going to be fairly simple. We have
21 submitted an order that clearly takes care of that and
22 incorporates by reference the UCC provisions that are involved
23 with respect to that. So everything can be taking place.

24 As far as the statements by the exchange bondholders
25 today that they are new to the fray, this case has been going

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1 on for a long, long time. This issue about the equal treatment
2 provisions has been in litigation for two years, your Honor.
3 They haven't intervened. They have no right to be here and to
4 participate in this case. If you want to entertain receiving
5 amicus briefs from them, that is one thing. But you ruled, and
6 it has been affirmed by the Court of Appeals, that the Republic
7 of Argentina can discharge its obligations to the exchange
8 bondholders and to the plaintiffs in this case and that is
9 final. There is no request for clarification of that.

10 As you indicated, this business about being held
11 hostage is nonsense. You ruled, after long consideration of
12 the matter, that they can pay, the Republic can pay the
13 exchange bondholders and pay the plaintiffs, and that was
14 affirmed specifically by the Second Circuit, and the Second
15 Circuit did not need any clarification about that.

16 What Mr. Boccuzzi says with respect to let December
17 slide, they are talking about making payments of well over \$3
18 billion, and of course that is why they want a stay so they can
19 make those payments and string out the plaintiffs that much
20 longer. I think that you have indicated that your patience has
21 run out with respect to that. I just simply want to say that
22 it is certainly justified to hold Argentina to the decision on
23 the merits that was affirmed with respect to the meaning of
24 these provisions and the obligation of Argentina, which was
25 affirmed on every particular by the Court of Appeals.

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1 MR. O'SHEA: Your Honor, a response very briefly, your
2 Honor, on behalf of the exchange bondholders. The Second
3 Circuit explicitly expressed concern for those third parties
4 and your Honor invited us here after we submitted a letter. We
5 have every right to be here.

6 THE COURT: I assume I will receive multiple briefs.
7 We are adjourned. Thank you. We are adjourned.
8 (Adjourned)
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EXHIBIT Q

12-105(L)
NML Capital, Ltd. v. Republic of Argentina

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2011

(Argued: July 23, 2012)

Decided: October 26, 2012)

Docket Nos. 12-105(L), 12-109(CON), 12-111(CON), 12-157(CON), 12-158(CON),
12-163(CON), 12-164 (CON), 12-170(CON), 12-176 (CON), 12-185 (CON), 12-189 (CON),
12-214 (CON), 12-909 (CON), 12-914 (CON), 12-916 (CON), 12-919 (CON), 12-920 (CON),
12-923 (CON), 12-924 (CON), 12-926 (CON), 12-939 (CON), 12-943 (CON), 12-951 (CON),
12-968 (CON), 12-971 (CON)

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 AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA
ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES,
MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

Before: POOLER, B.D. PARKER and RAGGI, *Circuit Judges.*

Plaintiffs appeal from permanent injunctions entered by the United States District Court for the Southern District of New York (Griesa, *J.*) designed to remedy Argentina's breach of its promise to pay bondholders after a 2001 default on its sovereign debt. We hold that Argentina breached its promise and, accordingly, affirm the underlying judgments of the district court. Further, we find no abuse of discretion in the injunctive relief fashioned by the district court. However, given the need for clarity as to how the injunctions are to function, the case is remanded to the district court for such proceedings as are necessary to address this matter.

AFFIRMED in part and REMANDED in part.

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for Amicus Curiae the United States of America, in
support of Defendant-Appellant.

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Curiae the Clearing House Association L.L.C., in
support of Defendant-Appellant.

BARRINGTON D. PARKER, *Circuit Judge*:

The Republic of Argentina appeals from permanent injunctions entered by the United States District Court for the Southern District of New York (Griesa, *J.*) designed to remedy Argentina's failure to pay bondholders after a default in 2001 on its sovereign debt. The district court granted plaintiffs summary judgment and enjoined Argentina from making payments on debt issued pursuant to its 2005 and 2010 restructurings without making comparable payments on the defaulted debt. We hold that an equal treatment provision in the bonds bars Argentina from discriminating against plaintiffs' bonds in favor of bonds issued in connection with the restructurings and that Argentina violated that provision by ranking its

1 payment obligations on the defaulted debt below its obligations to the holders of its restructured
2 debt. Accordingly, we affirm the judgment of the district court; we find no abuse of discretion in
3 the injunctive relief fashioned by the district court, and we conclude that the injunctions do not
4 violate the Foreign Sovereign Immunities Act (“FSIA”). However, the record is unclear as to
5 how the injunctions’ payment formula is intended to function and how the injunctions apply to
6 third parties such as intermediary banks. Accordingly, the judgment is affirmed except that the
7 case is remanded to the district court for such proceedings as are necessary to clarify these two
8 issues. *See United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994).

9 BACKGROUND

10 Overview

11 In 1994, Argentina began issuing debt securities pursuant to a Fiscal Agency
12 Agreement (“FAA Bonds”). A number of individual plaintiffs-appellees bought FAA Bonds
13 starting around December 1998. The remaining plaintiffs-appellees, hedge funds and other
14 distressed asset investors, purchased FAA Bonds on the secondary market at various times and
15 as recently as June 2010.¹ The coupon rates on the FAA Bonds ranged from 9.75% to 15.5%,
16 and the dates of maturity ranged from April 2005 to September 2031.

17 The FAA contains provisions purporting to protect purchasers of the FAA Bonds
18 from subordination. The key provision, Paragraph 1(c) of the FAA, which we refer to as the
19 “*Pari Passu* Clause,” provides that:

20 [t]he Securities will constitute . . . direct, unconditional, unsecured
21 and unsubordinated obligations of the Republic and shall at all times rank

¹ These plaintiffs include NML Capital, Ltd. (“NML”); Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, and Blue Angel Capital I LLC (collectively, “Aurelius et al.”); and Olifant Fund, Ltd. (“Olifant”).

1 pari passu without any preference among themselves. *The payment*
 2 *obligations of the Republic under the Securities shall at all times rank at*
 3 *least equally with all its other present and future unsecured and*
 4 *unsubordinated External Indebtedness*

5
 6 J.A. at 157 (emphasis added) (“External Indebtedness” is limited to obligations payable
 7 in non-Argentine currency. J.A. at 171.).² We refer to the second sentence of the *Pari Passu*
 8 Clause as the “Equal Treatment Provision.” Following the 2001 default on the FAA Bonds,
 9 Argentina offered holders of the FAA Bonds new exchange bonds in 2005 and 2010 (the
 10 “Exchange Bonds”). Argentina continued to make payments to holders of those Exchange
 11 Bonds while failing to make any payments to persons who still held the defaulted FAA Bonds.

12 After Argentina defaulted, its President in December 2001 declared a “temporary
 13 moratorium” on principal and interest payments on more than \$80 billion of its public external
 14 debt including the FAA Bonds. Each year since then, Argentina has passed legislation renewing
 15 the moratorium and has made no principal or interest payments on the defaulted debt. Plaintiffs
 16 estimate that, collectively, their unpaid principal and prejudgment interest amounts to
 17 approximately \$1.33 billion.

²The practical significance of an equal ranking obligation is readily apparent in the event of the bankruptcy or insolvency of a corporate debtor. Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 873 (2004). In a corporate bankruptcy, holders of senior obligations have a priority claim over the debtor’s assets. *Id.* In the case of sovereign borrowers, however, the impact of the clause is less clear because creditors cannot force them into bankruptcy-like proceedings, and no comparable asset distribution plan applies. Thus, in the event of a debt crisis, sovereigns wishing to honor some portion of their defaulted debt must negotiate with individual creditors or groups of creditors to effectuate restructurings. Typically, these proceedings leave in their wake so-called “holdout” creditors who refuse to restructure, opting instead to seek judgments against the sovereign. *See generally* William W. Bratton, *Pari Passu and a Distressed Sovereign’s Rational Choices*, 53 Emory L.J. 823, 828-33 (2004).

1 The plaintiffs allege that Argentina's conduct violated the *Pari Passu* Clause by
 2 both subordinating their FAA Bonds to the Exchange Bonds and lowering the ranking of their
 3 FAA Bonds below the Exchange Bonds. The primary issues on appeal are whether Argentina
 4 violated the *Pari Passu* Clause, and if so, whether the remedy the district court ordered was
 5 appropriate.

6 **Argentina's Restructurings**

7 In 2005, Argentina initiated an exchange offer in which it allowed FAA
 8 bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external
 9 debt at a rate of 25 to 29 cents on the dollar. In exchange for the new debt, participants agreed to
 10 forgo various rights and remedies previously available under the FAA. To induce creditors to
 11 accept the exchange offer, Argentina stated in the prospectus under "Risks of Not Participating
 12 in [the] Exchange Offer" the following:

13 *Existing defaulted bonds eligible for exchange that are not tendered*
 14 *may remain in default indefinitely. As of June 30, 2004, Argentina was in*
 15 *default on approximately U.S. \$102.6 billion of its public indebtedness . . .*
 16 *. The Government has announced that it has no intention of resuming*
 17 *payment on any bonds eligible to participate in [the] exchange offer . . . that*
 18 *are not tendered or otherwise restructured as part of such transaction.*
 19 *Consequently, if you elect not to tender your bonds in an exchange offer*
 20 *there can be no assurance that you will receive any future payments in*
 21 *respect of your bonds.*

22
 23 2005 Prospectus, J.A. at 465 (second emphasis added).

24 That same year, in order to exert additional pressure on bondholders to accept the
 25 exchange offer, the Argentine legislature passed Law 26,017 (the "Lock Law") declaring that:

26 Article 2 – The national Executive Power may not, with respect to the
 27 bonds . . . , reopen the swap process established in the [2005 exchange offer].
 28

1 Article 3 – *The national State shall be prohibited from conducting*
 2 *any type of in-court, out-of-court or private settlement with respect to the*
 3 *bonds*

4
 5 Article 4 – The national Executive Power must . . . remove the bonds
 6 . . . from listing on all domestic and foreign securities markets and
 7 exchanges.

8 2005 Lock Law, J.A. at 436 (emphasis added). The 2005 exchange offer closed in June
 9 2005 with a 76% participation rate, representing a par value of \$62.3 billion. Plaintiffs did not
 10 participate.

11 In 2010, Argentina initiated a second exchange offer with a payment scheme
 12 substantially identical to the 2005 offer. To overcome the Lock Law’s prohibition against
 13 reopening the exchange, Argentina temporarily suspended the Lock Law (the “Lock Law
 14 Suspension”).³ Like the 2005 prospectus, the 2010 exchange offer prospectus also warned of
 15 “Risks of Not Participating in the [2010 restructuring]”:

16 *Eligible Securities that are in default and that are not tendered*
 17 *may remain in default indefinitely and, if you elect to litigate, Argentina*
 18 *intends to oppose such attempts to collect on its defaulted debt.*

19
 20 Eligible Securities in default that are not exchanged
 21 pursuant to the Invitation may remain in default indefinitely. In light of its

³ The Lock Law Suspension, Law 26,547, explained that

[t]he holders of government bonds that were eligible for the [2005] swap . . . who wish to participate in the [2010] restructuring . . . will have to waive all of the rights that pertain to them by virtue of the [FAA Bonds], including those rights that may have been recognized by any judicial or administrative judgment, . . . and waive and discharge the Republic of Argentina of any judicial . . . action, initiated or that may be initiated in the future, with regard to the [FAA Bonds] . . . It is prohibited to offer the holders of government bonds who may have initiated judicial . . . action, more favorable treatment than what is offered to those who have not done so.

Lock Law Suspension, J.A. at 440.

1 financial and legal constraints, *Argentina does not expect to resume*
 2 *payments on any Eligible Securities in default that remain outstanding*
 3 *following the expiration of the Invitation.* Argentina has opposed
 4 vigorously, and intends to continue to oppose, attempts by holders who
 5 did not participate in its prior exchange offers to collect on its defaulted
 6 debt through . . . litigation . . . and other legal proceedings against
 7 Argentina. Argentina remains subject to significant legal constraints
 8 regarding its defaulted debt. . . .

9 Consequently, if you elect not to tender your Eligible
 10 Securities in default pursuant to the Invitation *there can be no assurance*
 11 *that you will receive any future payments or be able to collect through*
 12 *litigation in respect of your Eligible Securities in default.*

13 2010 Prospectus, J.A. at 980 (second and third emphases added). As with the 2005
 14 exchange offer, plaintiffs did not participate in the 2010 restructuring. After the two exchange
 15 offers, Argentina had restructured over 91% of the foreign debt on which it had defaulted in
 16 2001.

17 An important new feature of the Exchange Bonds was that they included
 18 “collective action” clauses. These clauses permit Argentina to amend the terms of the bonds and
 19 to bind dissenting bondholders if a sufficient number of bondholders (66 2/3% to 75% of the
 20 aggregate principal amount of a given series) agree.⁴ With the inclusion of collective action
 21 clauses, the type of “holdout” litigation at issue here is not likely to reoccur.

22 Argentina has made all payments due on the debt it restructured in 2005 and
 23 2010. Under the indentures for the 2005 and 2010 Exchange Bonds, Argentina makes principal
 24 and interest payments to a trustee in Argentina that in turn makes an electronic funds transfer
 25 (“EFT”) to U.S.-registered exchange bondholders. The EFTs are made from the trustee’s non-

⁴ See 2010 Prospectus at 122, J.A. at 1054 (providing that certain “modification[s] to the terms and conditions of [the Exchange Bonds] . . . may generally be made, and future compliance therewith may be waived, with the consent of Argentina and the holders of not less than 75% in aggregate principal amount or notional amount . . . of the [Exchange Bonds] at the time outstanding.”).

U.S. bank to the registered holder's U.S. bank, often routed through one or more intermediary banks.

Proceedings Below

Plaintiffs sued Argentina on the defaulted FAA Bonds at various points from 2009 to 2011, alleging breach of contract and seeking injunctive relief, including specific performance of the Equal Treatment Provision.⁵ The FAA is governed by New York law and further provides for jurisdiction in "any state or federal court in The City of New York." J.A. at 184. However, Argentina's courts have held that the Lock Law and the moratoria on payments prevent them from recognizing New York judgments regarding the FAA Bonds. In SEC filings, Argentina has stated that it has classified unexchanged FAA Bonds as a category separate from its regular debt and that, since 2005, it has "not [been] in a legal . . . position to pay" that category. Republic of Arg., Annual Report (Form 18-K) ("18-K"), at 2, 11 (Sept. 30, 2011)

In December 2011, the district court granted plaintiffs partial summary judgment (the "Declaratory Orders").⁶ The court observed that the Republic violates the Equal Treatment

⁵ In separate litigation on different bonds, plaintiffs hold judgments against Argentina that, as we have seen, its courts have refused to honor, and the FSIA has largely prevented plaintiffs from attaching the Republic's foreign assets to satisfy those judgments. *See, e.g., EM Ltd. v. Republic of Arg.*, 473 F.3d 463, 472 (2d Cir. 2007) (affirming vacatur of attachment of central bank reserves); *NML Capital, Ltd. v. Banco Central de la República Arg.*, 652 F.3d 172, 197 (2d Cir. 2011) (vacating attachment of same reserves); *Aurelius Capital Partners, LP v. Republic of Arg.*, 584 F.3d 120, 131 (2d Cir. 2009) (rejecting attempt to restrain assets to be acquired by Argentine social security system); *but see NML Capital Ltd. v. Republic of Arg.*, 680 F.3d 254, 260 (2d Cir. 2012) (affirming attachment and restraining orders); *EM Ltd. v. Republic of Arg.*, 389 F. App'x 38, 43 (2d Cir. 2010) (affirming post-judgment restraint and pre-judgment attachment orders on certain assets of Argentina held in trust in the United States).

⁶ The remainder of the procedural history discussed below, while referencing "plaintiffs," describes the district court's rulings with respect to NML Capital. The court subsequently entered essentially identical judgments with respect to all other plaintiffs.

1 Provision “whenever it lowers the rank of its payment obligations under [plaintiffs’] Bonds
2 below that of any other present or future unsecured and unsubordinated External Indebtedness.”
3 The district court then held that Argentina “lowered the rank” of plaintiffs’ bonds in two ways:
4 (1) “when it made payments currently due under the Exchange Bonds, while persisting in its
5 refusal to satisfy its payment obligations currently due under [plaintiffs’] Bonds” and (2) “when
6 it enacted [the Lock Law] and [the Lock Law Suspension].” Special App. at 13-14. As the court
7 explained:

8 it’s hard for me to believe that there is not a violation of the [Equal
9 Treatment Provision] accomplished by the congressional legislation in ’05
10 and ’10, simply saying that the Republic will not honor these judgments. It
11 is difficult to imagine anything would reduce the rank, reduce the equal
12 status or simply wipe out the equal status of these bonds under the [Equal
13 Treatment Provision] [more than the Lock Law and the Lock Law
14 Suspension]. . . . [The Equal Treatment Provision] can’t be interpreted to
15 allow the Argentine government to simply declare that these judgments will
16 not be paid, and that’s what they have done.
17

18 J.A. at 2124.

19 In January 2012, the district court issued a temporary restraining order enjoining
20 Argentina

21 from altering or amending the processes or specific transfer
22 mechanisms (including the use of specific firms) by which it makes payments
23 due to holders of bonds or other securities issued pursuant to its 2005 and
24 2010 exchange offers, including without limitation by using agents, financial
25 intermediaries and financial vehicles other than those used at the time of this
26 Order.
27

28 Special App. at 26.

29 **The District Court’s Injunctions**

30 In February 2012, the district court granted injunctive relief, ordering Argentina
31 to specifically perform its obligations under the Equal Treatment Provision (the “Injunctions”).

1 *Id.* at 38. The Injunctions provide that “whenever the Republic pays any amount due under the
2 terms of the [exchange] bonds,” it must “concurrently or in advance” pay plaintiffs the same
3 fraction of the amount due to them (the “Ratable Payment”).⁷ We are unable to discern from the
4 record precisely how this formula is intended to operate. It could be read to mean that if, for
5 example, Argentina owed the holders of restructured debt \$100,000 in interest and paid 100% of
6 that amount then it would be required to pay the plaintiffs 100% of the accelerated principal and
7 all accrued interest. Or it could be read to mean that, if such a \$100,000 payment to the
8 exchange bondholders represented 1% of the principal and interest outstanding on the
9 restructured debt, then Argentina must pay plaintiffs 1% of the amount owed to them. We
10 cannot tell precisely what result the district court intended. On remand the district court will
11 have the opportunity to clarify precisely how it intends this injunction to operate.

12 Anticipating that Argentina would refuse to comply with the Injunctions and in
13 order to facilitate payment, the district court ordered that copies of the Injunctions be provided to
14 “all parties involved, directly or indirectly, in advising upon, preparing, processing, or
15 facilitating any payment on the Exchange Bonds.” These could include Argentina’s agent-banks
16 located in New York that hold money in trust for the exchange bondholders and process
17 payments to them under the terms of those bonds. Under Rule 65(d)(2), parties, their “officers,
18 agents, servants, employees, and attorneys,” as well as “other persons who are in active concert

⁷ Under the Injunctions’ terms, calculating the Ratable Payment requires first determining a “Payment Percentage,” a fraction calculated by dividing “the amount actually paid or which the Republic intends to pay under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds.” Special App. at 39. The Payment Percentage is in turn multiplied by “the total amount currently due to [plaintiffs],” including pre-judgment interest. *Id.* Because Argentina has defaulted on all of plaintiffs’ bonds, the “amount currently due” on the FAA Bonds is the amount due under the FAA’s Acceleration Clause – the entire principal amount of the bonds – plus pre-judgment interest which, according to plaintiffs, totals approximately \$1.33 billion.

1 or participation with” them, are bound by injunctions. Furthermore, the Injunctions expressly
2 prohibit Argentina’s agents from

3 aiding and abetting any violation of this ORDER, including any
4 further violation by [Argentina] of its obligations under [the Equal Treatment
5 Provision], such as any effort to make payments under the terms of the
6 Exchange Bonds without also concurrently or in advance making a ratable
7 payment to [plaintiffs].
8

9 Special App. at 40.

10 To give effect to this provision, the Injunctions prevent Argentina from “altering
11 or amending the processes or specific transfer mechanisms by which it makes payments on the
12 Exchange Bonds” without approval of the court (the “Preliminary Injunction”). Special App. at
13 40. Finally, the Injunctions require Argentina to certify to the court, concurrently or in advance
14 of making a payment on the Exchange Bonds, that it has satisfied its obligations under the
15 Injunctions.

16 In justifying the remedy ordered, the court reasoned that

17 [a]bsent equitable relief, [plaintiffs] would suffer irreparable harm
18 because the Republic’s payment obligations to [plaintiffs] would remain
19 debased of their contractually-guaranteed status, and [plaintiffs] would never
20 be restored to the position [they were] promised that [they] would hold
21 relative to other creditors in the event of default.
22

23 *Id.* at 37. Further, there was no adequate remedy at law “because the Republic has made
24 clear – indeed, it has codified in [the Lock Law] and [the Lock Law Suspension] – its intention
25 to defy any money judgment issued by this Court.” *Id.*

26 The court further reasoned that the balance of the equities tipped in plaintiffs’
27 favor because of (1) Argentina’s “unprecedented, systematic scheme of making payments on
28 other external indebtedness, after repudiating its payment obligations to Plaintiffs, in direct

violation of” the Equal Treatment Provision and (2) Argentina’s ability to “violate [that Provision] with impunity” in the absence of injunctive relief. *Id.* at 37-38. The district court also stated that “if there was any belief that the Republic would honestly pay its obligations, there wouldn’t be any need for these kinds of paragraphs” in the Injunctions. J.A. at 2319. The court noted that the Injunctions “require[] of [Argentina] only that which it promised Plaintiffs and similarly situated creditors to induce those creditors to purchase [Argentina’s] bonds.” The court further observed that Argentina now “has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and [to the exchange bondholders].” Special App. at 37-38. As to the exchange bondholders, the Injunctions do not “jeopardiz[e] [their] rights” because “all that the Republic has to do” is “honor its legal obligations.” J.A. at 2339. Finally,

[t]he public interest of enforcing contracts and upholding the rule of law will be served by the issuance of th[ese] [Injunctions], particularly here, where creditors of the Republic have no recourse to bankruptcy regimes to protect their interests and must rely upon courts to enforce contractual promises. No less than any other entity entering into a commercial transaction, there is a strong public interest in holding the Republic to its contractual obligations.

Special App. at 38.⁸

⁸ The court also rejected Argentina’s argument that, because plaintiffs had full knowledge of the purported basis of their *Pari Passu* Clause claims as early as 2004, and yet waited until the 2010 exchange offer was completed to bring those claims, those claims were barred by the equitable defense of laches. The district court found “no merit” to the defense because any delay by plaintiffs in advancing their claim for equitable relief was due to the fact that they “were trying to do other things” to obtain payment on their bonds. J.A. at 2125, 2321; *see also id.* at 2339 (“The effort under the *pari passu* clause comes late. But it is absolutely true[,] and this court knows the facts and history painfully well, . . . that the plaintiffs have tried in many ways to enforce their rights. They are now attempting to make use of a very important provision in the [FAA]. . . . They are entitled to do so.”).

Argentina's Appeal from the Injunctions

In March 2012, Argentina timely appealed from the Injunctions and the Declaratory Orders. We have jurisdiction over the Injunctions under 28 U.S.C. § 1292(a)(1). The Declaratory Orders are also properly before us because they are “inextricably intertwined” with the Injunctions. *Lamar Adver. of Penn, LLC v. Town of Orchard Park, N.Y.*, 356 F.3d 365, 371 (2d Cir. 2004).⁹

Argentina advances a host of reasons as to why the district court erred. First, the Republic argues that it has not violated the Equal Treatment Provision because it has not given the exchange bondholders a legally enforceable preference over the FAA Bonds in the event of default on the Exchange Bonds – even if it has favored the exchange bondholders by honoring their payment rights while violating plaintiffs’. Argentina contends that plaintiffs’ bonds have always remained “direct, unconditional, unsecured and unsubordinated obligations of the Republic” with the same legal “rank” as any other debt – which is all the Equal Treatment Provision requires. Appellant’s Br. 45-48. In any event, even if the Provision had been violated, Argentina argues the contractually agreed upon remedy is acceleration, which has already occurred.

⁹ In January 2012, after the district court issued the Declaratory Orders but before it entered the Injunctions, Argentina filed notices of appeal from the Orders “[o]ut of an excess of caution and to rebut any possible future argument that it did not preserve all appellate rights with respect to the Declaratory Orders.” Appellant’s Opp’n to Appellees’ Mot. To Dismiss Prior Appeals at 5. Those appeals were subsequently consolidated with the ones over which we have jurisdiction. Therefore, there are two sets of appeals before this Court that Argentina concedes are “overlapping” and “clogging the dockets.” *Id.* at 7. Because Argentina’s second set of appeals have successfully reached this Court, Plaintiffs’ motion to dismiss the first set of appeals is therefore granted. *See* Appellees’ Mot. to Dismiss the Premature Appeals. The clerk of the court is directed to dismiss appeal nos. 12-105, 12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, and 12-214.

1 Second, Argentina argues that the Injunctions violate the FSIA by ordering the
2 Republic to pay plaintiffs with immune property located outside the United States. *Id.* at 26-27
3 (citing *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (holding
4 district courts “may not grant, by injunction, relief which they may not provide by attachment”).

5 Third, the Republic contends that the assets the Injunctions restrain are not
6 property of the Republic, but are held in trust for exchange bondholders, and therefore, under
7 New York law, may not be reached by creditors. Moreover, the Injunctions, which by their
8 terms apply to “indirect facilitators” of payments on the Exchange Bonds, Special App. at 39,
9 violate the U.C.C., which prohibits injunctive relief against “intermediary banks” responsible for
10 processing fund transfers. U.C.C. § 4-A-503 cmt. Since subjecting exchange bondholder money
11 to process in U.S. courts is improper, Argentina argues, the court erroneously restricted it from
12 utilizing other methods to service its debt.

13 Fourth, because the only harm plaintiffs suffer is monetary, Argentina argues that
14 the district court incorrectly concluded that such harm was irreparable.

15 Fifth, Argentina argues that the hardship to exchange bondholders and to the
16 Republic stemming from the Injunctions far outweighs the purported prejudice to “holdouts,”
17 who bought their debt at or near default with full knowledge of the limitations on their ability to
18 collect. The Injunctions “will thrust the Republic into another economic crisis and undermin[e]
19 the consensual [sovereign debt] restructuring process the United States has been at pains to foster
20 for the past several decades.” *Id.*

21 Sixth and finally, Argentina argues that plaintiffs’ claims are barred by laches.

1 We review a district court's decision to grant equitable relief for abuse of
2 discretion. *See Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66,
3 76 (2d Cir. 2004); *Leasco Corp. v. Taussig*, 473 F.2d 777, 786 (2d Cir. 1972); *Citigroup Global*
4 *Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010). We
5 review *de novo* a district court's grant of partial summary judgment. *See Juliano v. Health*
6 *Maint. Org. of N.J., Inc.*, 221 F.3d 279, 286 (2d Cir. 2000).

8 DISCUSSION

9 I.

10 We first address Argentina's argument that the district court erred in its
11 interpretation of the Equal Treatment Provision. The district court held that Argentina violated
12 the Provision when it made payments currently due under the Exchange Bonds while persisting
13 in its refusal to satisfy its payment obligations to plaintiffs and when it enacted the Lock Law
14 and the Lock Law Suspension.

15 "In New York, a bond is a contract. . . ." *Arch Ins. Co. v. Precision Stone, Inc.*,
16 584 F.3d 33, 39 n.4 (2d Cir. 2009). Thus, the parties' dispute over the meaning of the Equal
17 Treatment Provision presents a "simple question of contract interpretation." *EM Ltd. v. Republic*
18 *of Argentina*, 382 F.3d 291, 292 (2d Cir. 2004) (interpreting Acceleration Clause in FAA).
19 Argentina argues that the *Pari Passu* Clause is a boilerplate provision that, in the sovereign
20 context, "has been universally understood for over 50 years . . . to provide protection from *legal*
21 *subordination* or other discriminatory *legal ranking* by preventing the creation of *legal priorities*

1 by the sovereign in favor of creditors holding particular classes of debt.” Appellant’s Br. 32, 34
 2 (emphasis added); *accord* Clearing House Amicus Br. 2, 10.

3 We are unpersuaded that the clause has this well settled meaning. Argentina’s
 4 selective recitation of context-specific quotations from arguably biased commentators and
 5 institutions notwithstanding, the preferred construction of *pari passu* clauses in the sovereign
 6 debt context is far from “general, uniform and unvarying,” *Law Debenture Trust Co. of N.Y. v.*
 7 *Maverick Tube Corp.*, 595 F.3d 458, 466 (2d Cir. 2010) (quotation marks omitted). Argentina’s
 8 primary authorities and Argentina itself appear to concede as much. *See* Appellant’s Reply Br.
 9 21 n.9 (“[N]o one knows what the clause really means” (emphasis in Appellant’s Reply Br.));
 10 Lee C. Buchheit, *The Pari Passu Clause Sub Specie Aeternitatis*, 10 Int’l Fin. L. Rev. 11, 11
 11 (1991) (“[N]o one seems quite sure what the clause really means, at least in the context of a loan
 12 to a sovereign borrower.”); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law
 13 635, 646 (2001) (“[I]n the sovereign context there is at least disagreement about the meaning of
 14 the clause.”); Stephen Choi & G. Mitu Gulati, *Contract As Statute*, 104 Mich. L. Rev. 1129,
 15 1134 (2006) (“The leading commentators on sovereign contracts acknowledged that there exists
 16 ambiguity as to the meaning of this clause.”); Philip R. Wood, *Project Finance, Subordinated*
 17 *Debt and State Loans* 165 (1995) (“In the state context, the meaning of the clause is uncertain
 18 because there is no hierarchy of payments which is legally enforced under a bankruptcy
 19 regime.”). In short, the record reveals that Argentina’s interpretation of the *Pari Passu* Clause is
 20 neither well settled nor uniformly acted upon.

21 Once we dispense with Argentina’s customary usage argument, it becomes clear
 22 that the real dispute is over what constitutes subordination under the *Pari Passu* Clause.

1 Argentina contends the clause refers only to legal subordination and that none occurred here
2 because “any claims that may arise from the Republic’s restructured debt have no priority in any
3 court of law over claims arising out of the Republic’s unstructured debt.” Appellant’s Br. 47.
4 Plaintiffs, on the other hand, argue that there was “de facto” subordination because Argentina
5 reduced the rank of plaintiffs’ bonds to a permanent non-performing status by passing legislation
6 barring payments on them while continuing to pay on the restructured debt and by repeatedly
7 asserting that it has no intention of making payments on plaintiffs’ bonds.

8 We disagree with Argentina because its interpretation fails to give effect to the
9 differences between the two sentences of the *Pari Passu* Clause. *See Singh v. Atakhanian*, 818
10 N.Y.S.2d 524, 526 (N.Y. App. Div. 2d Dep’t 2006) (“A contract should not be interpreted in
11 such a way as would leave one of its provisions substantially without force or effect.” (internal
12 quotation marks and citation omitted)).

13 Instead, we conclude that in pairing the two sentences of its *Pari Passu* Clause,
14 the FAA manifested an intention to protect bondholders from more than just formal
15 subordination. *See Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398,
16 404 (2009). The first sentence (“[t]he Securities will constitute . . . direct, unconditional,
17 unsecured, and unsubordinated obligations . . .”) prohibits Argentina, as bond *issuer*, from
18 formally subordinating the bonds by issuing superior debt. The second sentence (“[t]he payment
19 obligations . . . shall at all times rank at least equally with all its other present and future
20 unsecured and unsubordinated External Indebtedness.”) prohibits Argentina, as bond *payor*,
21 from paying on other bonds without paying on the FAA Bonds. Thus, the two sentences of the
22 *Pari Passu* Clause protect against different forms of discrimination: the issuance of other

1 superior debt (first sentence) and the giving of priority to other payment obligations (second
2 sentence).¹⁰

3 This specific constraint on Argentina as payor makes good sense in the context of
4 sovereign debt: When sovereigns default they do not enter bankruptcy proceedings where the
5 legal rank of debt determines the order in which creditors will be paid. Instead, sovereigns can
6 choose for themselves the order in which creditors will be paid. In this context, the Equal
7 Treatment Provision prevents Argentina as payor from discriminating against the FAA Bonds in
8 favor of other unsubordinated, foreign bonds.

9 The record amply supports a finding that Argentina effectively has ranked its
10 payment obligations to the plaintiffs below those of the exchange bondholders. After declaring a

¹⁰ Argentina, along with the Clearing House, argues that the FAA’s “repurchase” provision, authorizing the Republic to “at any time purchase Securities at any price in the open market or otherwise,” is inconsistent with “NML’s ‘ratable’ interpretation.” FAA § 9(c), J.A. at 169; Appellant’s Br. 39. Leaving aside that that is not NML’s “interpretation,” we find the repurchase provision wholly consistent with the Equal Treatment Provision: Were Argentina to make such a repurchase, it would not be fulfilling its “payment obligations” on the Securities, Securities that by the FAA’s own terms are not “redeemable prior to maturity.” FAA § 9(a), J.A. at 167. Rather, it would be purchasing them, potentially at a discount or premium reflecting the market’s expectations of the Republic’s likelihood of fulfilling those obligations, in an arms-length transaction with a willing seller. Such repurchases would not breach Argentina’s promise, under the Equal Treatment Provision, not to discriminate against outstanding bondholders in meeting its payment obligations to them. To conclude otherwise would be to hold that the 2005 and 2010 exchange offers themselves violated the Equal Treatment Provision, a position not even plaintiffs have taken.

Argentina and the Clearing House also argue that “NML’s interpretation of the *pari passu* clause as requiring ‘ratable’ payments to creditors would render meaningless other standard loan contract clauses” such as “sharing clauses” which “do actually address the issue of payment to one creditor before another.” Appellant’s Br. 37-38. Leaving aside that NML does not “interpret . . . the *pari passu* clause as requiring ‘ratable’ payments” – it proposed ratable payments as a *remedy* for Argentina’s breach of the Provision – this argument fails. A “sharing clause” (which does not even appear in the FAA) is an agreement made among *lenders* to divide payments that a debtor makes (or that are obtained by other means, such as offsets); it is not a promise made by the *borrower*. See Clearing House Amicus Br. 12 (citing Lee C. Buchheit, *How to Negotiate Eurocurrency Loan Agreements* 76-81 (2d ed. 2004)). Thus, a sharing clause, unlike the Equal Treatment Provision, could not ensure against the *debtor*’s discrimination in favor of other, non-sharing creditors. The fact that sharing clauses “contain complex payover provisions which are necessary to reallocate among creditors disproportionate payments,” *id.* at 13, is not surprising given that they serve as a coordinating mechanism among a number of lenders.

1 moratorium on its outstanding debt in 2001, Argentina made no payments for six years on
2 plaintiffs' bonds while simultaneously timely servicing the Exchange Bonds. Argentina has
3 renewed that moratorium in its budget laws each year since then. It declared in the prospectuses
4 associated with the exchange offers that it has no intention of resuming payments on the FAA
5 Bonds. 2005 Prospectus, J.A. at 465; 2010 Prospectus, J.A. at 980. It stated in SEC filings that
6 it had "classified the [FAA Bonds] as a separate category from its regular debt" and is "not in a
7 legal . . . position to pay" them. 18-K at 2, 11. Its legislature enacted the Lock Law, which has
8 been given full effect in its courts, precluding its officials from paying defaulted bondholders
9 and barring its courts from recognizing plaintiffs' judgments. By contrast, were Argentina to
10 default on the Exchange Bonds, and were those bondholders to obtain New York judgments
11 against Argentina, there would be no barrier to the Republic's courts recognizing those
12 judgments. Thus, even under Argentina's interpretation of the Equal Treatment Provision as
13 preventing only "legal subordination" of the FAA Bonds to others, the Republic breached the
14 Provision. *See* Appellant's Br. 35 (stating that "'the clause must mean that, for example, there is
15 no statutory or constitutional or other rule of law . . . subordinating the debt to other debt'").

16 In short, the combination of Argentina's executive declarations and legislative
17 enactments have ensured that plaintiffs' beneficial interests do *not* remain direct, unconditional,
18 unsecured and unsubordinated obligations of the Republic and that any claims that may arise
19 from the Republic's restructured debt *do* have priority in Argentinian courts over claims arising
20 out of the Republic's unstructured debt. Thus we have little difficulty concluding that Argentina
21 breached the *Pari Passu* Clause of the FAA.

1 We are not called upon to decide whether policies favoring preferential payments
 2 to multilateral organizations like the IMF would breach *pari passu* clauses like the one at issue
 3 here. Indeed, plaintiffs have never used Argentina's preferential payments to the IMF as
 4 grounds for seeking ratable payments. Far from it; they contend that "a sovereign's *de jure* or *de*
 5 *facto* policy [of subordinating] obligations to commercial unsecured creditors beneath
 6 obligations to multilateral institutions like the IMF would **not** violate the Equal Treatment
 7 Provision for the simple reason that commercial creditors never were nor could be on equal
 8 footing with the multilateral organizations." Appellees' (NML et al.'s) Br. 40.

9 Moreover, plaintiffs' claims are not barred by laches. Argentina argues that, after
 10 it sought to resolve the meaning of the Equal Treatment Provision in December 2003 (and the
 11 court deemed the issue unripe for adjudication),¹¹ plaintiffs "sat silent as the Republic
 12 restructured over 91% of its defaulted debt and made regular biannual payments to holders of its
 13 restructured debt." Appellant's Br. 29. In the face of this "inexcusable delay," Argentina
 14 argues, "plaintiffs cannot now rely on 'equity' to interfere with payments to third parties who
 15 have obviously developed a reasonable expectation of that regular source of income." *Id.*

16 This contention has no merit. Under New York law, the equitable defense of
 17 laches requires: (1) conduct giving rise to the situation complained of, (2) delay in asserting a
 18 claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of

¹¹ In 2003, in separate Argentine bondholder litigation, Argentina moved to preclude plaintiffs from interfering with payments it anticipated making in connection with its contemplated debt restructuring and with its debt to creditors such as the IMF "based on [a] misconstruction of the *Pari Passu* Clause." J.A. at 237. The district court found the issue not ripe for review because the plaintiffs, including appellee NML as intervenor, were not at that time seeking any relief under the *Pari Passu* Clause and further agreed by joint stipulation to give Argentina thirty days' notice before seeking any such relief.

1 the offending party that the complainant would assert the claim, and (4) injury or prejudice to the
2 offending party as a consequence relief granted on the delayed claim. *See Denaro v Denaro*, 84
3 A.D.3d 1148, 1149-50 (N.Y. App. Div. 2d Dep't 2011); *see also Cohen v. Krantz*, 227 A.D.2d
4 581, 582 (N.Y. App. Div. 2d Dep't 1996) (citation omitted).

5 Argentina's laches argument fails because it had not yet violated the Equal
6 Treatment Provision when it sought a declaration in 2003 that plaintiffs could not invoke the
7 Provision to impede its restructuring efforts. It violated the Provision later by persisting in its
8 policy of discriminatory treatment of plaintiffs, for example, by passing the Lock Law. In any
9 event, we do not see how Argentina can claim prejudice by plaintiffs' purported delay.

10 Argentina has known since 2004 that NML retained the option to pursue the claim. Moreover,
11 because equitable relief was not granted until 2012, Argentina was able to hold its 2005 and
12 2010 exchange offers unimpeded.

13 II.

14 We turn now to Argentina's challenges to the Injunctions and their requirement
15 that it specifically perform its obligations under the FAA. Specific performance may be ordered
16 where no adequate monetary remedy is available and that relief is favored by the balance of
17 equities, which may include the public interest. *Guinness-Harp Corp. v. Jos. Schlitz Brewing*
18 *Co.*, 613 F.2d 468, 473 (2d Cir. 1980); *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992
19 F.2d 430, 433 (2d Cir. 1993); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 32 (2008)
20 (noting that "the balance of equities and consideration of the public interest [] are pertinent in

1 assessing the propriety of any injunctive relief, preliminary or permanent.”); *eBay Inc. v.*
 2 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).¹²

3 Once the district court determined that Argentina had breached the FAA and that
 4 injunctive relief was warranted, the court had considerable latitude in fashioning the relief. The
 5 performance required by a decree need not, for example, be identical with that promised in the
 6 contract. *Greenspahn v. Joseph E. Seagram & Sons, Inc.*, 186 F.2d 616, 620 (2d Cir. 1951).
 7 Where “the most desirable solution” is not possible, this Court may affirm an order of specific
 8 performance so long as it achieves a “fair result” under the “totality of the circumstances.”
 9 *Leasco*, 473 F.2d at 786.

10 Argentina’s first contention is that, even assuming it breached the *Pari Passu*
 11 Clause, plaintiffs are limited to the “contractually agreed upon remedy of acceleration.”
 12 Appellant’s Br. at 48. This argument is easily dispensed with. While paragraph 12 of the FAA
 13 specifies acceleration as one remedy available for a breach of the Equal Treatment Provision, the
 14 FAA does not contain a clause limiting the remedies available for a breach of the agreement.
 15 Nor does the FAA contain a provision precluding specific performance or injunctive relief.
 16 Under New York law the absence of the parties’ express intention in the FAA to restrict the
 17 remedies available for breach of the agreement means that the full panoply of appropriate
 18 remedies remains available. *Vacold LLC v. Cerami*, 545 F.3d 114, 130 (2d Cir. 2008) (New
 19 York courts “recognize limitations on available remedies” “only when the contract contains a
 20 clause *specifically* setting forth the remedies available. . . .”) (quotation marks omitted)).

¹² To be eligible for specific performance of a contractual provision, a party also needs to show that “(1) a valid contract exists between the parties, (2) the plaintiff has substantially performed its part of the contract, and (3) plaintiff and defendant are each able to continue performing their parts of the agreement.” *Nemer Jeep-Eagle*, 992 F.2d at 433. There is no dispute that these factors are satisfied here.

Moreover, it is clear to us that monetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach. Argentina will simply refuse to pay any judgments. It has done so in this case by, in effect, closing the doors of its courts to judgment creditors. In light of Argentina's continual disregard for the rights of its FAA creditors and the judgments of our courts to whose jurisdiction it has submitted, its contention that bondholders are limited to acceleration is unpersuasive. Insofar as Argentina argues that a party's persistent efforts to frustrate the collection of money judgments cannot suffice to establish the inadequacy of a monetary relief, the law is to the contrary. *See Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996); Restatement (Second) of Contracts § 360 cmt. d ("Even if damages are adequate in other respects, they will be inadequate if they cannot be collected by judgment and execution."). In this context, the district court properly ordered specific performance.

Next, we conclude that because compliance with the Injunctions would not deprive Argentina of control over any of its property, they do not operate as attachments of foreign property prohibited by the FSIA. Section 1609 of the FSIA establishes that "the property in the United States of a foreign state shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. Each of these three terms refers to a court's seizure and control over specific property.¹³ However, courts are also barred from granting "by injunction, relief which they may

¹³An "attachment" is the "seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." *Black's Law Dictionary* 123 (9th ed. 2009); *see also* 6 Am. Jur. 2d *Attachment and Garnishment* § 1. An arrest is "[a] seizure or forcible restraint." *Black's Law Dictionary* 124 (9th ed. 2009). "Execution" is "an act of dominion over specific property by an authorized officer of the court . . . which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his or her judgment creditor." 30 Am. Jur. 2d *Executions* § 177; *see also* *Black's Law Dictionary* (9th ed. 2009) ("Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property.").

1 not provide by attachment.” *S&S Machinery Co.*, 706 F.2d at 418; *see also Stephens v. Nat’l*
2 *Distillers & Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1995).

3 The Injunctions at issue here are not barred by § 1609. They do not attach, arrest,
4 or execute upon any property. They direct Argentina to comply with its contractual obligations
5 not to alter the rank of its payment obligations. They affect Argentina’s property only
6 incidentally to the extent that the order prohibits Argentina from transferring money to some
7 bondholders and not others. The Injunctions can be complied with without the court’s ever
8 exercising dominion over sovereign property. For example, Argentina can pay all amounts owed
9 to its exchange bondholders provided it does the same for its defaulted bondholders. Or it can
10 decide to make partial payments to its exchange bondholders as long as it pays a proportionate
11 amount to holders of the defaulted bonds. Neither of these options would violate the Injunctions.
12 The Injunctions do not require Argentina to pay any bondholder any amount of money; nor do
13 they limit the other uses to which Argentina may put its fiscal reserves. In other words, the
14 Injunctions do not transfer any dominion or control over sovereign property to the court.
15 Accordingly, the district court’s Injunctions do not violate § 1609.¹⁴

16 Nor does the FSIA create any other impediment to the injunctive relief ordered by
17 the district court. Argentina voluntarily waived its immunity from the jurisdiction of the district
18 court, and the FSIA imposes no limits on the equitable powers of a district court that has
19 obtained jurisdiction over a foreign sovereign, at least where the district court’s use of its
20 equitable powers does not conflict with the separate execution immunities created by § 1609. A

¹⁴For similar reasons, we see no merit to Argentina’s argument that the Injunctions violate New York trust or attachment law on the theory that they “execute upon” funds that do not belong to Argentina. Appellant’s Br. 53-54. Nothing in the Injunctions suggests that plaintiffs would “execute upon” any funds, much less those held in trust for the exchange bondholders.

1 “federal court sitting as a court of equity having personal jurisdiction over a party has power to
2 enjoin him from committing acts elsewhere.” *Bano v. Union Carbide Corp.*, 361 F.3d 696, 716
3 (2d Cir. 2004) (internal quotation marks and citation omitted).

4 Turning to Argentina’s argument that the balance of equities and the public
5 interest tilt in its favor, we see no abuse of discretion in the district court’s conclusion to the
6 contrary. The FAA bondholders contend with good reasons that Argentina’s disregard of its
7 legal obligations exceeds any affront to its sovereign powers resulting from the Injunctions.¹⁵

8 Moreover, nothing in the record supports Argentina’s blanket assertion that the
9 Injunctions will “plunge the Republic into a new financial and economic crisis.” Appellant’s Br.
10 61. The district court found that the Republic had sufficient funds, including over \$40 billion in
11 foreign currency reserves, to pay plaintiffs the judgments they are due. *See* Special App. at 37-
12 38 (concluding that Argentina “has the financial wherewithal to meet its commitment of
13 providing equal treatment to [plaintiffs] and [the exchange bondholders]”). Aside from merely
14 observing that these funds are dedicated to maintaining its currency, Argentina makes no real
15 argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt,
16 and it certainly fails to demonstrate that the district court’s finding to the contrary was clearly
17 erroneous.

¹⁵Argentina repeatedly expresses its frustration with plaintiffs for refusing to accept the exchange offers. *See* Appellant’s Br. 47 (“A holder of defaulted debt cannot *voluntarily* decline to participate in a restructuring and then afterward assert that the creditors who elected to settle their claims are a ‘preferred class.’” (emphasis in original)). But plaintiffs were completely within their rights to reject the 25-cents-on-the-dollar exchange offers. And because the FAA does not contain a collective action clause, Argentina has no right to force them to accept a restructuring, even one approved by a super-majority.

1 Nor will the district's court's judgment have the practical effect of enabling "a
 2 single creditor to thwart the implementation of an internationally supported restructuring plan,"
 3 as the United States contends. U.S. Amicus Br. 5. It is up to the sovereign – not any "single
 4 creditor" – whether it will repudiate that creditor's debt in a manner that violates a *pari passu*
 5 clause.¹⁶ In any event, it is highly unlikely that in the future sovereigns will find themselves in
 6 Argentina's predicament. Collective action clauses – which effectively eliminate the possibility
 7 of "holdout" litigation– have been included in 99% of the aggregate value of New York-law
 8 bonds issued since January 2005, including Argentina's 2005 and 2010 Exchange Bonds. Only
 9 5 of 211 issuances under New York law during that period did not include collective action
 10 clauses, and all of those issuances came from a single nation, Jamaica.¹⁷ Moreover, none of the
 11 bonds issued by Greece, Portugal, or Spain – nations identified by Argentina as the next in line
 12 for restructuring – are governed by New York law.

13 However, we do have concerns about the Injunctions' application to banks acting
 14 as pure intermediaries in the process of sending money from Argentina to the holders of the
 15 Exchange Bonds. Under Article 4-A of the U.C.C., intermediary banks, which have no

¹⁶ Further, to the extent the district court suggested that a breach would occur with *any* non-payment that is coupled with payment on other debt, *see* Special App. at 13 (holding that Argentina breaches the Equal Treatment Provision "whenever it . . . fail[s] to pay the obligations currently due under [plaintiffs'] Bonds while at the same time making payments currently due *to holders of other unsecured and unsubordinated External Indebtedness*" (emphasis added)), we need not decide whether it was correct. Nor need we determine whether "legislative enactment" alone could result in a breach of the Equal Treatment Provision. *See id.* We simply affirm the district court's conclusion that Argentina's course of conduct here did.

¹⁷ See Datalogic, Bloomberg, and other publicly available sources. Although these sources identified 221 issuances, data on the presence of collective action clauses was available only for 211 of those issuances (96% of the aggregate value of all issuances); the figures above are compared against those 211 issuances with sufficient data. *See also* Michael Bradley & Mitu Gulati, Collective Action Clauses for the Eurozone: An Empirical Analysis 11-12 (Oct. 24, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1948534>.

1 obligations to any party with whom they do not deal directly, are not subject to injunctions
2 relating to payment orders. *See, e.g.,* N.Y. U.C.C. § 4-A-503 cmt. Any system that seeks to
3 force intermediary banks to stop payments by a particular entity for a particular purpose imposes
4 significant costs on intermediary banks and risks delays in payments unrelated to the targeted
5 Exchange Bond payments. *Grain Traders, Inc v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir.
6 1998). Plaintiffs claim that the Injunctions do not encompass intermediaries, but they fail to
7 offer a satisfactory explanation for why intermediary banks would not be considered “indirect[] .
8 . . . facilitat[ors]” apparently covered by the Injunctions. Special App. at 39.

9 Our concerns about the Injunctions’ application to third parties do not end here.
10 Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged
11 order will apply to third parties generally. Consequently, we believe the district court should
12 more precisely determine the third parties to which the Injunctions will apply before we can
13 decide whether the Injunctions’ application to them is reasonable. Accordingly, we remand the
14 Injunctions to the district court under *United States v. Jacobson*, 15 F.3d at 22, for such further
15 proceedings as are necessary to address the Injunctions’ application to third parties including
16 intermediary banks and to address the operation of their payment formula.

17 CONCLUSION

18 For the reasons stated, the judgments of the district court (1) granting summary
19 judgment to plaintiffs on their claims for breach of the Equal Treatment Provision and (2)
20 ordering Argentina to make “Ratable Payments” to plaintiffs concurrent with or in advance of its
21 payments to holders of the 2005 and 2010 restructured debt are affirmed. The case is remanded
22 to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994) for such

1 proceedings as are necessary to address the operation of the payment formula and the
2 Injunctions' application to third parties and intermediary banks. Once the district court has
3 conducted such proceedings the mandate should automatically return to this Court and to our
4 panel for further consideration of the merits of the remedy without need for a new notice of
5 appeal.

EXHIBIT R

UNITED STATES COURT OF APPEALS
NEW YORK SECOND CIRCUIT

-----X

IN THE MATTER OF:

NML CAPITAL LTD.,

Plaintiff

Index No.:
12-105cv-(L)

Vs.

THE REPUBLIC OF ARGENTINA,

Respondent

-----X

July 23, 2012

HELD AT: DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 Pearl Street
New York, NY 10007

BEFORE: HONORABLE ROSEMARY S. POOLER,
HONORABLE BARRINGTON DANIELS PARKER,
JR.,
HONORABLE REENA RAGGI,
Judges

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<u>RESPONDENT:</u>				RE	RE	V.	
<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>D.</u>	<u>J</u>	

E X H I B I T S

<u>PLAINTIFF:</u>					
<u>IDENTIFICATION</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>IN EV.</u>		

<u>RESPONDENT:</u>					
<u>IDENTIFICATION</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>IN EV.</u>		

1 THE COURT: This is the only case on our
2 calendar today. I believe that I gave the United
3 States five minutes to argue as well but, at the cost
4 of taking it away from the Republic of Argentina,
5 I've decided that's not necessary. So Argentina can
6 keep their 12 and NML Capital could add a couple
7 minutes, should they need to. I'm not requiring you
8 to speak longer, but you may if you need to. Okay.
9 We'll begin with Appellants.

10 MR. JONATHAN I. BLACKMAN: May it please the
11 Court, I'm Jonathan Blackman from Cleary, Gottlieb,
12 representing the Republic of Argentina. The district
13 court's order here, which enjoined the Republic from
14 paying billions of dollars on its restructured debt,
15 is based on fundamental errors of law. First, there
16 is nothing in the boilerplate pari passu clause which
17 requires--

18 THE COURT: [Interposing] Well, let me ask
19 you this. If the injunction had been crafted in such
20 a way that it was limited to the payments that went
21 from the Argentine treasury to the trustee in New
22 York on their way to the new bondholders, what would
23 be your objections to that?

24 MR. BLACKMAN: Every one of the objections--

25 THE COURT: [Interposing] Let's assume

1 hypothetically for a minute that the district court's
2 reading of the pari passu clause was appropriate and
3 we--hypothetically. Go ahead.

4 MR. BLACKMAN: Well, if we leave the merits
5 aside--

6 THE COURT: [Interposing] Right.

7 MR. BLACKMAN: --although I don't concede
8 that, it would still be violative of at least four
9 other fundamental principles. First, it would
10 violate the Foreign Sovereign Immunities Act because
11 in your hypothetical--

12 THE COURT: [Interposing] Why wouldn't the
13 money be the treasurer's money--excuse me, the
14 trustee's money, so to speak, when it hit his or her
15 bank account?

16 MR. BLACKMAN: Well, that's part of the
17 point. If the money is the trustee's money and not
18 Argentina's money, which is undisputed on this
19 record, then there is no basis under either the
20 Foreign Sovereign Immunities Act or indeed New York
21 Common Law for restraining it. When the trustee
22 receives it, it's property--

23 THE COURT: [Interposing] I'm not sure--I'm
24 not sure that's true. Let's suppose, hypothetically,
25 it was drug money, and I'm a drug dealer and I want

1 to put the money in trust for my kids. Once the
2 money hit the trustee in New York it could be seized.
3 It could be attached.

4 MR. BLACKMAN: Of course it could be, but it
5 would be under the wholly separate body of forfeiture
6 law. This is not tainted or illegal money. This is
7 totally legitimate debts paid to third parties who
8 are not before the Court, who in good faith entered
9 into two debt restructurings, taking a significant
10 haircut on their original debt. And they have a
11 right to be paid. And, when the money hits the
12 trustee in New York, it is being held in trust for
13 them. It's not property of Argentina.

14 The only thing that can be restrained,
15 executed on, attached, or any way affected by any
16 remedy to enforce a judgment under Section 1609 and
17 1610(a) of the Foreign Sovereign Immunities Act, is
18 property of Argentina being used for commercial
19 activity in the United States, not property of
20 bondholders or held by a trustee for the benefit of
21 bondholders.

22 THE COURT: But I'm not sure I understand
23 why that's a foreign sovereign immunities issue. If
24 it's not--if you're argument is it's no longer
25 Argentina's, how is--you might have other arguments,

1 but you led by saying the first of your four
2 feedbacks is that it violates the Foreign Sovereign
3 Immunities Act.

4 MR. BLACKMAN: Well, because the Foreign
5 Sovereign Immunities Act in this respect mirrors
6 basic legal principles. You can't attach the
7 property of third parties under the FSIA or restrain
8 it or enjoin it or do anything else with it to
9 enforce a judgment against Argentina. Here, of
10 course--

11 THE COURT: [Interposing] Where does the
12 Foreign Sovereign Immunities Act prohibit that?

13 MR. BLACKMAN: Well, it prohibits it by
14 strong and necessary negative implication. It says
15 the only property that can be--of Argentina that can
16 be executed on is--

17 THE COURT: [Interposing] But you're just
18 telling us it's no longer Argentina's.

19 MR. BLACKMAN: Okay. If it's no longer
20 Argentina--

21 THE COURT: [Interposing] I think we're
22 getting a feel, but I'm not--

23 MR. BLACKMAN: [Interposing] Okay.

24 THE COURT: I'm not sure I understand the
25 reasoning at all.

1 MR. BLACKMAN: I understand your point, Your
2 Honor, and if it's no longer Argentina's but is
3 somehow here for a different purpose belonging to the
4 bondholders, again, it can't be attached or
5 restrained to enforce a judgment against Argentina.
6 It's no different than if my friends were to go to
7 the bondholders and say, "We want that money back
8 because we have a legal theory that says that you're
9 not allowed to get it"--

10 THE COURT: [Interposing] All right.

11 MR. BLACKMAN: --"unless we get paid."

12 THE COURT: The district court order does
13 not attach that money. What is does is tell
14 Argentina that it cannot pay money in violation of
15 its obligations to give equal rank to its debt. Now,
16 as I understand it, that could be complied with by
17 not paying anybody.

18 MR. BLACKMAN: It could be, but that--

19 THE COURT: [Interposing] And, to the extent
20 there is that possibility, there is paying everybody,
21 there is deciding one can pay a billion dollars and
22 somehow prorating it among them, how is any of this
23 an attach?

24 MR. BLACKMAN: Well, now you're going to
25 back to--you're changing, Judge, Judge Parker's

1 hypothetical and you're getting right to the Foreign
2 Sovereign Immunities Act first because to the extent
3 we're not talking about property in the United States
4 but property of Argentina in Argentina which ceases
5 to be property of Argentina when it gets here. But,
6 if it's property of Argentina in Argentina, we have
7 in effect, under the court's order, both a negative
8 injunction and a mandatory injunction. A negative
9 injunction is you may not use your property in
10 Argentina to pay other people. That is equivalent in
11 all substance to an extraterritorial injunction or
12 restraint or--

13 THE COURT: [Interposing] But I think that
14 misstates the injunction. I mean why don't you stick
15 with the district court's language?

16 MR. BLACKMAN: Well, that's--the District--

17 THE COURT: [Interposing] Which is that you
18 cannot violate your obligation to treat your debt has
19 having equal rank.

20 MR. BLACKMAN: Well, the district court's
21 injunction accomplishes that base--that result, which
22 has no legal basis, if we go to the merits, in two
23 ways. It enjoins us from paying people unless we
24 turn over money which is also exempt from execution,
25 attachment, or restraint, to pay them. It's two

1 sides of a coin which--and the fact that there is a
2 conditionality, you're only enjoined unless you pay
3 us, doesn't take it out from the purview of the FSIA.
4 It's sort of a double whammy.

5 If the Court ordered us to pay them, that
6 would clearly be a turnover of property outside the
7 United States that this Court has already, I think,
8 held in the Walters [phonetic] case that you've sat
9 on, you can't do that. They can't--the district
10 court can't order Argentina turn over 20 billion
11 dollars to pay the holdout creditors, couldn't do
12 that. Similarly, the district court can't say, "You
13 are restrained from using 20 billion dollars of your
14 funds to pay the creditors who went into your
15 restructuring."

16 Those decisions, those orders--and they're,
17 as I say, they're two sides of the same coin--violate
18 the Foreign Sovereign Immunities Act. That's the--
19 that's the basic FSIA issue. The fact that it's
20 construed as, "Well, you don't have to turn over
21 money to us, as long as you don't pay other people"--
22 leaving aside the other issues which I'll come to in
23 a minute--is no sense and it is not sense. It is an
24 injunction not to use your property, not to use your
25 property to pay your legitimate debts. That's the

1 FSIA issue in a nutshell.

2 Now, if I could go to the other issues, Your
3 Honor?

4 THE COURT: Go ahead.

5 MR. BLACKMAN: First of all, I do want to
6 talk very much about the merits here because what
7 Plaintiff's here call equal payment, which of course
8 if nothing of the kind, it's quite Orwellian, they
9 want to be pay 100 cents on the dollar of all of
10 their principal and interest, and they say if you
11 don't do that you can't pay the much smaller fraction
12 of the original debt that is owed to the 92% of the
13 creditors who took a big haircut to enter into two
14 restructurings. That's not equal treatment. That's
15 profoundly unequal treatment. There is no--

16 THE COURT: [Interposing] Why is that?

17 THE COURT: They're entitled to that.

18 THE COURT: Yeah.

19 MR. BLACKMAN: They're entitled to be paid
20 but not because of the pari passu clause. They have
21 a contractual right to be paid. They don't have a
22 contractual right, under this clause, to forbid other
23 people from being paid. That's the essence--

24 THE COURT: [Interposing] But you've never
25 paid them.

1 MR. BLACKMAN: What?

2 THE COURT: But you have never paid them and
3 you--

4 MR. BLACKMAN: [Interposing] We have never
5 paid them and they have a right to pursue their
6 remedies under the law to be paid. They have been--

7 THE COURT: [Interposing] Well, but that's a
8 question of whether--what has--what Argentina has
9 done constitutes a subordinate of debt.

10 MR. BLACKMAN: Exactly, and we don't believe
11 it does.

12 THE COURT: Now, so the question is not how
13 much do they want to be paid. They may be entitled
14 to that amount. The question is whether their debt
15 has been subordinated. And I'm not really sure
16 understand what the point of your argument is about
17 their seeking unequal payment. The question is
18 whether their debt has been subordinated.

19 MR. BLACKMAN: And it of course has not
20 been, Your Honor. If you go through this--

21 THE COURT: [Interposing] Well, "of course"
22 is the part that I need you to explain to me.

23 MR. BLACKMAN: Well, okay. Well, the
24 subordination argument they've hinged on this Lock
25 Law. And so I want to just take the Court, with your

1 permission, through the Lock Law. It's only eight
2 articles. It's in the Joint Appendix at A-436. The
3 first article simply says that this law will apply to
4 bonds that have not been submitted in the exchange.
5 That's not subordination.

6 The second one says the National Executive
7 will not, with respect to those bonds, reopen the
8 exchange. That has to do with the division of powers
9 within the Argentine state. It's as, by negative
10 implication, congress can. And in fact the record is
11 clear congress did again in 2010. That's not
12 subordination.

13 The third one says the state shall be
14 prohibited from conducting any type of in court, out
15 of court, or private settlement. That's not
16 subordination. That is simply a statement that we're
17 not going to settle a claim. It does not change the
18 legal ranking or the legal--

19 THE COURT: [Interposing] You're not going
20 to pay them?

21 MR. BLACKMAN: --hierarchy.

22 THE COURT: Does it say you're not going to
23 pay them, though you are going to pay the people who
24 submitted to restructuring?

25 MR. BLACKMAN: That has been true since day

1 one. That has nothing to do with the Lock Law. That
2 was true before the Lock Law, we weren't paying
3 people.

4 THE COURT: Only before the Lock Law there
5 may have been some discretion by executive officials
6 in Argentina about this. The Lock Law now makes it
7 clear that this debt cannot be paid by anyone.

8 MR. BLACKMAN: It says we're nt. It's a
9 statement of fact. It all states that through laws.
10 The logical conclusion, Judge Raggi, what you said
11 was that by merely passing a budget item, because
12 states have to have budgets, that says that we're
13 going to pay one debt and not another, that would
14 violate the pari passu clause. That would be an
15 unbelievably extreme - - .

16 THE COURT: Yeah, I know, but the question
17 here is whether this language prohibiting any type of
18 in court, out of court, or private settlement of
19 these bonds effectively reduces them to a nonpayment
20 status that is now not equal to that of any other
21 unsecured debt.

22 MR. BLACKMAN: They've had a nonpayment
23 status since December 2001. They had it before--

24 THE COURT: [Interposing] That may be.

25 MR. BLACKMAN: No, let me finish, please.

1 THE COURT: But this--well, counsel, but
2 you're not answering our questions.

3 MR. BLACKMAN: I'm trying.

4 THE COURT: The question is whether this
5 language now does what you say must be done in this
6 case, which is legally subordinate the debt.

7 MR. BLACKMAN: The answer is no. There is
8 not word of subordination here. Subordination
9 implies that they are junior, not that they won't be
10 paid.

11 THE COURT: So in your view--

12 THE COURT: [Interposing] So that debt--

13 THE COURT: --the debt still has--so, if you
14 agree to pay them one cent on the dollar, they have
15 subordinated. But, if you say you're not going to
16 pay them a penny, then it's--then it's only a breach?

17 MR. BLACKMAN: No, because it has to do with
18 legal ranking. We haven't affected their legal
19 ranking.

20 THE COURT: Well, how much longer can you be
21 ranked than not getting paid at all?

22 MR. BLACKMAN: We haven't affected--we
23 haven't affected their legal ranking, Your Honor.
24 First of all, we can't. This is an Argentine law.
25 This is New York governed debt. If Argentina wanted

1 to pass a law, which this law does not, that says,
2 "You are hereby subordinated," it would have no
3 effect. You decided that, this court, in the Allied
4 Bank case in 1982. And, incidentally, you reversed
5 Judge Griesa because in that case Costa Rica had
6 passed certain regulations that foreign exchange
7 could not be used to pay certain debts.

8 THE COURT: Didn't you--

9 MR. BLACKMAN: [Interposing] And you said,
10 "We don't care. That's Costa Rica. These debts are
11 governed by New York law and under New York law we're
12 not going to give any credence, credit, or active
13 state recognition to that judgment." This is the
14 same case. But I did want to make the point, Judge
15 Raggi--

16 THE COURT: [Interposing] Yeah, didn't you
17 all, in subsequent filings with the SEC, describe the
18 instruments that were issued under the FAA as even--
19 as below nonperforming?

20 MR. BLACKMAN: They are nonperforming. What
21 we called them--they're nonperforming. And the point
22 I did want to make, Judge Raggi, is if this law were
23 repealed tomorrow they wouldn't be paid. When the
24 law was suspended for the 2010 exchange offer, they
25 weren't paid. This law does not subordinate them.

1 THE COURT: How does any of that help your
2 argument?

3 MR. BLACKMAN: It helps--

4 THE COURT: [Interposing] It seems to me
5 that only reinforces the District Judge's conclusion
6 that this debt is subordinate to any other kind of
7 non-secured debt.

8 MR. BLACKMAN: No because subordinate means
9 legal ranking. Subordinate doesn't have to do with
10 the fact that one debt is simply not being paid.
11 That's the crux of it. I mean if you believe that
12 nonpayment of one debt and payment of another debt
13 means subordination, then on the merits--and I
14 emphasis only the merits because there are lots of
15 other problems here--on the merits we would lose.
16 But there is no basis for that.

17 THE COURT: Isn't it subordination in fact,
18 if not at law?

19 MR. BLACKMAN: Subordination in fact is not
20 what we're talking about. Every time I pay you and
21 not you means, by definition, you're being paid and
22 you're not. Are you being subordinated? No. the
23 conclusion of their argument would be that if I in
24 default to one of you, I have to default to all of
25 you.

1 THE COURT: I don't think so. there's a
2 difference between making that choice on a one-time
3 basis and putting into the law the inability of any
4 party whose responsible for paying being able to.
5 Let me make sure I understand what your argument
6 reduces to. Though Argentina has publicly announced
7 through its moratorium that it's not paying these
8 debts and has--and has passed this law that no one in
9 Argentina can pay the debts, because you're saying
10 New York would not recognize that subordination, you
11 have no subordinated. Is that what I'm to take from
12 this argument?

13 MR. BLACKMAN: I'm saying more. I'm saying
14 more than that.

15 THE COURT: Please.

16 MR. BLACKMAN: I am--the second part is
17 clearly true but the first part I must respectfully
18 disagree. Stating I am not paying a debt, whether I
19 state that in a press release or in a press
20 conference, or in this case the law--which simply
21 says "I'm not settling claims," so it doesn't say
22 that--is not subordination. It is simply not
23 subordination.

24 If it were subordination, you could never
25 have done any of the debt restructurings that have

1 been done over the decades which all hinge on the
2 principal that the holdouts are not going to get
3 treated better. No one would have entered into our
4 restructurings if they knew that the next day someone
5 else could say, "Well, I have a--I am entitled not
6 only to be paid in full," which they are as a legal
7 matter of course, "but that I can prevent you, who
8 went into my restructuring, from being paid
9 anything."

10 THE COURT: But nobody would have invested
11 to begin with if they had known that down the road
12 you were going to issue discounted debt and take the
13 view that you would pay that but not the original
14 debt.

15 MR. BLACKMAN: I disagree with that. The
16 record is clear in this case that--and particular
17 with these Plaintiffs--this is the business they're
18 in. They boy defaulted sovereign debt.

19 THE COURT: Some of them.

20 MR. BLACKMAN: Certainly NML.

21 THE COURT: Some of them are individuals.
22 There was some individual debt.

23 MR. BLACKMAN: Some individuals may not have
24 understood, but they certainly bought debt for which
25 the disclosure was very clear about the possibility

1 that sovereigns default because regrettably it
2 happens.

3 THE COURT: Well, I'm not sure how much that
4 kind of finger pointing helps you. After all, the
5 secondary market is legal, whereas breaching your
6 obligations to pay is not.

7 MR. BLACKMAN: I have never suggested it
8 wasn't legal for them to buy the debt or sue on it or
9 attempt within the limits of the law, within the
10 limits of the Foreign Sovereign Immunities Act, to
11 collect. But what they told the District judge in
12 effect was--and he recognized all these problems,
13 which cited repeatedly in the brief, they've told the
14 District judge, you know, we have big difficulties
15 here but you've got to cut the Gordian knot.

16 You've got to kind of throw the problems to
17 the wind, the problems of the lack of irreparable
18 injury which I hope you'll let me get to for a few
19 minutes, the problems of latches, the problems that
20 nobody until ten years ago ever advanced this
21 interpretation of the pari passu clause, which is a
22 boilerplate language.

23 THE COURT: The district court felt great
24 frustration at what he called the Republic's
25 continued lawlessness.

1 MR. BLACKMAN: Well, the district court--and
2 I sympathize with him. I've been before him for ten
3 years on this. But lawlessness here means we're not
4 paying judgments. That's the situation which the
5 Foreign Sovereign Immunities Act contemplates
6 occurring. Otherwise, we wouldn't have 1609 and 1610.
7 And, in the world of sovereign debt, it happens.
8 Greece just had to do a massive restructuring. It
9 couldn't pay its debts.

10 That doesn't mean that one should not, in
11 the ideal world, fulfill all ones contracts. Of
12 course one should, but sovereigns can't go bankrupt
13 and so their only alternative when they're faced with
14 crushing financial distress, which Argentina faced,
15 which Greece faced, which is down the road
16 potentially in Italy and Spain, in Ireland and
17 Portugal and perhaps other states, is they have to
18 restructure and it has to be voluntary. And the
19 question is what about the holdouts.

20 THE COURT: The Appellee is suggesting that
21 Argentina has some 45, 47 billion dollars in foreign
22 reserve sitting in Swiss banks. Is that true?

23 MR. BLACKMAN: Argentina, by its last report
24 in June, had 46 billion of reserves, but it owes the
25 holdouts collectively between 15 and 20. No country

1 could simply take between a third and a half of its
2 reserves--

3 THE COURT: [Interposing] I thought it was
4 six.

5 MR. BLACKMAN: --and have them go flying out
6 the window.

7 THE COURT: I thought they owed the holdouts
8 six. That's what--

9 MR. BLACKMAN: [Interposing] No, the
10 principal amount of these holdouts is six. With
11 interest alone on that it's over 11. And there are
12 other external debts as well to the Paris Club and
13 other creditors. It's a huge amount of money. And,
14 with all respect, that--although it's a not unnatural
15 calculus to make--the fact is that Argentina could
16 not take between I estimate 15 and 20 billion of its
17 reserves and pay the holdouts. It couldn't do it.

18 THE COURT: But I gather the district court
19 invited you when it framed the injunction to raise
20 these practical concerns. And there was no counter
21 proposal made that you would pay principal but not
22 interest or you would pay X amount. I'm not
23 suggesting whether that makes sense or not, but for
24 you to argue to us that you were left in this
25 position of six billion or 15 billion or how much it

1 means or nothing doesn't seem quite consistent with
2 the record.

3 MR. BLACKMAN: No, I--

4 THE COURT: [Interposing] What am I missing
5 here?

6 MR. BLACKMAN: The record is that we--I
7 personally have been telling the District judge--

8 THE COURT: [Interposing] And then
9 Argentina's before the district court saying "We're
10 not paying a penny."

11 MR. BLACKMAN: Well, the--

12 THE COURT: [Interposing] And so it's--

13 MR. BLACKMAN: [Interposing] Two things, two
14 things, Your Honor.

15 THE COURT: It's a big difference between
16 six billion and nothing.

17 MR. BLACKMAN: But, if we were just sort of
18 operating in what some person said in law school was
19 kadi justice where you sit under the tree and just
20 sort of do the fair thing and the law didn't matter,
21 the fair treatment would be to pay everyone the same
22 percentage. And that's what in fact they were
23 invited into twice in our two exchange offers. The
24 district court, with all respect, I don't think has
25 the power to say, "Well, this injunction is too

1 onerous but if you pay X percent to the holdouts then
2 it's okay. You can pay your other debts."

3 THE COURT: They were invited but they
4 weren't required to accept that invitation. You did
5 not structure this debt, as some sovereigns do, to
6 allow you to restructure on less than unanimous
7 approval.

8 MR. BLACKMAN: Well, no, that's--we can
9 restructure whenever we--the debt--the deal can be
10 reopened.

11 THE COURT: But you could--you could come--
12 you could have structured the original debt to compel
13 acceptance of a restructuring on a certain majority
14 vote. You could do that.

15 MR. BLACKMAN: Would that we could have, but
16 these--this debt does not contain so called
17 Collective Action Clauses.

18 THE COURT: Right.

19 MR. BLACKMAN: Okay. Collective actions
20 clauses, had we had them, would have allowed us to
21 cram them down.

22 THE COURT: Right.

23 MR. BLACKMAN: But this debt didn't--

24 THE COURT: [Interposing] And you don't have
25 that.

1 MR. BLACKMAN: It didn't have it and CACs--

2 THE COURT: [Interposing] So you are
3 indebted to them.

4 MR. BLACKMAN: CACs hadn't been invented
5 when this debt was issues in the mid-'90s. They were
6 invented later on. They were first used in a later
7 deal for Uruguay but they don't, by the way, solve
8 the problem. They don't solve the problem. We know
9 for a fact in Greece, for example, that one of the
10 Appellees here, E.M. or entities affiliated with it,
11 bought a blocking position in certain Greek debts
12 that even with the Collective Action Clause you
13 couldn't require them to accept a restructuring.

14 THE COURT: All right, counsel, we're going
15 to have to move on. You'll--

16 MR. BLACKMAN: [Interposing] Okay. Can I
17 just move on to two other points? I realize I'm way
18 over time.

19 THE COURT: Yes, you're way over. Go on.

20 MR. BLACKMAN: And I crave the Court's
21 indulgence but they are important. First of all,
22 injunctive relief. Apart from everything else, where
23 is the irreparable injury? This is a case--a claim
24 for money damages, a claim for money damages that
25 accrued when the debt defaulted ten years ago. There

1 is no basis for suggesting that the nonpayment of
2 that is irreparable injury, and there is a total
3 disconnect between the order saying "We want to be
4 paid and we're not," that's a legitimate grievance,
5 "and therefore other people shouldn't be paid."

6 It's the dog in the manger theory of
7 irreparable injury. Mr. Link [phonetic], whose
8 declaration I comment to you is the reason why we
9 adjourned this, said--refers to Aesop's dog barking
10 in the manger. He says these people--the dog can't
11 get the food but he doesn't want the cows to get it
12 either. That's not irreparable injury. And,
13 finally, latches.

14 THE COURT: Well, let's stay with the
15 reparable injury before you move on. And let me ask
16 my question about that. To the extent that the
17 breach here is of the provision that they all--the
18 obligations be treated equally, as every payment out
19 that is not equal does harm to Argentina and every--
20 I'm sorry, to the Plaintiffs, and given Argentina's
21 flouting of every other order that's been entered by
22 the United States Court, why isn't it sensible and
23 permissible for the district court to think that the
24 injuries are irreparable?

25 MR. BLACKMAN: Well, they--because that

1 injury remains purely monetary. If it was
2 irreparable--

3 THE COURT: [Interposing] By a party that
4 has demonstrated that it is not prepared to respect
5 money judgments. I mean this is the usual assumption
6 in injunction cases, is it's remediable in a money
7 judgment. The party has the assets. When the
8 judgment is entered there is no reason to think it
9 won't be honored. Here, as I understand the
10 argument, it's that there is every reason to think
11 the judgment won't be honored.

12 THE COURT: And, in addition, the--your
13 client uses the authority of a sovereign legislature
14 to further ensure that no money judgment will ever be
15 satisfied.

16 MR. BLACKMAN: Well, first of all, it will
17 be.

18 THE COURT: And that seems to me--that fact
19 seems to me to separate this from the paradigm that
20 the admonition about the adequacy of money judgments
21 is directed to.

22 MR. BLACKMAN: Well, if you--if you look at
23 those cases about money judgments and adequacy or
24 not, typically the defendant is doing something,
25 which is not the non-payment of money. He's

1 terminating a franchise. He's firing an employee.
2 He's doing something that if he--if he was solvent
3 and had the money would be compensated.

4 THE COURT: But there are no--

5 MR. BLACKMAN: [Interposing] But at the end
6 of the day, he may not have the money.

7 THE COURT: There are not cases where the--

8 THE COURT: [Interposing] This is different.

9 THE COURT: There is no cases--there are
10 cases where the party is passing laws to achieve that
11 result that I have seen.

12 MR. BLACKMAN: Yeah, but I mean that's--but
13 that doesn't go to irreparable injury. That goes to
14 whether there is a violation of the pari passu
15 clause. At the end of the day, they have the same
16 grievance. As I said before, whether this law
17 existed or not, they're not being paid. And, again,
18 with all respect, we're not flouting an order. We're
19 not paying a judgment, a situation that the FSIA
20 contemplates.

21 But I also just wanted to be completely
22 clear on this point, they have pursued legal remedies
23 and they've succeeded. This Court has affirmed a
24 number of judgments in their favor. It was reported
25 on Friday, coincidentally, that in one of your cases,

1 the one that involved the BH Options Trust, they've
2 executed on ADRs that were deemed to be property used
3 for commercial activity in the United States that are
4 worth over 20 million dollars.

5 Yes, would they like to have executed on
6 something that was worth more? Of course. Are they
7 pursuing their remedies? Vigorously; not only here,
8 but elsewhere. They're not deprived of remedies.
9 Congress circumscribed their remedies under the FSIA.
10 That's--

11 THE COURT: [Interposing] All right. In
12 conclusion?

13 MR. BLACKMAN: And finally latches, can I
14 give you a moment of latches?

15 THE COURT: You may be guilty of it
16 yourself.

17 [Laughter]

18 MR. BLACKMAN: And if I--if so, I apologize,
19 but mine is nothing to the waiting for five years and
20 telling Judge Griesa, "Don't worry. You don't need
21 to give relief to Argentina" when I was before him at
22 the beginning of 2004. And they said in their papers
23 afterwards, "Argentina can point to nothing in the
24 record which suggests there's a likelihood that such
25 an event will happen at any time in the near or

1 distant future;" A-2042. And, in reliance on that,
2 we and the 92% of the creditors who participated
3 entered into two debt restructurings.

4 THE COURT: thank you, counsel.

5 MR. BLACKMAN: Thank you.

6 THE COURT: You have two minutes for
7 rebuttal. We'll hear from the United States.

8 MR. JOHN DALTON CLOPPER: Good afternoon,
9 Your Honor. May it please the Court, my name is John
10 Clopper and I represent the United States.

11 I want to make two points today. The first
12 is the district court incorrectly interpreted the
13 pari passu clause, and the second, the injunction by
14 the order by the district court violates the Foreign
15 Sovereign Immunities Act. And I want to start by
16 talking about the pari passu clause and this notion
17 of selective payment. A pari passu clause does not
18 prohibit selective payment, and this is true whether
19 it's a single payment--

20 THE COURT: [Interposing] But the government
21 does not take a position on whether the Lock Law
22 does. Is that right?

23 MR. CLOPPER: It's correct, Your Honor, that
24 the United States doesn't take a position on the Lock
25 Law.

1 THE COURT: And how about--

2 MR. CLOPPER: [Interposing] Except to the
3 extent--

4 THE COURT: --in the six-year history of
5 paying only the restructured debt and not the
6 original debt?

7 MR. CLOPPER: On that, that is selective
8 payment and there has always been--

9 THE COURT: [Interposing] And so six years
10 as opposed to six months of that does not make it--
11 time makes no difference in terms of how long they
12 maintain--

13 MR. CLOPPER: [Interposing] Correct, Your
14 Honor.

15 THE COURT: --the payment of only the one?

16 MR. CLOPPER: Correct.

17 THE COURT: And why is that?

18 MR. CLOPPER: Because pari passu clauses
19 only prohibit changes in legal rank, and that means
20 something other than selective payment. And this is
21 very important, Your Honor, for a couple of reasons.
22 First, consensual restructurings of sovereign debt
23 depend on selective payment, at least in the absence
24 of complete unanimity. And it's infrequent that
25 there is complete unanimity.

1 And, second, payments to international
2 financial institutions like the IMF also depend on
3 selective payment. The IMF, for example, is
4 frequently talked about as a preferred creditor but
5 in fact what happens with the IMF is that there are
6 selective payments that the IMF expects to be paid,
7 even when other creditors are not. But that's a--

8 THE COURT: [Interposing] Well, I'm sure
9 that Plaintiffs will speak for themselves, but I
10 gather that they may concede that IMF payments
11 wouldn't trigger a breach here of the--of the
12 injunction.

13 MR. CLOPPER: But that's important, Your
14 Honor.

15 THE COURT: I'm perplexed, though, as to why
16 you think that a pattern of activity can go on for so
17 long without permitting a factual finding that it has
18 effectively become a subordination.

19 MR. CLOPPER: Your Honor, I'll explain why
20 and I'd like to do so in the context of going back to
21 the IMF.

22 THE COURT: And I'd prefer that you did it
23 in terms of the discounted debt, but go ahead.

24 MR. CLOPPER: Sure. Well, okay--

25 THE COURT: [Interposing] I asked the

1 question with respect to the discounted debt.

2 MR. CLOPPER: Sure. Your Honor, a change in
3 legal rank is something other than selective payment.
4 So it's--the commentators have been all over the
5 place as to what it would be, but we know it's not
6 selective payment. So change in legal rank is
7 something like giving something akin to a security
8 interest or there are other historical examples that
9 have been given. Spain wants, for example--

10 THE COURT: [Interposing] And does this
11 apply even when it's a sovereign? You know we're
12 talking about it's a legal subordination. I
13 understand that a private company can't decide how it
14 legally--you know, whether it's legally subordinate,
15 but when it's the sovereign that does it?

16 MR. CLOPPER: That's correct, Your Honor.
17 These selective payments have always been tolerated
18 and they don't violate the pari passu clause. And to
19 go back just for a moment to the IMF because I think
20 this helps explain the point, is that the district
21 court carved out the IMF at NML--at NML's request,
22 but there is no reason in law or logic as to why the
23 IMF would be treated differently. The debt to the
24 IMF is external indebtedness under the pari passu
25 clause.

1 So there is--if it applies to other types of
2 selective payment, it also, by reason of logic, ought
3 to apply to the IMF. In fact, NML has previously
4 sought to attach payments to the IMF. It was only
5 because this Court ruled that those payments were not
6 commercial activities that that wasn't permitted to
7 go forward.

8 THE COURT: And why should we fret so much
9 about it in a case in which we do have legislation?
10 I mean the government doesn't want to take a position
11 on what seems to be the distinguishing feature of
12 this case.

13 MR. CLOPPER: Well--

14 THE COURT: [Interposing] Why don't you tell
15 us what your position is in light of legislation
16 being enacted?

17 MR. CLOPPER: The Lock Law you mean?

18 THE COURT: Yeah.

19 MR. CLOPPER: Unfortunately, I realize it's
20 not a particularly satisfactory answer but I simply
21 don't have a position to take with respect to the
22 Lock Law.

23 THE COURT: Because you're arguing 75% of
24 the facts of this case, or 50%, and not helping us
25 with what the totality of the circumstances are.

1 MR. CLOPPER: Well, what I can add, Your
2 Honor, again, and I don't have the authority to argue
3 with respect to the Lock Law, except that selective
4 payments by themselves, even long term, wouldn't
5 violate the pari passu clause. And if that's all the
6 Lock Law was about, that also wouldn't violate the
7 pari passu clause. It's because there are difficult
8 issues as to whether or not the Lock Law affects
9 legal rank that the United States isn't taking a
10 position with respect to the Lock Law.

11 THE COURT: Why don't you turn to your other
12 points besides pari passu?

13 MR. CLOPPER: The other point, Your Honor,
14 very briefly, is simply that the injunction order by
15 the district court violates the Foreign Sovereign
16 Immunities Act. Although I recognize that it
17 purports to target action, in effect it targets--
18 actually, more than in effect. It specifically
19 requires the payment out of immune assets. The
20 funds, my understanding is according to the record
21 the funds on which the payments to the exchange
22 bondholders are located outside of Argentina and NML
23 has not identified any other non-immune assets on
24 which the district court could exercise its coercive-
25 -

1 THE COURT: [Interposing] Is it correct that
2 the injunction is not violated if there are no
3 payments made to anyone?

4 MR. CLOPPER: I'm not sure, Your Honor. If
5 I can answer this way, I don't think a--Argentina, in
6 my understanding, has a legal obligation to pay its
7 exchange bondholders. And so--

8 THE COURT: [Interposing] Has a legal
9 obligation to pay the Plaintiffs.

10 MR. CLOPPER: True enough, but by targeting
11 immune funds the district court has asserted a
12 coercive measure against immune assets, and that's
13 the problem. And I don't think it's remedied by the
14 fact that Argentina may decide to do nothing.
15 Coercive measures against--

16 THE COURT: [Interposing] Well, as we try to
17 decide whether or not this is the equivalent of an
18 attachment, which would be prohibited by the statute,
19 I'm having difficulty understanding how something is
20 an attachment if no monies would have to be spent
21 under the injunction, remote as that possibility is.

22 MR. CLOPPER: Because, Your Honor, I don't
23 think that the legal issue that actually this Court
24 is faced with is whether or not it's an attachment or
25 the equivalent of an attachment, at least not

1 directly. Under the Foreign Sovereign Immunities
2 Act, all property of a foreign state actually
3 anywhere located inside or outside of the United
4 States is immune. Section 1609 of the Foreign
5 Sovereign Immunities Act states that property of a
6 foreign sovereign inside the United States is immune,
7 subject to certain exceptions. Property outside the
8 United States of a foreign sovereign remains immune.

9 So any type of coercive measure, attachment,
10 arrest, execution, any type of coercive measure in
11 aid of execution against immune properties and
12 permissible under the Foreign Sovereign Immunities
13 Act. And the way to attach something, if you are a
14 judgment creditor under the Foreign Sovereign
15 Immunities Act, is to identify non immune assets and
16 attach those assets. Seeking coercive measures
17 against all assets, wherever located and however
18 denominated, also is not permissible under the
19 Foreign Sovereign Immunities Act.

20 THE COURT: Thank you, counsel.

21 MR. CLOPPER: Thank you, Your Honor.

22 THE COURT: We'll hear from the Appellee.

23 MR. THEODORE B. OLSON: Thank you, Your
24 Honors. May it please the Court; Argentina has
25 repudiated and subordinated its payment obligations,

1 payment obligations to Plaintiffs in every way
2 possible.

3 THE COURT: Tell us how it subordinated it.

4 MR. OLSON: It's subordinated by making it
5 worthless. It is saying that with respect to the
6 payments to the exchange bondholders they will be
7 paid in full, when due, on time. With respect to my
8 clients and others in their position, they will never
9 be paid.

10 THE COURT: Not quite in full because they
11 all took a--it's not quite in full since they took a
12 cut in what they were entitled to.

13 MR. OLSON: They made a choice. The
14 exchange bondholders decided not to go through with
15 what my clients have gone through, to fight in court
16 for their rights under the contract. What Argentina
17 has done, it made an offer to certain bondholders and
18 they accepted it. They took the hand--

19 THE COURT: [Interposing] Didn't it make an
20 offer to your clients as well?

21 MR. OLSON: Yes, they--yes, they did. They
22 came to my clients and said "Take it or leave it."
23 Some of the bondholders said, "This is worth it to us
24 to accept. This is the bird in the hand rather than
25 the birds in the bush. We will accept that."

1 My clients decided to stick with their
2 rights. They were entitled under the contract to
3 equal treatment. They were entitled under the
4 contract to be paid and they were entitled
5 specifically under the contract that their payment
6 obligations would not be made less, subordinated,
7 reduced in rank, made inferior to the exchange
8 bondholders. Those are other external indebtedness--

9 THE COURT: [Interposing] You've just heard
10 the government say that selective payment is not
11 subordination.

12 MR. OLSON: Well, I was looking throughout
13 the government brief for any authority for that. The
14 government--this is government ipse dixit and I would
15 also add that we're not talking about a selective
16 payment here. Judge Griesa specifically said in his
17 order, his December order with respect to summary
18 judgment on this issue, that subordinating, reducing
19 in rank by consistent nonpayment, refusing to pay one
20 set of obligations while paying the other
21 obligations--and he specifically had before him a
22 record of a six-year annual renewal of the moratorium
23 of payments, a statement of public policy, positions
24 articulated by Argentina in briefs in Argentine
25 courts, and the Lock Law, and a statement to the SEC

1 in form 18 which specifically said these are not
2 payable--and then Judge Griesa specifically said to
3 my colleagues in court, "What is the ranking of the
4 bonds that the Plaintiffs are pursuing here? What is
5 their ranking?"

6 The answer to that, and it's on the record,
7 is "not payable." So when I said that they were
8 subordinated in every conceivable way, Black's Law
9 Dictionary defines subordination as placed in a lower
10 order, class, or occupying a lower position or
11 inferior in order.

12 THE COURT: Let me ask you a question about
13 that. It seems though that that definition
14 contemplates a recognition of the bond. It may be
15 very low on the--in terms of where it's ordered, but
16 it's still recognized by the debtor as a viable bond.
17 What has happened here is basically the bond has been
18 written off, so to speak, by Argentina. And I'm
19 wondering why that shouldn't just be viewed as a
20 breach but not necessarily a reduction of rank.

21 MR. OLSON: Well, I would give the same
22 answer that was implicit in your--or articulated in
23 your question. If they were--they are saying here if
24 we make it worth one cent or one fraction of one
25 cent, then we would be violating the Equal Treatment

1 Provision or the pari passu provision or supervisions
2 in this thing--in these provisions that we're talking
3 about here. But, if we make it absolutely worthless,
4 if we make it worse than 100th of one cent, then it
5 is not a subordination. That defies logic and common
6 sense.

7 THE COURT: If that were your only remedy, I
8 would be sympathetic to that, but you have a remedy.
9 It's for outright breach. And so I'm not sure why
10 there is a separate breach of the ranking prohibition
11 here.

12 MR. OLSON: Well, there is--there is, in
13 this respect. The promise is to pay what you owe,
14 but it's also a promise to pay--make your payment
15 obligations equivalent to the payment obligations of
16 the other external unsubordinated indebtedness. And
17 so that's a second breach.

18 The breach is like a security interest.
19 It's establishing a sense of priority of payment
20 according to other indebt--objects of indebtedness.
21 And so there is a second breach. Whenever they make
22 a payment of the exchange bondholders, they are
23 breaching the obligation to treat the payment
24 obligations equally owed to my clients. So that's a
25 separate breach and the only remedy for that isn't in

1 damages. The Argentina refuses to pay any judgment
2 and it has funds now.

3 The District judge made it clear, and this
4 issue came up over and over again during the
5 hearings, Argentina can pay indebtedness, any other
6 indebtedness owed to the exchange bondholders, and
7 any other indebtedness altogether. This is a
8 specific finding never challenged in the district
9 court and not challenged here. Argentina can afford
10 to pay it.

11 Now, we've heard some new numbers today, 16
12 billion dollars I heard. This case involving all of
13 the parties that are before this Court involves
14 something like 1.3 billion dollars. That's what the-
15 -

16 THE COURT: [Interposing] Is that a face
17 amount or is it including accrued interest?

18 MR. OLSON: That includes interest, Your
19 Honor. It's 670 million dollars with respect to my
20 clients and another approximate 700 million dollars
21 with respect to the other parties that are here in
22 court in connection with these proceedings. So we're
23 talking about--

24 THE COURT: [Interposing] And the total with
25 interest is what did you say it was?

1 MR. OLSON: Pardon me?

2 THE COURT: The total with interest is?

3 MR. OLSON: The total with interest is 1.3
4 billion dollars, approximately.

5 THE COURT: And not 20 million? Not 20--

6 MR. OLSON: [Interposing] No, that number is
7 something that's new to me today. I don't know where
8 it's in the record. There are other plaintiffs and
9 there are other cases pending, but even if you add
10 all of those that are not here, and some of those
11 went to judgment and there's other issues with
12 respect to cases that have already gone to judgment,
13 these are prejudgment cases. And but even with
14 respect to those numbers Argentina never said that it
15 could not pay all of its obligations. And the
16 District judge specifically found, it's paragraph
17 1(c) of the February 23 order, that Argentina had the
18 wherewithal to pay all of its obligations with
19 respect--

20 THE COURT: [Interposing] What percent--do
21 you know what percentage of the external bondholders
22 settled in 2005 and then again in 2008--'10? I
23 thought it was 91%.

24 MR. OLSON: We're up to 90 something
25 percent. Some of those were agencies of Argentina

1 itself that held some of these bonds internal to
2 Argentina, but the figure is something about 91, 92%
3 collectively.

4 THE COURT: So that's 90% of the original
5 debt that's still outstanding, the original debt of
6 Argentina that caused the crisis?

7 MR. OLSON: We're talking about something
8 like less 8% or something like that, I think, yes.

9 THE COURT: And what is that total?

10 MR. OLSON: The total with interest, with
11 respect to the Plaintiffs that I represent--

12 THE COURT: [Interposing] No, I meant all
13 the Plaintiffs.

14 MR. OLSON: All of the Plaintiffs all
15 together I'm not sure. I would hate to give you--

16 THE COURT: [Interposing] So that Mr.
17 Blackman may be correct when he said 20 billion?

18 MR. OLSON: Well, no, I--well, that's not in
19 the record. I did not see that anywhere in the
20 record. And what is in the record is this issue came
21 up over and over again. We kept saying, "Argentina
22 has 46 billion dollars of reserves in Swiss banks.
23 It can afford to pay the exchange bondholders and the
24 Plaintiffs in this case." And there was never an
25 argument that Argentina could not do that. There was

1 never any evidence that Argentina could not do that.

2 There was a finding that's not challenged
3 here that Argentina had the wherewithal to pay this
4 indebtedness. So it's inappropriate to make an
5 argument that somehow this is going to cause some
6 financial difficulties to Argentina when that has not
7 been the issue before and it was resolved as a
8 factual matter in the district court.

9 Now, with respect to the issues that are
10 specifically involved here, first of all, the question
11 is has there been a violation of the Equal Treatment
12 Provision. And it's quite clear that there has been
13 a violation, whether you call it subordination or a
14 reduction in rank. The issue is that the exchange
15 bondholders are being paid every nickel that they're
16 owed on the dates that the money is owed to them, and
17 the Plaintiffs that I represent are being paid
18 nothing and will be paid nothing.

19 THE COURT: Just let me correct you again.
20 The exchange bondholders are being paid everything
21 that's owed to them, which is less than they
22 originally bargained for with Argentina.

23 MR. OLSON: Well, you're assuming, Your
24 Honor, in connection with that question, that the
25 exchange bondholders are the same people that entered

1 into those transactions in 2005 and 2010.

2 THE COURT: I'm assuming that the lenders
3 had to settle for less than they were due.

4 MR. OLSON: Yes, but these--the exchange
5 bond holders that exist today could have purchased in
6 the secondary market. They could have purchased down
7 the line. They are not people that you can say
8 suffered any damage as a result of participating in
9 this exchange.

10 Secondly, if they did, they entered into a
11 voluntary transaction that they wished to enter into.
12 They didn't have to pay for lawyers for ten years to
13 try to pursue Argentina with respect to obligations
14 it owed and judgments of district courts. So there's
15 this--this is 100%--they are receiving 100% of what
16 they bargained for when they bargained for it. They
17 thought it was a good deal to them. They're not
18 being hurt in any way possible. The only people that
19 are being hurt here are the people that are not being
20 paid and not being treated consistent with the Equal
21 Treatment Provisions.

22 THE COURT: Does the record show what the
23 original coupon on these bonds was when they were
24 issued?

25 MR. OLSON: The original coupon?

1 THE COURT: Yeah.

2 MR. OLSON: It may, Your Honor. I don't
3 know what that is.

4 THE COURT: Remind me, Mr. Olsen, the
5 Plaintiffs before us in this case have obtained
6 judgments of breach or have not?

7 MR. OLSON: These are--these are prejudgment
8 cases.

9 THE COURT: That's what I thought. That's
10 what I thought.

11 MR. OLSON: Now, with respect to whether
12 there has been a violation, Argentina has put their
13 obligations to these Plaintiffs in a rank of zero.
14 The exchange bondholders are in a range of 100. That
15 is subordination of there is anything. There is
16 ample funds to pay these judgments. Let me step
17 aside for a second and address the United States--

18 THE COURT: [Interposing] Pay what
19 judgments?

20 MR. OLSON: To pay--

21 THE COURT: [Interposing] To pay the--

22 MR. OLSON: --the obligations to my clients
23 under the Equal Treatment Provision.

24 THE COURT: But you're saying there is no
25 judgment entered, so--

1 MR. OLSON: [Interposing] Yes. To the
2 extent that there would be, yes.

3 THE COURT: Okay.

4 MR. OLSON: Excuse me.

5 THE COURT: So what do you think--if
6 Argentina wants to make a payment next month, your
7 view is your client is due the entire debt
8 obligation, right?

9 MR. OLSON: If they're paying--if they're
10 paying a full amount that's due--by the way, they
11 paid 2.4 billion dollars to exchange bondholders in
12 December. There is another two or three billion
13 dollars that--

14 THE COURT: [Interposing] Right, but you're
15 taking--you're looking for the amount you would say
16 you were entitled to on a breach judgment.

17 MR. OLSON: Yes.

18 THE COURT: Even though no breach judgment
19 has yet been entered in the case?

20 MR. OLSON: Well, we're entitled as an--yes,
21 we're entitled to the injunction that says if you're
22 going to pay 100% to these external creditors, then
23 you should pay 100% to the Plaintiffs. That's what
24 you promised them. That's the enforcement to the--

25 THE COURT: [Interposing] I ask this because

1 it comes back to the question I asked you before
2 about whether the real violation here is the breach
3 of the payment obligation, to the breach--not a
4 breach of a ranking provision.

5 MR. OLSON: It is both. It is both. It is
6 by not paying the obligation that they owe to my
7 clients and by paying the other parties 100% of what
8 are owed to them, they are breaching their obligation
9 to pay.

10 THE COURT: You have not reduced their
11 obligation to you to a judgment?

12 MR. OLSON: Pardon me?

13 THE COURT: You have not reduced Argentina--

14 MR. OLSON: [Interposing] It has not yet
15 been reduced to a judgment, but their obligation is--
16 they're breaching their obligation to pay what they
17 owe, which is being litigated in court. And they're
18 breaching their obligation to pay on an equal basis
19 their payment--treat their payment obligations
20 equally.

21 The remedy--well, let me direct myself to
22 the federal government's position first of all. I
23 was really surprised to read the government's brief
24 and not see any quotation of the Equal Treatment
25 Provision at all. The government talks about a

1 boilerplate pari passu provision as if there is a
2 boilerplate pari passu provision. The record
3 demonstrates that those differ from situation to
4 situation.

5 Secondly, the second clause that we're
6 talking about principally here, the payment
7 obligations of the Republic shall at all times rank
8 at least equally, that is not even mentioned in the
9 government brief. So we don't know from the
10 government's brief whether they're talking about the
11 same provisions at all.

12 Secondly, as was pointed out during the
13 questioning before I stood up here, the government
14 explicitly says, "We don't have any expertise and
15 we're not going to address the effect of the Lock
16 Law." But the government also says in its brief that
17 a legal subordination would violate this provision or
18 the pari passu provisions, and then they say "We
19 don't know whether the law of Argentina which
20 codifies Argentina's conduct would violate that
21 provision at all." So the government's brief is
22 essentially of no value to this Court to these
23 proceedings because the two principal issues, the
24 Equal Treatment Provision and the Lock Law provision
25 that codified Argentina's policy, the government

1 doesn't have any position on.

2 THE COURT: Okay. Well, what about the
3 government's position that this injunction violates
4 the Sovereign Immunities Act?

5 MR. OLSON: I was listening to that to, Your
6 Honor. I don't understand how--there is no question,
7 legislative history makes this clear and decisions of
8 other courts make it clear, that courts have personal
9 jurisdiction where personal jurisdiction exists.
10 Argentina waived sovereign immunity with respect to
11 the issuance of injunctions. The courts of the
12 United States have the power to issue injunctions
13 under the Sovereign Immunities Act.

14 THE COURT: Full equitable powers?

15 MR. OLSON: Full equitable powers.

16 THE COURT: They claim the money is immune.

17 MR. OLSON: Pardon me?

18 THE COURT: They claim the money is immune.

19 MR. OLSON: They say that money is immune
20 but there is nothing in the Foreign Sovereign
21 Immunities Act that makes money immune. It does say
22 that in connection with an attachment or an execution
23 there are certain limits with respect to those
24 remedial remedies. But this is not an attachment.
25 This is not an execution.

1 THE COURT: They say it's an attachment by
2 another name.

3 MR. OLSON: It is--well, it is not an
4 attachment by another name, Your Honor, because an
5 attachment takes dominion over control of specific
6 property. It's a seizure of property. It's an
7 assertion of dominion over a particular property.
8 This is an order in person addressed to Argentina
9 saying you must comply with the provisions of the
10 agreement that you used to induce people to loan you
11 money. Now--

12 THE COURT: [Interposing] It would perhaps
13 help me to understand that better if I understood how
14 this injunction would be enforced. If the next
15 payment is made to the discounted bondholders without
16 paying your client, how do you enforce the
17 injunction?

18 MR. OLSON: We would--we would approach the
19 district court with an--or seek a contempt against
20 the government of Argentina.

21 THE COURT: And?

22 MR. OLSON: Well, how this would all work,
23 there are--this is--we're dealing with a situation
24 where Argentina uses every authority and every power
25 and every stroke of ingenuity that it might have to

1 avoid its obligations of court orders of the courts
2 of the United States. So we are--we are--by the way,
3 there are decisions of this court that say that you
4 must assume that your orders will be--

5 THE COURT: [Interposing] I understand that.

6 MR. OLSON: --agreed with.

7 THE COURT: But just walking down the
8 practical road, Argentina is held in contempt and
9 then what? I mean I understand what would happen if
10 a U.S. corporation or an individual were held in
11 contempt in terms of fines, in terms of possible
12 jailing. What about Argentina?

13 MR. OLSON: Well, we--and, by the way, this
14 also goes to the exercise of discretion of the
15 District judge. The District judge was very, very
16 concerned about these very points. We had several
17 hearing where the judge said, "Well, what are you
18 going to do? Argentina doesn't pay any attention to
19 my orders anyway. What makes you think they're going
20 to pay any attention to this and what are you going
21 to do about it?"

22 We pointed out to the Court that, in the
23 first place, we hope and expect that Argentina would
24 comply with it because it has responsibilities to
25 these other exchange bondholders and it has to use

1 instruments, entities in the United States, the Bank
2 of New York CD and Company, which are their agents
3 with respect to the fulfilling of their
4 responsibility under these--

5 THE COURT: [Interposing] What would you try
6 and do, attach those Bank of New York--

7 MR. OLSON: [Interposing] Well, no, we're
8 not attaching. We can't attach anything with respect
9 to--we're not saying that. We're saying that if
10 someone under Rule 65 violates an injunction after
11 having notice of the injunction and acts like driving
12 the getaway car, as an aider or abettor, as an agent--
13 -

14 THE COURT: [Interposing] Bank of New York
15 would be in contempt?

16 MR. OLSON: Might, it might be. It might,
17 and court specifically said, "I want to hear some
18 certification to me that comparable payments are
19 being made with respect to this and I want--we want
20 you to give notice to everybody that's going to be
21 involved in this process so that my orders can be
22 fulfilled. We fully expect that corporations doing
23 business in New York will respect the orders of the
24 federal district court even if Argentina won't. We
25 expect--

1 THE COURT: [Interposing] What if they
2 change their intermediaries?

3 MR. OLSON: They're not intermediaries. The
4 Argentina is the originator. The bondholders are
5 beneficiaries. The Bank of New York is an agent of
6 Argentina. We're not--

7 THE COURT: [Interposing] What if they
8 change their agents to a different country?

9 MR. OLSON: Well, that's also covered by the
10 order of injunction that the court issued, but with
11 Argentina--Argentina doesn't know who the exchange
12 bondholders are. It doesn't know the identities.
13 Those are large--those are people all over the United
14 States. They might be held in different kind of
15 names. Argentina can hardly do that, but I wouldn't
16 put anything past Argentina in terms of attempting to
17 violate the orders of this court or the orders of the
18 district court.

19 We will try to deal with that and we will
20 deal with people that are entities that are working
21 in conjunction with aiding and abetting Argentina to
22 violate the orders of the United States District
23 Court for the Southern District of New York. They
24 have responsibility to live up to those orders. Now,
25 with respect.

1 THE COURT: So but we're really here hearing
2 is that this is an injunction that's sought so that
3 you can then seek to perhaps get relief from banks or
4 entities in the United States that you would charge
5 with facilitating the contempt?

6 MR. OLSON: Yes. If we can prove that, if
7 we can prove that with knowledge of the injunction
8 that they are acting as an aider and abettor under
9 Rule 65, the Federal Rules of Civil Procedures, and
10 the specific orders of this court with notice of the
11 order, and if they are acting--if we can prove that--

12 THE COURT: [Interposing] You know, I'm not
13 sure that courts enter injunctions primarily for the
14 purpose of taking action against such third parties.
15 Just to go back to my original question, am I hearing
16 you correctly that there is no remedy against
17 Argentina for its own contempt beyond being labeled a
18 contemnor?

19 MR. OLSON: No, I think that there are
20 other--A, I think that that would have an impact in
21 the international financial community. It would have
22 an impact with respect to foreign relations within
23 the United States. The fact that Argentina would
24 hold itself deliberately in contempt of a United
25 States court order would have significance and

1 consequences. We expect and Argentina has said that
2 it would comply. It would--it has to--it feels that
3 it has to pay the exchange bond holders and would
4 comply with this. However, my caveat to that is that
5 Argentina has tried everything possible.

6 All we're doing here is coming to the courts
7 of the United States with what we regard to be a
8 legal enforceable inducement made by Argentina to get
9 people to loan money to them. It's contrary to what
10 the United States says, that they make the argument
11 that this was somehow a strange interpretation of the
12 provisions that we're talking about, even though they
13 don't specify that they are actually focused on the
14 provisions that we're talking about.

15 Even the Plaintiffs experts, Choi and
16 Gulati, say that all of the courts consider this
17 remedy--have ruled in favor of the side that we're
18 representing here and none have taken the position
19 that Argentina has. Courts--they're not binding on
20 this court, but courts that have considered this
21 issue have come out the same way. This is an
22 enforceable provision. The courts of equity decide
23 whether to enforce it or not.

24 We're not talking about an order of payment,
25 which is what the United States is talking about;

1 somebody got paid first, somebody else gets paid
2 second or two days later or a year, or anything like
3 that. We're talking about a composite level of
4 conduct by Argentina that involves public
5 pronouncements, legal decisions rendered by the
6 legislature, enforceable in any court that they can
7 find, including Argentina where enforcement of these
8 indebtedness has been rejected. So that everything
9 Argentina has done, including representations made to
10 the SEC that these debts will never be paid.

11 So we're talking about a composite set of
12 conduct that makes these obligations inferior to the
13 other obligations. And what we have in terms--the
14 only thing that can be done in terms of irreparable
15 injury--Argentina has suffered no injury. It has not
16 irreparable injury. With respect to latches, it
17 consented to provision getting a 30-day notice. It
18 doesn't--Argentina--

19 THE COURT: [Interposing] Where is your
20 irreparable injury? I think that was the argument.

21 MR. OLSON: Yeah. Well, the irreparable
22 injury is that our clients are not being paid.
23 Argentina--

24 THE COURT: [Interposing] Which is nothing
25 new.

1 MR. OLSON: That is nothing new, but it's
2 been--

3 THE COURT: [Interposing] And it could be--
4 it could be you could be answered in damages.

5 MR. OLSON: It has gone on and gone on and
6 gone on. We don't--the irreparable injury is that
7 we're entitled to equal treatment. We're not getting
8 equal treatment. The money that is there now, which
9 Argentina has and can afford to pay these
10 obligations, it is not paying. We don't know
11 tomorrow whether it will be there.

12 Argentina, with respect to the injunction,
13 Argentina can do anything it wants with its money.
14 It can buy Rolls Royce's. It can put money in bank
15 accounts for its officials in Switzerland. It can do
16 anything it wants with its money, but if it is going
17 to pay the exchange bondholders then it has to pay on
18 an equal basis the obligations to my clients.

19 THE COURT: It's your understanding of this--
20 -of the injunction that we're considering today that
21 the only payment that it interferes--that it impacts
22 is the payment to the exchange bondholders?

23 MR. OLSON: Exactly. Judge Griesa was very
24 concerned about this process. It does not affect the
25 IMF to which Argentina doesn't owe any money anyway.

1 But the Judge made it very clear that we're only
2 talking about similarly situated. When I say
3 similarly situated, I'm using the phrase out of
4 Argentina's brief itself. It says that the
5 Plaintiffs that I represent and the exchange
6 bondholders are similarly situated.

7 So we're only talking about external
8 indebtedness, not trade creditors, not payments that--
9 the United States talks about various things that
10 are just not involved in this. So we're only talking
11 about comparable similarly situated creditors, which
12 are the exchange bondholders. So that's all we're
13 talking about here.

14 And it's this court that said that the IMF
15 was in a different situation. It's much less like a
16 creditor. It's more like a regulator. So we're not
17 talking about anything there.

18 I think that I have covered--I have taken
19 your indulgence way too far and I want to make sure
20 that I have covered everything. I believe I have
21 covered everything that has come up. The one point
22 that sticks in my mind that maybe I haven't covered
23 is that we heard that these Collective Action
24 Provisions--

25 THE COURT: [Interposing] CACs, yes.

1 MR. OLSON: --was something new, never
2 invented when these bonds were issued. That's
3 ridiculous. I mean one of the provisions--one of the
4 briefs here cites Professor Gulati himself who talks
5 about the Czech government having clauses such as
6 this as far back as 1922. Cram down provisions have
7 been in the Bankruptcy Code for decades.

8 THE COURT: So they could have but didn't
9 include Collective Action Clauses?

10 MR. OLSON: Collective Action Clauses, and
11 the concern that the United States expresses about
12 restructuring, 99%--we mentioned this in our--in one
13 of the briefs that's been filed in this case. 99% of
14 the sovereign indebtedness that's been issued since
15 2005 under New York law contains these Collective
16 Action Provisions or have not been any problems with
17 restructuring.

18 This at the end of the day is a sovereign
19 who came into New York, invited the application of
20 New York law, and the jurisdiction of New York
21 courts, and consented to the jurisdiction and the
22 orders of the courts of the United States in order to
23 receive money that it could use. It now can afford
24 to pay its obligations, and we're talking about the
25 construction of a relatively clear provision.

1 Argentina has put one set of creditors at
2 the bottom and another set of creditors at the top.
3 It's a clear violation of the Equal Treatment
4 Provision and the pari passu clause. And the remedy--
5 there is no other remedy at this point except for
6 the one that Judge Griesa very carefully fashioned.
7 Argentina could have said, and I think this was
8 raised in a question, what else--what else--what we
9 could do instead. We could pay 10% here and 10%
10 there. They weren't interested in any solution other
11 than paying 100% to these creditors and 0%, nothing
12 to these other creditors.

13 THE COURT: Before you sit down, should we
14 affirm and injunction that Judge Griesa has no
15 ability to enforce if it's violated vis-a-vis
16 Argentina?

17 MR. OLSON: Well, yes, in the sense that you
18 must assume--and there is decisions from this court--
19 that the parties before this court over which this
20 court has jurisdiction, will obey the orders of these
21 courts, this court.

22 THE COURT: So your position on what you're
23 suggesting is we need to put that aside, that worry
24 aside?

25 MR. OLSON: It's--

1 THE COURT: [Interposing] In your brief you
2 laid out quite persuasively the history of
3 Argentina's conduct with respect to prior orders of
4 this court.

5 MR. OLSON: Yes, and it wasn't very hard to
6 amass that evidence either, Your Honor. I don't
7 suggest that you put that concern aside. It's a
8 very, very significant, live concern. I believe that
9 this court's order and Judge Griesa's order will be
10 respected. That's what the laws of this court say.

11 Secondly, entities that are also subject of
12 the jurisdiction of this court who are not
13 contemptuous actors such as Argentina will be subject
14 to this decree if they're acting in concert with to
15 aid and abet the violation of a court order. That's
16 a serious consequence. That will be taken seriously.
17 And I believe the contempt powers of the federal
18 court are sufficient to have other applications that
19 we would attempt to invoke wherever we could not just
20 here but elsewhere, with respect to the
21 interpretation of this provision and the
22 responsibility of Argentina to live up to its
23 obligations under the laws of the United States.

24 THE COURT: Thank you, counsel.

25 MR. OLSON: Thank you.

1 THE COURT: Mr. Blackman?

2 MR. BLACKMAN: I have a lot of ground to
3 cover and you'll tell me when I've said too much.

4 THE COURT: Yeah, I'll be generous.

5 MR. BLACKMAN: But I wanted to begin with a
6 point that Judge Raggi made, which goes really to the
7 heart of one of the issues here when you said the
8 remedy. And of course this is a covenant in a loan
9 agreement. And the remedy for breach of a non-
10 monetary, non-payment covenant is acceleration, which
11 is what they've done. And that's why their claiming
12 the entire amount of the principal and interest,
13 because there was a breach of a covenant and they
14 accelerated. That's their remedy.

15 It's no different than if we breached a
16 covenant about ratios. Would any creditor come in
17 and say, "I want an injunction that my debtor is
18 required to preserve a certain debt equity ratio?"
19 Of course not. They would say that there's been a
20 default.

21 THE COURT: But acceleration of a debt
22 that's never paid is no remedy at all.

23 MR. BLACKMAN: Well, then we get to the
24 legal remedy that they have, which is to get a
25 judgment. And, incidentally, the only reason that

1 they haven't actually gotten their judgment--

2 THE COURT: [Interposing] But I'm not sure I
3 see that. I mean if the--if the breach is that
4 there's been discrimination among unsecured creditors
5 and there's a remedy of now they get their debt
6 accelerated, why isn't it also a permissible remedy
7 that the court enjoin the continued discrimination
8 among unsecured creditors?

9 MR. BLACKMAN: Well, I guess in part of
10 course it does go to the merits of whether they've
11 been discriminated, but I would say--

12 THE COURT: [Interposing] Right. So but if-
13 -

14 MR. BLACKMAN: [Interposing] If this is a
15 covenant--

16 THE COURT: [Interposing] If the view is
17 remedies now, because that's where you started us,
18 I'm not sure why when the breach is of an essentially
19 what I'm calling a nondiscrimination clause. The
20 court can't enforce it not just with the statutory--
21 not just with the contractual acceleration provision,
22 but by prohibiting future discrimination in now
23 paying that accelerated debt.

24 MR. BLACKMAN: And all I can say it it's a
25 covenant. And why is that covenant different than

1 the covenant to preserve the ratio or file reports or
2 do anything else? You don't say, "Well, they have a
3 separate right to get a ratio, therefore we order our
4 insolvent"--

5 THE COURT: [Interposing] Because nonpayment
6 of an accelerated debt is no remedy.

7 MR. BLACKMAN: But that's true of any
8 acceleration. Acceleration gets you to your
9 principal due.

10 THE COURT: I'm sorry. I'm not being clear.
11 The violation here is not just nonpayment. Its
12 discrimination in the payment. And so I don't know
13 why the court can't both afford them acceleration and
14 prohibit the discrimination that caused the breach in
15 the first place.

16 MR. BLACKMAN: And all I'm saying is that--
17 as a more general point, which is that a breach--
18 typically the breach of any covenant other than a
19 payment covenant is acceleration. This is
20 conceptually just a covenant. And the nonpayment
21 exists regardless. Their paradigm is that somehow
22 they have the right, as I said before and I don't
23 want to repeat myself, to be a dog on the manger.
24 Paying somebody else doesn't increase their injury.
25 They are owed the money. Let me move on. Let me

1 move on.

2 THE COURT: You were about to say why you
3 think they haven't reduced these to judgments.

4 MR. BLACKMAN: I was about to say that the
5 only reason they haven't is because they--Mr. Olson
6 very obliquely without mentioning it, alluded to the
7 fact that there's an argument to be made that once
8 you have a judgment of course all of the contract
9 merges into the judgment and they're afraid of that.
10 Meaning you can't then enforce separate contractual
11 covenants. What you get instead of the contractual
12 duties is a judgment to enforce.

13 But let there be no mistake, I mean they--if
14 they want to get a judgment of course they can--they
15 can get a judgment entered. The fact that they
16 haven't had a judgment entered is a tactical maneuver
17 on their part. On this question of reserves--

18 THE COURT: [Interposing] Let me ask you--
19 let me ask you this.

20 MR. BLACKMAN: Yes.

21 THE COURT: Has Argentina taken a position
22 in the proceedings below as to whether it will or
23 will not comply with the injunction that Judge Griesa
24 finished?

25 MR. BLACKMAN: Well, Argentina did not

1 expressly take any position on that subject, but I
2 wanted to point out to the practicalities of
3 reserves, which was a great deal of the discussion,
4 that somehow we can pay out of reserves. Those are
5 the very reserves that on two separate occasions this
6 court has held to be immune from any form of
7 restraint, most recently in the case that was decided
8 about a year ago in the Second Central Bank case, and
9 before that in--

10 THE COURT: [Interposing] Opposing counsel
11 just told me money cannot be immune.

12 MR. BLACKMAN: What?

13 THE COURT: Opposing counsel--

14 MR. BLACKMAN: [Interposing] With all
15 respect, my friend is wrong. Every case that you've
16 had involving attachment here, or the vast majority,
17 has involved an attempt to attach money. If the
18 money is reserves of the Central Bank, it is immune.
19 That's what you held in the--in the Central Bank case
20 and the two decisions by Judge Cabranes. The most
21 recent one of which was on July 5, 2011.

22 THE COURT: It's immune from attachment
23 though.

24 MR. BLACKMAN: Or execution, or restraint.

25 THE COURT: So the whole--or execution. So

1 the whole question is whether what is being ordered
2 here is execution or attachment.

3 MR. BLACKMAN: And the answer, for the
4 reason I gave earlier, is yes because we're being
5 told to pay them out of immune assets. That's
6 certain a turnover, which is even more egregious.

7 THE COURT: But, see, I think I'm getting
8 confused by your referring to the assets as immune.
9 The assets are not immune except to the extent
10 they're being attached or executed.

11 MR. BLACKMAN: Or restrained.

12 THE COURT: Or restrained, I'm sorry. I
13 keep misstating that.

14 MR. BLACKMAN: And they're being restrained
15 here because we're being told we can't use our immune
16 assets to pay other people.

17 THE COURT: And the argument that I just
18 heard in response to that is that that's not so in
19 the extent that you could use them for any purposes,
20 including corrupt payment of government officials.

21 MR. BLACKMAN: Well, I mean this is--

22 THE COURT: [Interposing] What you can't do--
23 --what you can't do is use them in violation of the
24 subordination clause.

25 MR. BLACKMAN: Well, that's what he's--

1 THE COURT: [Interposing] Otherwise, you can
2 use them for whatever you want.

3 MR. BLACKMAN: He's saying we can use them
4 for illegitimate purposes.

5 THE COURT: Indeed, it sounds silly, but
6 nevertheless that's the point. It's that--it's that
7 you are not losing total dominion over these monies.
8 Therefore it's not an attachment.

9 MR. BLACKMAN: No, we're losing--the FSIA
10 doesn't talk about partial lose. It refers to immune
11 and not immune for some purposes and not for others.
12 If it's immune, it's immune, and we decide what we
13 want to use it for. And I would suggest that a very
14 high and laudable use is to pay the 92%, to use the
15 number that you were discussing with Mr. Olson, of
16 the debt--

17 THE COURT: [Interposing] Unless it's in
18 breach of an agreement.

19 MR. BLACKMAN: Which we don't think it is.
20 Can I talk about the merits for just a little bit?
21 Because there's a wealth of history here that has, of
22 necessity, not really been gone into. Pari--

23 THE COURT: [Interposing] We've all read
24 your excellent brief.

25 MR. BLACKMAN: Okay. Just a couple of

1 points on the CACs, on the Collective Action Clauses.
2 Collective Action Clauses existed in English law
3 bonds for a long time. They didn't exist in New York
4 law bonds until well after these bonds were issued in
5 1994. That is a fact and I commend Lee Buchheit's
6 article. I think Gulati says the same thing. It's
7 not disputed. So that's the history of CACs. And
8 pari passu clause is around for a long time and
9 nobody ever suggested that it has this equal payment
10 aspect. They were around in the 19th century in
11 secured debt and then they migrated into unsecured
12 corporate debt, and they migrated into sovereign
13 bonds specifically to deal with things like
14 legislation that says that you can after the fact
15 notarize your bond and get a preference. That's what
16 they dealt with. They didn't deal with our situation
17 in any way, shape, or form. And, if they did, no
18 sovereign debt restructuring would ever have been
19 possible.

20 And don't take my word for it. The United
21 States says that, the fed says that, the clearing
22 house says that, the Bank of England Financial
23 Markets Law Committee says that. They have no axe to
24 grind except the public interest, and I really
25 commend their views on the interpretation.

1 You asked a question, Judge Pooler, that
2 writing off, I think you said, isn't subordination.
3 And Mr. Olson said, "No, it is." But, in fact, it
4 isn't. If I don't pay a debt, that's not
5 subordinating it. Subordinating it means, again,
6 legal hierarchy, and that's what is at issue here.

7 Mr. Olson used a very telling slip of the
8 tongue. He said "This is like a security interest."
9 It's not. This is unsecured debt. That's the whole
10 point. What they're trying to get from the court
11 through a misreading of the pari passu clause in
12 effect is a security interest. They don't have that.

13 In terms of the number of debt--number of
14 outstanding bonds, the holdout debt just in terms of
15 the external debt is set forth in the Appendix as
16 being about 11.5 million dollars. That is what the
17 number is.

18 THE COURT: Million or billion?

19 MR. BLACKMAN: I'm sorry. Oh, yeah. As
20 they say, from your lips to God's ears. 11.5 billion
21 dollars, but in addition to that there is all kinds
22 of other debt that is also owed. And it's not
23 directly covered by this injunction, but if we start
24 paying the holdouts we're going to have to pay that
25 debt too.

1 THE COURT: So you don't dispute that the
2 amount in question in this case is under two billion,
3 but it--should it from a precedent, all the other
4 holdouts will be in court.

5 MR. BLACKMAN: Well, some of them are
6 already here. Mr. Olson was talking about this
7 client, and it think that--the principal amount of
8 that is well over a billion and a half, as I recall,
9 just of these non-judgment cases. They have
10 judgments for billions of dollars.

11 You don't think he's going to be back here
12 in demanding pari passu treatment for those? Of
13 course he will and the other holdouts have billions
14 more. So if you just look at the specific holdout
15 debt it's 11.5 billion, but with interest and other
16 unpaid debt it's a lot more than that.

17 THE COURT: Mr. Blackman, can I ask you a
18 question sort of extra record?

19 MR. BLACKMAN: Yeah.

20 THE COURT: Why would anyone lend money to
21 Argentina with this sordid history?

22 MR. BLACKMAN: In the past? You sound like
23 Judge Cabranes' footnote number two.

24 THE COURT: I'm asking why would anyone who
25 can read ever lend money to Argentina?

1 MR. BLACKMAN: Well, Argentina--you asked
2 the question about the coupon on this debt. It was
3 of the time 11.5 or 12, which was a pretty hefty
4 percentage.

5 THE COURT: The original bond?

6 MR. BLACKMAN: Yeah. Yeah, but in addition
7 to that people lend money. Argentina doesn't--didn't
8 default whimsically. There was a financial crisis in
9 Argentina that was worse than the Great Depression.
10 I mean at the end of 2001 there was rioting in the
11 streets. There were four presidents in the space of
12 several weeks. The economy was so in the tank that
13 kids were passing out in school from hunger.

14 And I remember the first time I went down to
15 Buenos Aires. It was like what you read about
16 Weimar, Germany. There were middle class people in
17 the street selling their possessions on street
18 corners. That was the financial crisis. Okay?

19 People lent money. These people didn't lend
20 money at the time. These people bought in the
21 secondary market at very steep discounts.

22 THE COURT: Well, we've established the
23 second market--

24 MR. BLACKMAN: [Interposing] Okay, but you
25 asked the question. People lent money. Of course

1 they hoped to be paid back. They were warned in the
2 disclosures that they were dealing with a sovereign,
3 that if there was a default there would be the
4 Sovereign Immunities Act, and other difficulties to
5 collection. The sovereign--your question would
6 suggest that no one should ever invest in sovereign
7 debt.

8 THE COURT: No.

9 MR. BLACKMAN: People do, and that brings
10 these interesting cases before you.

11 THE COURT: I was only--I was only talking
12 about Argentina, not all sovereigns.

13 MR. BLACKMAN: Well, but sovereigns--look
14 at--who would have said that Italy was potentially
15 going to default? Or Spain? Or Ireland? Ireland
16 was a financial miracle a few years ago. People were
17 talking about the Celtic tiger. Ireland for the
18 first time in its history was really prospering.
19 Now--

20 THE COURT: [Interposing] But it's hard to
21 feel sorry for Argentina once we hear the amount of
22 money salted away in Switzerland.

23 MR. BLACKMAN: It didn't salt away. These
24 are the reserves. This supports the currency, Judge
25 Parker. They can't--this is not money that's sitting

1 in a Swiss bank, with all the evil connotations that
2 has. These are the country's reserves. Some of that
3 is sitting right here in the fed and you decided on
4 two occasions that those were protected from
5 execution. That is what Argentina uses every day to
6 support its currency, to lend to its own banks, to
7 finance foreign trade, to hold from its banks as
8 their reserve requirements. This isn't some kind of
9 kitty to be used for some purpose.

10 THE COURT: Mr. Blackman, let me take you to
11 the text again, because I had asked about whether
12 writing off is subordination and expressed some
13 concern about that. The text of the contract does
14 not talk about subordination. What it obligates your
15 client to do was to maintain the payment obligations
16 at a rank at least equally with all its other present
17 and future unsecured and unsubordinated external
18 indebtedness.

19 Whatever concerns I may have about whether
20 subordination contemplates what I'll call live debt,
21 ranking would surely seem to include written off debt
22 at the very bottom rung. So stay with this language
23 and why is what happened here not placing this debt
24 that the Plaintiffs hold at a rank that's not equal
25 to that of the other discounted debtors?

1 MR. BLACKMAN: Because rank, as explained in
2 the materials, means a hierarchy, not a decision
3 either to pay or not to pay. If you--

4 THE COURT: [Interposing] I can't see where
5 anybody said that not paying--a decision that you
6 wouldn't pay did put something on the rank at the
7 very bottom rung.

8 MR. BLACKMAN: No, I think--I don't have all
9 the materials in front of me, but I think if you look
10 at Mr. Link, if you look at Gulati, if you look at
11 Buchheit, if you look at the authorities I cited
12 before, the Bank of England Financial Markets Law
13 Committee, the U.S.--the clearing house, all of them
14 specifically address the situation that nonpayment,
15 including an announcement not to pay--

16 THE COURT: [Interposing] They're talking
17 about that though in the context that nonpayment will
18 not immediately be seen as triggering this. It
19 doesn't talk about it not being part of the ranking
20 though.

21 MR. BLACKMAN: Well--

22 THE COURT: [Interposing] And, anyway, your
23 obligation is to rank it equally, and I'm not sure
24 how you can say that having made a statutory decision
25 that it won't be paid at all, that you are ranking it

1 equally to this other discounted debt.

2 MR. BLACKMAN: Well, again, all I can say is
3 that ranking--whether the decision not to pay is
4 short term, medium term, or long term, none of these
5 materials say it matters.

6 THE COURT: So is it your position that this
7 debt still ranks equally with the others?

8 MR. BLACKMAN: Absolutely, absolutely it
9 ranks completely equally. It's in default. It's in
10 default. And, if we were to go into default to the
11 other debt, it would also rank equally.

12 THE COURT: But when a country passes
13 legislation that says not simply "We're in default
14 and we really regret that," but says, "We will never
15 pay this debt"--

16 MR. BLACKMAN: [Interposing] Well, okay, we-
17 -

18 THE COURT: --I'm not sure that you have the
19 same argument.

20 MR. BLACKMAN: I think we do conceptually
21 because the "never" part of it really--I mean there
22 is nothing in the language of this clause that talks
23 about never ever, know, like Gilbert and Sullivan, or
24 anything like that. It's a statement of the
25 government's intent. And I can only repeat what I

1 said before, the government--

2 THE COURT: [Interposing] It's not a
3 statement of the government's intent. It's a
4 prohibition on anyone in the government paying the--
5 paying or settling these debts.

6 MR. BLACKMAN: Well, it doesn't actually say
7 "paying." The word "paying" does not appear in that
8 clause. It says "settle." It says "settle in out of
9 court, in court," etcetera. It doesn't--

10 THE COURT: [Interposing] So you don't think
11 somebody would be in violation of this if next week
12 they paid any of these debts?

13 MR. BLACKMAN: They wouldn't be in--

14 THE COURT: [Interposing] Of course they
15 would be. Let's not--let's not--I mean you've got
16 serious arguments, so I think we have to devolve into
17 the--

18 MR. BLACKMAN: [Interposing] Okay. But it
19 doesn't say that.

20 THE COURT: --frivolous arguments.

21 MR. BLACKMAN: It's not--Your Honor, I'm
22 using the point because the words do matter and my
23 friends are reading in pari passu rank things that
24 also aren't there. The Lock Law in this one clause,
25 which is the only one that is faintly relevant, says

1 we're not going to enter into out of court
2 settlements. And the prior clause says we're not
3 going to do another restructuring unless congress
4 authorizes it, which congress did on an occasion.

5 And I would just go back to the point that I
6 made about sovereign debt restructuring. You asked
7 me, Judge Pooler, why did people go into that--into
8 this debt in the first place. Obviously they thought
9 they'd be paid, but things happen. And one of the
10 things that happened here was a financial
11 catastrophe. 92% of the debt recognized that the
12 sensible thing to do was to take a haircut. They
13 would not have done that nor could we have done a
14 restructuring if each holdout creditor had a veto
15 over that. And it is the veto over that that my
16 friends at the other table are saying that this pari
17 passu clause gives them. That is a huge amount of
18 power.

19 In the sovereign debt world, it's the
20 equivalent of the nuclear weapon that our Supreme
21 Court talked about when it refused to all so called
22 Mareva injections in the Grupo Mexicana Desarrollo
23 case. It's a nuclear weapon. They say that this
24 clause which in fact is boilerplate--their own expert
25 Scott [phonetic] says that the different nuances of

1 language don't mean anything. Link says the same
2 thing. So does Gulati. They're saying that this
3 boilerplate clause is the nuclear weapon that gives
4 them or anybody else the right to veto a sovereign
5 debt restructure.

6 And that's why the United States is here.
7 That's why we have this room of people. It's not the
8 narrowness of the Lock Law and it's not Argentina.
9 This is about sovereign debt restructuring in a world
10 without bankruptcy, where the only way to do it is
11 voluntarily. And, if you give each holdout a veto,
12 it can't happen and the whole world is in big
13 trouble. Thank you.

14 THE COURT: Thank you, counsel. Thank you
15 both. We'll reserve decision. I'll ask the clerk to
16 adjourn court.

17 THE COURT: Court stands adjourned.

18 [END OF HEARING]

C E R T I F I C A T E

I, Brandi Dean, certify that the foregoing transcript of proceedings in the United States Court of Appeals for the Second Circuit, NML Capital Ltd. v. The Republic of Argentina, Index No. 12-105cv-(L), was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: 

Date: July 28, 2012

EXHIBIT S

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),
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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)

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 AQUERRETA,
MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO,
CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES,
MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

—against— *Plaintiffs-Appellees,*

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

BRIEF FOR *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF REVERSAL

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Dated: New York, New York
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INTRODUCTION

The Clearing House Association L.L.C. (“The Clearing House”) submits this brief, with consent of all parties, as *amicus curiae* in the appeal by defendant the Republic of Argentina (“Argentina”) from orders entered by the United States District Court for the Southern District of New York (Griesa, J.) on February 23, 2012 (the “Injunction” (A-3382–89)¹) and underlying orders entered on December 7 and 13, 2011 (the “December 2011 Orders” and together with the Injunction, the “Orders”) (A-2164–68, A-3047–53). The Clearing House supports Argentina’s position that the Court should reverse the Orders.²

This brief addresses an issue of vital importance to the U.S. and international credit markets for trillions of dollars of debt obligations governed by New York law. The critical question posed is the effect, as a matter of New York law, of the *pari passu* covenant included in Section 1(c) of Argentina’s Fiscal

¹ Citations to “A-” refer to the Joint Appendix. Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), The Clearing House states that this brief was authored by The Clearing House and its counsel; was neither authored nor funded by any party to this action; and no person other than the *amicus curiae*, its members, or counsel contributed money that was intended to fund preparing or submitting this brief.

² On March 30, 2012, the Court granted The Clearing House’s unopposed emergency motion for an extension of time to file this brief. *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Mar. 30, 2012) (Dkt No. 176).

Agency Agreement dated as of October 19, 1994 (the “FAA”), A-157, and in the bonds issued thereunder and held by plaintiffs. Our member banks and other participants in the credit markets have long understood such a clause—which is standard language included in substantially the same form in numerous credit documents—to prohibit a debtor from creating unsecured debt that ranks senior in legal right of payment to the payment obligations the debtor has to creditors for whose benefit the covenant is made.

On December 7 and 13, 2011, the district court entered orders that adopted a markedly different, broader interpretation of this clause: that it also serves to prevent a debtor from paying certain of its unsecured, unsubordinated creditors without making a “Ratable Payment” to each of its other unsecured, unsubordinated creditors, and to permit an unpaid creditor to interfere with payments to other creditors. The district court ruled that the enactment of a 2005 (and 2009) Argentine statute, known as the “Lock Law,” that prohibited the Argentine government from re-opening the then-pending exchange offer without approval of the Argentine Congress, and from settling later with non-tendering bondholders, constituted a violation of the *pari passu* clause. A-3053. The district court separately ruled that Argentina, apparently irrespective of the Lock Law, would violate the clause if it “fail[ed] to pay the obligations currently due under [plaintiffs’] Bonds while at the same time making payments currently due to

holders of other unsecured and unsubordinated External Indebtedness.” A-3052. The court postponed the question of remedy for later consideration.

On February 23, 2012, the district court granted plaintiffs’ motions for injunctive relief. The Injunction requires that Argentina make “Ratable Payments” to plaintiffs when Argentina “pays any amount due under the terms of the bonds or other obligations issued pursuant to [Argentina’s] 2005 or 2010 Exchange Offers” (the “Exchange Bonds”). A-3387 (Injunction ¶ 2.a). The Injunction defines Ratable Payment to mean the portion of the total amount owed to plaintiffs that corresponds to the *percentage* of the amount then due and owing on the Exchange Bonds that is being paid (not the actual dollar amount being paid). A-3387 (Injunction ¶ 2.b & c). (That is, if Argentina pays 100% of an installment owed on the Exchange Bonds it must pay 100% of the accelerated amounts of principal and interest due on the plaintiffs’ bonds (a much larger sum). A-3387 (Injunction ¶ 2.b & c).) More generally, and vaguely, Argentina is enjoined from “violating [the *pari passu* clause in the FAA], *including* by making any payment under the terms of the Exchange Bonds without . . . concurrently or in advance making a Ratable Payment to” plaintiffs. A-3387 (Injunction ¶ 2.d) (emphasis added). Thus, apparently any payment to any unsecured creditor could be said to trigger the prohibition. Moreover, the Injunction purports to bind “all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any

payment on the Exchange Bonds.” A-3388 (Injunction ¶ 2.e). It prohibits such “Participants” from processing payments made pursuant to the Exchange Bonds unless Argentina certifies to the district court that Argentina has made or concurrently is making a Ratable Payment to plaintiffs and provides notice of the certification to the Participants. A-3388 (Injunction ¶ 2.e-f).³

The Clearing House respectfully submits that its interpretation—not the unique interpretation of the court below—reflects the view of how credit markets have negotiated and understood these clauses to operate for many decades, and is the correct reading of New York law. The Orders, on the other hand, are based upon an interpretation that constitutes a dramatic and disruptive departure

³ Plaintiffs and the district court in the hearing at which the Injunction was signed indicated that the Injunction was intended to reach both entities with a designated role in the payment to bondholders—such as The Bank of New York (the trustee for the Exchange Bondholders) and Cede & Company (the registered Exchange Bondholder)—and unspecified “banks” and “intermediaries” who might participate in making payments to Exchange Bondholders. *E.g.*, A-2296–97 (Feb. 23, 2012 Tr. 7:22-8:2 (“THE COURT: The banks wouldn’t be aiding and abetting [a violation of an order directed only at Argentina]. The banks only pay the exchange offer people. That’s what they do. Now, if I entered this order, this would impose an obligation on the banks and it might impose an impediment upon the banks with respect to the exchange offer people which does not exist now.”); *see also* A-2293, 2295-97, 2329 (*id.* at 4:12-19, 4:23, 6:13-15, 7:10, 8:17-24, 40:15-17) (referring to effect of order on “banks” and “intermediaries”).

from how New York law-based credit markets have functioned in this area.⁴ We do not address in this brief whether Argentina's Lock Law in itself constitutes a breach of the *pari passu* clause,⁵ but we submit that the district court's holding that paying the Exchange Bondholders without also paying other unsecured creditors was by itself a breach of the *pari passu* clause was clearly wrong. This Court should reverse the Orders and reaffirm the long-understood meaning of these clauses in the market.

The Clearing House wishes to highlight for the Court two independent reasons for vacating the Orders of particular importance to The Clearing House

⁴ On two occasions, courts in Brussels, Belgium, have interpreted New York law to give *pari passu* clauses the second, broader meaning—that is, barring payments to some unsecured creditors if other unsecured creditors are not paid pro rata. In each case, however, the Belgian court ruled without citing any New York authority. See *Elliott Assocs., L.P. v. Banco de la Nacion*, Hof van Beroep [HvB] [Court of Appeal] Brussel, 8e Kamer, Sept. 26, 2000, A.R. Nr. 2000/QR/92 (Belg.) (A-1356–67); *LNC Inv. LLC v. Republic of Nicaragua*, Rechtbanken van Koophandel [Kh.] [Commercial Court] Brussel, Sept. 11, 2003, R.K. 240/03 (Belg.) (A-1333–55).

⁵ It is important, however, to distinguish between changes in *ranking* of subordinated debt and decisions by a debtor to pay one creditor over another. On its face, Argentina's Lock Law appears to be nothing more than an expression of a sovereign's intent in the context of a restructuring not to give a better deal to bondholders who do not accept the restructured terms being offered. Such statements are common, necessary in any sovereign restructuring and not ordinarily understood as changing the legal right to enforce the right to be paid. In any event, enjoining payment to certain bondholders would not appear to be a proper remedy for a breach of a *pari passu* clause in unsecured debt held by other creditors.

and its members. *First*, the district court's interpretation of the standard *pari passu* clause conflicts with longstanding market practice and understanding and, significantly, is inconsistent with the existence of other clauses that specifically provide for sharing and other allocation of payments by debtors and that are widely used in domestic and international credit agreements. *Second*, if applied in accordance with its terms, the Injunction would impose undue burdens on the bank Participants, risk unacceptable delays to the clearing and settlement of unrelated payments, and threaten the orderly functioning of the U.S. and international credit markets and payment systems.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1853, The Clearing House is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits.⁶ The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment

⁶ The members of The Clearing House are: Banco Santander, S.A.; Bank of America, N.A.; The Bank of New York Mellon; The Bank of Tokyo-Mitsubishi UFJ Ltd.; Branch Banking and Trust Company; Capital One, N.A.; Citibank, N.A.; Comerica Bank; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; PNC Bank, N.A.; Regions Bank; The Royal Bank of Scotland N.V.; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

letters, *amicus* briefs and white papers, the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C. (“PaymentsCo”), provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost \$2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S.⁷

PaymentsCo operates the Clearing House Interbank Payments System (“CHIPS”), a real time, final payment funds transfer system that serves 53 U.S. and foreign banks and that each day processes, on average, over 377,967 payment orders, with an aggregate daily value of \$1.522 trillion as of February 29, 2012.⁸ CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal payment systems for international funds transfers in the United States.⁹

The Clearing House has a substantial interest in the outcome of this action because the lower court’s broader interpretation of the *pari passu* clause so as to prevent the payment of one debtor in preference to another is not only wrong but also dangerous. This is the first New York court to reach that conclusion.

⁷ See <http://www.theclearinghouse.org>.

⁸ See <http://www.chips.org/docs/000652.pdf>.

⁹ Average daily funds transfers using Fedwire amounted to \$2.513 trillion in the fourth quarter of 2011. See http://federalreserve.gov/paymentsystems/fedfunds_qtr.htm.

Unless and until reversed, it may be looked to by foreign courts as the only statement of New York law on the issue. Maintaining the correct interpretation of this widely used clause is important to Clearing House members not only as parties to the debt instruments that include the clause. An interpretation of the standard *pari passu* clause in debt instruments to permit some of a debtor's creditors to interdict payments to other creditors, as the Injunction does, would impose undue costs on intermediary banks and almost certainly delay some payments beyond those targeted by the court's order, incrementally degrading the reliability of the worldwide payment systems.¹⁰ Moreover, an erroneous interpretation of that clause in debt instruments threatens the proper functioning of U.S. and international credit markets and, especially, the negotiation of orderly workouts and restructuring of debt where necessary and appropriate.

¹⁰ For these reasons, in 2004 The Clearing House, the United States and the Federal Reserve Bank of New York all submitted *amicus* briefs to the district court opposing the proposed new interpretation. Mem. of *Amicus Curiae* The New York Clearing House Ass'n L.L.C., *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004) (A-1805–22); Statement of Interest of the United States, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004) (A-1760–85); Mem. of Law of *Amicus Curiae* Federal Reserve Bank of New York, *Macrotecnic Int'l Corp. v. Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004) ("FRBNY Mem.") (A-1786–1804). At that time, the district court resolved this issue without reaching the merits because plaintiffs represented to the court that they were not asserting a claim under the *pari passu* clause. A-2016–17. Each of these briefs was placed before the district court anew in connection with the motions that resulted in the Orders.

ARGUMENT

I. INTERPRETING THE *PARI PASSU* CLAUSE TO REQUIRE RATABLE PAYMENTS TO UNSECURED CREDITORS IS INCONSISTENT WITH THE LANGUAGE OF THE CLAUSE, OTHER PROVISIONS OF THE CONTRACT, AND MARKET PRACTICE AND UNDERSTANDING.

A. Interpreting and Understanding *Pari Passu* Clauses.

Trillions of dollars of outstanding unsecured debt obligations governed under New York law benefit from *pari passu* clauses. Like all contractual provisions, the *pari passu* clause must be interpreted to reflect the intent of the parties, as such intent is expressed in the language of the clause read in the context of the entire contract. The function of the clause, as its language provides, is to affirm that the obligations to which it relates will be unsecured and unsubordinated obligations, ranking *pari passu* and without preference among defined categories of unsecured debt. The *pari passu* clause contrasts directly with a subordination clause in which holders of debt agree to be subordinate in right of payment to certain specified debt obligations.

Pari passu clauses are usually not included in domestic U.S. debt instruments because the general parity of unsecured debt obligations, absent statutory priorities¹¹ or the exercise of a court's equitable powers of

¹¹ See, e.g., 12 U.S.C. § 1821(d)(11); 11 U.S.C. § 507(a).

subordination,¹² is well established by law.¹³ Indeed, it is so established that the prospectuses pursuant to which U.S. domestic corporate debt is sold typically refer to the *pari passu* status of the debtor's obligation even without inclusion of a specific contractual *pari passu* clause.

In contrast, for non-U.S. debt, it is the practice to include such clauses in the debt contracts because there is not always the same certainty that the legal regimes generally applicable to such debtors will necessarily protect creditors from involuntary subordination.¹⁴ The clause is not intended, however, to do more than what it says—to provide certainty on the issue of involuntary subordination. The *pari passu* clauses in both the FAA and the bonds held by plaintiffs reflect this standard approach.

There is no basis for concluding that a *pari passu* clause serves the broader function of prohibiting a debtor from choosing to pay some unsecured creditors without simultaneously paying others, or, if a debtor attempts to make

¹² See 3 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 55.07 (Alan Resnick & Henry J. Sommer ed. 2011).

¹³ See Debra J. Schnebel, *Intercreditor and Subordination Agreements – A Practical Guide*, 118 BANKING L.J. 48, 53 (2001).

¹⁴ See 2 PHILIP R. WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE § 6.03 (1990); William Tudor John, *Sovereign Risk and Immunity Under English Law and Practice*, 1 INTERNATIONAL FINANCIAL LAW 79, 95 (2d ed. R. Rendell ed. 1983); Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 902–04 (2004).

such payments, permitting an unpaid unsecured creditor to enlist the aid of a court to interfere with payments to other creditors. Before the December 2011 Orders, no New York or other U.S. court had interpreted the *pari passu* clause in such a way.¹⁵ There is, however, significant legal commentary criticizing such a broad interpretation of New York law-governed *pari passu* clauses.¹⁶

B. Reading the *Pari Passu* Clause in the Context of the Entire FAA Confirms That the Lower Court’s Interpretation is Erroneous.

Our conclusion about the limited purposes of the *pari passu* clause and the error in the analysis of the court below is confirmed when the clause is read in the context of the provisions included in and absent from the remainder of the FAA. Most telling is the absence of a “sharing clause.”

¹⁵ To date no court in New York has adopted either the *Elliott* or *Nicaragua* interpretation of the *pari passu* clause. The *Elliott* case was cited but not followed in *Nacional Financiera, S.N.C. v. Chase Manhattan Bank, N.A.*, No. 00 Civ. 1571 (JSM), 2003 WL 1878415 (S.D.N.Y. Apr. 14, 2003), which noted only that the presence of an injunction such as was entered in *Elliott* would present a different case. Similarly, the English courts have not addressed the merits of the issue with respect to *pari passu* clauses in English-law debt instruments. See *Kensington Int’l Ltd. v. Republic of the Congo*, 2002 No. 1088, transcript at 27 (Eng. Commercial Ct. Apr. 16, 2003) (noting absence of English authority and denying injunction on equitable grounds) (A-1991–97).

¹⁶ See, e.g., Buchheit & Pam, *supra* note 14, at 10–15; Philip R. Wood, *Pari Passu Clauses – What Do They Mean?*, BUTTERWORTHS J. INT’L BANKING & FIN. L. 371, 374 (2003); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 637–39 (2001).

A “sharing clause” is the vehicle for lenders or other creditors to agree among themselves on a contractual basis—typically in syndicated loan agreements—that, if any one of them receives a payment from a debtor that is disproportionate to any amounts received by all of the creditors who are party to the agreement, the excess payment will be shared with the others. These “sharing clauses” generally provide either that a lender is to pay over any disproportionate payment it receives to the other lenders as though it had been received from the debtor or that the lender receiving the disproportionate payment is to purchase participations in the loans held by the other banks. *See* Lee C. Buchheit, *HOW TO NEGOTIATE EURO CURRENCY LOAN AGREEMENTS* 76–81 (2d ed. 2004). The FAA and Argentine bonds at issue do not have such a clause.

There are three important points to note in relation to sharing clauses. First, these clauses are often found in loan agreements under which the creditors separately are protected against involuntary subordination through a *pari passu* clause, because these two types of clauses serve different purposes. It is, in fact, standard practice in syndicated loan agreements with non-U.S. debtors to include both sharing clauses, to protect against disproportionate payments to lenders in the

group, and *pari passu* clauses, to protect against involuntary subordination to new or existing classes of debt.¹⁷

Second, sharing clauses protect a narrowly defined set of creditors: the lenders who agree among themselves in the inter-creditor agreement in which they appear. In contrast, *pari passu* clauses relate to unilateral action by the debtor with respect to an extremely broad set of creditors: the holders of all sorts of unsecured debt. That could be trade debt, such as the bill owed to the electric company, short-term bank borrowings, or multi-billion dollar bond issuances.¹⁸ Moreover, sharing clauses contain complex “payover” provisions that are necessary to reallocate disproportionate payments among creditors. That is not necessary for *pari passu* clauses, which address only the ranking of legal right to, as opposed to the fact of, payment. Thus, given the specificity and restrictions on

¹⁷ See Financial Markets Law Committee, Issue 79 – *Pari Passu* Clauses, at 4, 17–18 (Mar. 2005) (A-1830, 1843–44).

¹⁸ Although the Injunction limits its certification requirement to payments from Argentina to Exchange Bondholders, it expressly enjoins Argentina from making any payments that would breach the *pari passu* clause as interpreted by the district court. A-3387 (Injunction ¶ 2.d). The Injunction provides no basis to limit payments that would trigger the requirement to pay the plaintiff bondholders. It is utterly implausible that the parties to a *pari passu* clause intended it to prevent any timely payment to any other creditor (including trade creditors) without Ratable Payment to plaintiffs, as that would prevent the Argentine national government from operating in the event of a default, yet that is the inevitable result of the district court’s interpretation.

standard sharing clauses, it is implausible to contend that the market intends *pari passu* clauses to accomplish the same thing in a much vaguer and open-ended way.¹⁹

Third, sharing clauses are generally not included in New York law-governed fiscal agency agreements, such as Argentina's FAA, or, for that matter, in bond issuances generally.²⁰ This practice as it relates to sovereign debt securities, and the effect of not having them in that context, has been the subject of considerable debate and commentary in the market. In the 1990s, official sector participants (the G-10 governments and the International Monetary Fund) proposed that emerging market sovereign bonds begin to incorporate sharing clauses modeled on those typically found in syndicated commercial bank loans. *See, e.g.*, Working Group on International Financial Crises, REPORT OF THE WORKING GROUP ON INTERNATIONAL FINANCIAL CRISES 19–20 (1998). Prominent trade associations representing bond market investors argued strongly against the

¹⁹ Similarly, when lenders agree to be subordinated to other debt, they do so through subordination clauses that, as typically drafted, (a) apply strictly for the benefit of a specified group of senior creditors (and, in most cases, not generally to the debtors' unsecured obligations) and (b) expressly provide that any subordinated creditor who receives a payment otherwise prohibited by the subordination provisions must pay it over to the beneficiaries of the clause.

²⁰ *See, e.g.*, Ad Hoc Comm. For Revision of the 1983 Model Simplified Indenture, Am. Bar Ass'n, *Revised Model Simplified Indenture*, 55 BUS. LAW. 1115 (2000).

inclusion of such clauses. *See, e.g.,* Edward Luce, *Pakistan a warning for bondholders*, FIN. TIMES, Feb. 18, 1999, at 6, *cited in* Buchheit & Pam, *supra* note 14, at 12 n.35. Ultimately, the market did not adopt the proposal. This debate clearly demonstrates that market participants and governments around the world did not consider *pari passu* clauses, which had been in use for decades, to impose a Ratable Payment obligation on debtors or to give rights to unpaid creditors to interfere with payments to other creditors.²¹

The FAA's lack of a sharing clause shows that plaintiffs (or the investors from whom plaintiffs purchased the bonds issued under the FAA) had not bargained for the right to Ratable Payments. Moreover, the FAA contains another provision, the inclusion of which is wholly inconsistent with the lower court's broad reading of the *pari passu* clause. Section 9(c) of the FAA (A-169) provides:

The Republic may at any time purchase Securities at any price in the open market or otherwise, provided that in

²¹ Although *pari passu* clauses apply to protect creditors against legal subordination to other *unsecured* obligations of the debtor, they do not address the terms under which the debtor may create *secured* obligations. That task is left for “negative pledge” clauses, which customarily are included in debt instruments—including the FAA at Section 11 (A-170–72) and agreements with the World Bank. Such clauses, for example, preclude the debtor from preferring other creditors by granting them security interests or liens over the debtor's assets or revenues without equally and ratably securing the creditors benefiting from the clause. *See, e.g.,* International Bank for Reconstruction and Development, GENERAL CONDITIONS APPLICABLE TO LOAN AND GUARANTEE AGREEMENTS FOR SINGLE CURRENCY LOANS § 9.03 (1995).

any such case such purchase or purchases are in compliance with all relevant laws, regulations and directives. Securities so purchased by the Republic, may, at the Republic's discretion, be held, resold or surrendered to the Fiscal Agent for cancellation. The Securities so purchased, while held by or on behalf or for the benefit of the Republic shall not entitle the registered holder thereof to vote at any meetings of registered holders of Securities and shall not be deemed to be outstanding for the purposes of calculating quorums at meetings of the registered holders of the Securities. Notwithstanding the foregoing, the Republic will not acquire any beneficial interest in any Securities unless it gives prior written notice of each acquisition to the Fiscal Agent. The Fiscal Agent will be entitled to rely without further investigation on any such notification (or lack thereof).

Pursuant to this clause, the issuer may purchase bonds (i) at any time, (ii) at any price, and (iii) in the open market or otherwise (*e.g.*, in privately negotiated transactions). The only conditions imposed upon the issuer are that purchases be made in accordance with applicable law and regulations, the issuer not vote securities held by it at bondholders' meetings, and the issuer give the fiscal agent prior notice of each purchase. There is nothing in this provision (or in its companion provision that sets out procedures for the issuer to cancel purchased bonds (FAA § 9(d) (A-169))) that contractually imposes upon the debtor any obligation to make ratable purchases at equal prices among holders of the securities, or to make payments to any bondholders upon cancellation of other outstanding bonds. Because, from the perspective of the recipient of the funds,

issuer repurchases are the functional equivalent of repayments, it would be irrational for bondholders to provide issuers with this broad flexibility to make repurchases if the intention of the *pari passu* clause were to prohibit payments to bondholders absent Ratable Payments to other creditors.

II. INTERPRETING THE *PARI PASSU* CLAUSE TO REQUIRE RATABLE PAYMENT TO UNSECURED CREDITORS, AND THE INJUNCTION BASED UPON THAT INTERPRETATION, THREATENS THE ORDERLY FUNCTIONING OF THE PAYMENT SYSTEMS AND CREDIT MARKETS.

The district court's conclusion that a *pari passu* clause requires a debtor to make Ratable Payments to its unsecured unsubordinated creditors, and the Injunction permitting unpaid creditors to interfere with payments that a debtor makes to other unsecured creditors, would impose undue burdens on banks and risk delay of unrelated payments. Further, because of the prevalence of New York law-governed debt instruments, the Injunction threatens the orderly functioning of the credit markets, particularly in cases of sovereign debt in or perceived to be near default.

A. The Injunction Would Place Undue Burdens on the Payment Systems That Are Inconsistent with New York Law and This Court's Precedents.

The Clearing House members act as intermediary banks for electronic funds transfer ("EFT") payments hundreds of thousands of times each day. *See supra* p. 7. The Injunction and its confirmation regime (A-3388 (Injunction ¶ 2.f))

would place significant burdens on intermediary banks that are inconsistent with New York law and this Court's precedents. The Injunction evidently depends on Participants—defined in the Injunction to include intermediary banks—to verify that no payment is made by Argentina to Exchange Bondholders unless and until the Participants have received notice that Argentina has filed a certification with the district court demonstrating that a Ratable Payment has been made to plaintiffs. This system, or any system that seeks to force intermediary banks to stop payments by a particular entity for a particular purpose, imposes significant costs on intermediary banks and risks delays in payments unrelated to the targeted Exchange Bond payments.²²

²² Plaintiffs have suggested in conversations prior to filing this brief that the Injunction was not intended to reach intermediary banks that might process payments made to the Exchange Bondholders. Such a limitation would be welcome but should have been included in the Injunction itself, which the district court directed be served on all "Participants" "involved, directly or indirectly, in . . . processing . . . any payment on the Exchange Bonds." A-3388. Moreover, that limitation apparently would not extend to the trustee for the Exchange Bondholders, a Clearing House member, which would be faced with a court order purporting to direct it not to carry out its fiduciary obligations to those Bondholders if it receives a payment of principal and interest for distribution to them. This attempt to interdict such payments could not be achieved by the ordinary means of attachment. *Brown v. J.P. Morgan & Co.*, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach money in the hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), *aff'd*, 295 N.Y. 867 (1946).

Under the 2005 and 2010 Exchange Bonds, Argentina makes principal and interest payments not to Exchange Bondholders directly but to a trustee for the Bondholders in Argentina. A-2207; A-2288. Pursuant to a trust indenture, dated June 2, 2005, The Bank of New York (now The Bank of New York Mellon, a Clearing House member) was appointed trustee (the “Trustee”). A-2281.

Payment from the Trustee to the U.S.-registered Exchange Bondholder takes the form of an EFT from the Trustee’s bank outside the United States to the registered holder’s bank in the United States, with the funds transfer often routed through one or more intermediary banks. An EFT is “a series of transactions, beginning with the originator’s payment order, made for the purpose of making payment to the beneficiary of the order.” N.Y. U.C.C. § 4-A-104(1). Only the originator’s bank and the beneficiary’s bank in an EFT have a contractual relationship with the ultimate originator and beneficiary, respectively; the remaining transactions in a typical EFT are with, or between, intermediary banks. *See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 60 n.1 (2d Cir. 2009) (explaining the operation of EFTs). As a consequence, while information about the ultimate originator and beneficiary is included in payment processing information to ensure that the payment is ultimately credited properly, from the perspective of intermediary banks, the critical information to know in

executing EFTs is the identity of the banks before and after them in the payment chain.

Payment order forms provide for the identification of the originator and ultimate beneficiary in “free text” fields, so that the identification may be abbreviated or appear with other variations.²³ For example, the originator or beneficiary could be identified by account number, or by an identifying code assigned by a funds-transfer network, with or without a name. If the name were included, the name could be abbreviated or otherwise shortened. In any case, under the procedures described in the trust indenture, the originator of any funds transfer to pay the U.S.-registered Exchange Bondholder would not be Argentina, but the Trustee, a large commercial bank that makes tens of thousands of payments every day, so one could not simply flag all payments from that bank. Moreover, even if a Participant could properly identify the originator, payment orders do not need to indicate the purpose of the payment and there is no uniform method for doing so. If the purpose of the funds transfer as a payment on the Exchange Bonds

²³ Cross-border funds transfer systems use computer-readable structured payment-order formats that require information to be placed in limited fields. The most common funds-transfer system used for cross-border payments is the Society for Worldwide Interbank Financial Telecommunication (“SWIFT”), and SWIFT payments coming into the United States are frequently routed through Fedwire or CHIPS.

is mentioned in any way in the payment orders, it would be in a free-form reference field.

In connection with counter-terrorism initiatives and economic-sanctions programs administered by the Treasury Department's Office of Foreign Assets Control ("OFAC"),²⁴ banks electronically screen all of their EFTs to identify payments that must be blocked or rejected under OFAC rules. This process frequently generates false positives. The process of eliminating those false positives is extremely labor-intensive, involving both iterative refinement of search terms and manual review of numerous "hits." This process is not only very costly to the banks, but sometimes results in delays in payments. This is because the process of eliminating false positives is not always completed in the course of a single payment day, resulting in some delay to payments having no connection to the target payment. The extent of that impact is impossible to predict, as it depends entirely on the specificity of the information provided with respect to the target payment.

The only way that banks would be able to comply with the Injunction as written would be to search for the enjoined payments using the screening procedures used to comply with OFAC sanctions, yet the Injunction provides very

²⁴ OFAC programs include sanctions against Iran, North Korea, and global terrorists. *See, e.g.*, 31 C.F.R. parts 500, 510, 535, and 594.

little information that could be used to identify the enjoined payments or reduce the costs to the banks or the risk of delayed payments. The Exchange Bond payment apparently would be originated by the Trustee—which, as noted earlier, is one of the largest participants in automated electronic payment systems—and be directed to one or more custodians in the United States or elsewhere who might or might not be known. There might or might not be an indication on the payment order that it was related to the Exchange Bonds. As a consequence, any attempt to identify a particular payment to Exchange Bondholders would generate numerous false hits. The banks' operations staff would need to review the entire message for the originator's and ultimate beneficiary's name, abbreviations or variations thereof, account or identifying numbers, or information concerning the purpose of the payment. Such an effort would raise significant problems with the speed of payment processing and, because it would require the use of the same personnel and procedures that the banks use for OFAC compliance, complicate the banks' ability to effectively identify and block payments that are subject to OFAC sanctions.

As the FRBNY noted in its 2004 *amicus* brief filed in the court below, this kind of manual review of transfers would increase costs for banks and the payment system. The FRBNY noted that it would have “a wholly unacceptable impact both on the speed of the system and the certainty of the payments it

handles.” FRBNY Mem. at 8 (this issue is not “unique to Fedwire or to the Reserve Banks. If dollar settlements can be restrained while they are being made in the Fedwire system, which is the model for payment systems globally, then all payments are at risk for such restraints”) (A-1798).

New York law has long recognized the critical need to protect the payment systems from interference of this kind. Under Article 4-A of the Uniform Commercial Code, intermediary banks are not subject to attachment or injunctions relating to payment orders. *See, e.g.*, N.Y. U.C.C. § 4-A-503 cmt. (“No other injunction is permitted. In particular, intermediary banks are protected”);²⁵ *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) (“[T]hese are matters as to which an intermediary bank ordinarily should not have to be concerned.”). As this Court has observed, permitting EFTs to be interdicted at intermediary banks “would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.” *Id.*

Similarly, this Court in *Jaldhi* explained that, during a period in which this Circuit’s law permitted restraint of EFTs by means of maritime attachments

²⁵ The “Official Comments” of the Uniform Commercial Code “are powerful dicta for the Code is ‘well on its way to becoming a truly national law of commerce,’ and is, therefore, as we have noted, a most appropriate source of federal law.” *In re Yale Express Sys., Inc.*, 370 F.2d 433, 437 (2d Cir. 1966) (citation omitted).

under *Winter Storm Shipping Ltd. v. Thai Petrochemical Industry PCL*, 310 F.3d 263, 278 (2d Cir. 2002), the resulting volume of restraints served on New York banks “led to strains on federal courts and international banks operating within” the Second Circuit to such an extent that “some ha[d] even suggested that *Winter Storm* ha[d] threatened the usefulness of the dollar in international transactions.” *Jaldhi*, 585 F.3d at 61 (citing Permanent Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: Sections 4A-502(d) and 4A-503 (July 1, 2009)).²⁶

B. The Orders Threaten the Proper Functioning of Credit Markets and the Certainty of Necessary Negotiated Workouts and Debt Restructurings.

Leaving to one side the logistical difficulty of requiring Participants to administer the Injunction in real time, as a more general matter, the payment regime envisioned by the Orders will increase litigation both in the United States and elsewhere and make orderly restructuring of much of the world’s New York law-governed sovereign debt impossible.

²⁶ As the Court in *Jaldhi* reported, ultimately the impact that maritime attachments had on banks and international funds transfers post-*Winter Storm* was limited in part because a district court denied a plaintiff’s request for a “continuous service” provision. 585 F.3d at 63 (discussing *Cala Rosa Marine Co., Ltd. v. Sucre et Denes Grp.*, 613 F. Supp. 2d 426, 432 (S.D.N.Y. 2009)). Because an attachment is void unless the bank holds an attachable interest of the debtor at time of service, that district court decision rendered “many maritime attachments effectively unenforceable.” *Jaldhi*, 585 F.3d at 63. In contrast, the Injunction at issue in this proceeding purports to impose a continuing obligation on bank Participants.

First, as a practical matter, the lower court's interpretation of the *pari passu* clause and the Injunction would spur further litigation, rather than provide an effective remedy to plaintiffs. Using the case of the Argentine debt crisis as an example, suppose that when plaintiffs commenced litigation, the Republic had paid them in full in accordance with its obligations under the bonds. Under the lower court's reading of the *pari passu* clause, other bondholders (and, for that matter, any other creditors under instruments containing a *pari passu* clause), could have sought to interfere with the payment to plaintiffs. And if those other creditors succeeded in receiving a Ratable Payment (assuming *arguendo* proration in the context of Argentina's billions of dollars of unsecured and unsubordinated debt entitled to *pari passu* treatment could have sensibly been made), then Argentina and such other creditors (and for that matter these plaintiffs) in turn would be at risk that yet another set of unpaid bondholders would bring a similar action. The resulting web of claims, counterclaims, and cross-claims against Argentina and among creditors would place an enormous burden on courts and make virtually impossible an orderly restructuring of Argentina's indebtedness.

Second, such a broad reading of the *pari passu* clause poses additional threats to the reliable functioning of international payment systems. By stimulating a proliferation of injunctions aimed at payment intermediaries—along the lines of the *Nicaragua* case with respect to Euroclear Bank S.A.—such an

interpretation would inhibit the free flow of funds among financial institutions, create uncertainty as to rights and liabilities, and place intermediary banks in the middle of civil disputes. In this particular instance, it also exposes banks to burdensome discovery. A-3388 (Injunction ¶ 3). Given the prevalence of New York law as the law governing international debt obligations, the Court should not allow a New York court ruling that adopts an interpretation of standard contractual language that is contrary to settled market understanding and expectations and would have such global disruptive implications to stand.

Moreover, if this improbable and unexpected interpretation is affirmed, it will raise questions for market participants about the stability of New York contract law. In the already close competition between New York and other law—particularly English law—when drafters choose a governing law, the outcome of this case is likely to tip the balance, in some instances, away from New York law and New York courts, which will have a deleterious long-term impact on New York’s financial institutions and its preeminence as a financial center.

Finally, such a reading would be highly disruptive to the credit markets that support trillions of dollars of existing non-U.S. unsecured debt issued under New York law with *pari passu* clauses. It is a common and long-established practice for troubled debtors to seek to manage their liabilities by satisfying the obligations of certain creditors (such as short-term trade creditors and holders of

short-term sovereign debt) in order to maintain ongoing operations or, in the case of a foreign sovereign, to cover potential budget deficits relating to necessary domestic programs, while holding off on satisfying obligations to other creditors. These liability management activities in which many debtors engage in the ordinary course with respect to their general, unsecured, unsubordinated obligations would become susceptible to challenge. Any obligor in financial distress and engaged in an effort to manage and negotiate its liabilities could find those efforts frustrated and be driven to insolvency even if insolvency, with its enormously disruptive impact, could otherwise have been avoided. Taken to its logical conclusion, a financially troubled debtor could never pay any unsecured obligation without making a Ratable Payment (which under the Injunction is the full payment of principal and interest) on all other unsecured claims (both financial obligations and trade claims), an absurd and counterproductive proposition.

CONCLUSION

The Clearing House respectfully urges the Court to reverse and vacate the Orders and reaffirm the long-understood meaning of *pari passu* clauses of the type included in Argentina's external debt offerings. Such clauses reflect standard practice and, under New York law, are not properly interpreted to prevent a debtor from paying certain of its unsecured unsubordinated creditors without making Ratable Payment to its other creditors. Allowing courts to convert a bargained-for

pari passu clause into universal sharing clauses would be inconsistent with expectations of credit market participants. Further, the Injunction would impose undue burdens on banks, risk delaying the timely settlement of unrelated payments, and disrupt the stability of these markets.

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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

(caption continued on inside cover)

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

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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)**

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 AQUERRETA,
MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL,
NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO,
CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES,
MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

—v.—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

**BRIEF FOR THE UNITED STATES OF AMERICA AS
AMICUS CURIAE IN SUPPORT OF REVERSAL**

Interest of the United States

Pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this brief as amicus curiae supporting reversal of orders entered by the United States District Court for the Southern District of New York (Griesa, *J.*), on December 7 and December 13, 2011 (the “December Orders”) (SPA 10-25), and February 23, 2012 (the “February 23 Orders”) (SPA 28-54) (collectively, the “Orders”).

This litigation involves efforts by so-called “holdout creditors” to collect on defaulted bonds from the Republic of Argentina (“Argentina”). In 2001, the Argentine government announced a moratorium on its repayment of approximately \$80 billion in public foreign debt. *See NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172, 175 (2d Cir. 2011). Since 2001, Argentina has not made any payments on the defaulted bonds. *Id.* Instead, Argentina restructured approximately 92 percent of its debt by launching global exchange offers in 2005 and 2010, pursuant to which creditors holding the defaulted bonds could exchange them for new securities with modified terms. *Id.* at 176 & n.4. Plaintiffs-appellees

did not accept the exchange offers and instead sought recourse from the courts.

In the December Orders, the district court adopted a broad and novel interpretation of the standard *pari passu* provision found in many sovereign debt instruments. The district court concluded that Argentina breaches the *pari passu* provision whenever it makes payments to those bondholders who accepted the exchange offers without simultaneously paying the full amount of principal and interest owed to plaintiffs-appellees. (SPA 13).

The February 23 Orders in turn require that Argentina pay the full amount due to plaintiffs-appellees whenever Argentina makes a payment under the terms of the exchange bonds. (*See, e.g.*, SPA 33). The court further prohibited third parties from assisting Argentina in servicing payments on the exchange bonds without ensuring that full payment to plaintiffs-appellees are also made. (*See, e.g.*, SPA 34). Finally, the court prohibited Argentina from altering the process by which Argentina makes payments on the exchange bonds without obtaining approval from the court. (*See, e.g.*, SPA 34-35).

In supporting reversal of the Orders, the United States does not condone or excuse a foreign state's failure to comply with the judgment of a U.S. court imposing liability on the state. The United States consistently has maintained, and continues strongly to maintain, that Argentina immediately should normalize relations with all of its creditors, both public and private.

In addition to Argentina's unwillingness to resolve remaining issues with all of its bondholders, the United States has several concerns regarding Argentina's failure to honor its international obligations. We encourage Argentina to continue to work with the International Monetary Fund ("IMF") and to participate in IMF surveillance as required under its Articles of Agreement, to improve its statistical reporting, clear its arrears to the United States and other Paris Club members, and honor final awards of arbitration panels convened under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). Argentina's failure to honor its obligations or to engage with international institutions remains a concern, given that Argentina is a member of the G-20, the IMF, the World Bank, and other international fora, and is a middle-income country with great potential to generate prosperity for its citizens. It is for these reasons that the United States has opposed lending to Argentina through multilateral development banks such as the World Bank and the Inter-American Development Bank. In addition, on March 26, 2012, President Obama suspended Argentina's eligibility under the Generalized System of Preferences program because of Argentina's failure to pay two longstanding ICSID arbitral awards in favor of U.S. companies.

Notwithstanding these concerns regarding Argentina's continued failure to abide by its obligations, and our strong insistence that it do so promptly, the United States respectfully submits this brief because these consolidated appeals raise two issues of vital

public policy and legal importance to the United States that extend beyond the particular facts of this case.*

First, the district court's interpretation of the *pari passu* clause, a boilerplate provision contained in a number of sovereign debt instruments, in a manner that deviates from decades of settled market expectations is contrary to United States economic policy. Notwithstanding recent developments in sovereign debt contracts that promote collective action by creditors, the district court's interpretation of the *pari passu* provision could enable a single creditor to thwart the implementation of an internationally supported restructuring plan, and thereby undermine the decades of effort the United States has expended to encourage a system of cooperative resolution of sovereign debt crises. Allowing creditors recourse to such an enforcement mechanism would have adverse consequences on the prospects for voluntary sovereign debt restructuring, on the stability of international financial markets, and on the repayment of loans extended by international financial institutions ("IFIs"). Accordingly, the United States opposes the adoption of the district court's ratable payment interpretation of the *pari passu* clause as contrary to United States policy interests.

Second, the United States has a significant interest in ensuring that courts correctly construe the laws

* In 2004, the United States filed a Statement of Interest in related litigation addressing the proper interpretation of the *pari passu* clause and the permissible scope of relief against a foreign sovereign. (See A-1760–A-1785).

relating to foreign sovereign immunity, including immunity from enforcement of judgments against the property of foreign states. The issues raised in this appeal regarding the appropriate scope of an injunction issued against a foreign sovereign could affect all foreign sovereigns in U.S. courts, and have a significant, detrimental impact on our foreign relations, as well as on the reciprocal treatment of the United States and its extensive property holdings.

A R G U M E N T

P O I N T I

THIS COURT SHOULD REJECT THE DISTRICT COURT'S INTERPRETATION OF THE *PARI PASSU* CLAUSE IN SOVEREIGN DEBT INSTRUMENTS*

A. The United States Has Long Promoted Consensual, Orderly Sovereign Debt Restructuring Efforts Within a Framework of Contractual Certainty

Recognizing the serious difficulties that sovereign solvency crises present for both sovereign borrowers

* In addition to holding that the *pari passu* clause was violated when Argentina made payments to the holders of exchange bonds without also satisfying its payment obligations under the bonds held by the appellees (SPA-32 at ¶ 5), the district court found that the *pari passu* clause was violated by the enactment of Argentina's Lock Law (SPA-32 at ¶¶ 6-7). The parties here dispute the proper characterization of the Lock Laws. Argentina argues that the Lock Law does not

and the international financial system, the United States has adopted, as a cornerstone of its foreign economic policy, the position that emerging markets should embrace strong macroeconomic policies that will produce economic growth, allow them to fully satisfy their external debt obligations, and strengthen the international financial system. In those rare cases where a sovereign cannot meet its external obligations, however, the policy of the United States is that the orderly and consensual restructuring of sovereign debt, in conjunction with needed macroeconomic adjustments, is the most appropriate response. This policy promotes international economic and financial stability by allowing a debtor nation to move expeditiously past a balance of payment crisis, while at the same time minimizing potentially devastating “ripple effects” that

legally subordinate debt, but merely requires legislative approval to authorize new settlements with bondholders. Brief of Defendant-Appellant the Republic of Argentina (“Arg. Br.”) at 45. Plaintiffs-appellees contend, in contrast, that the Lock Law is a legislative enactment that prohibits payments with respect to their bonds and accords a higher legal preference to the exchange bonds. (A-2122). The United States does not have particular expertise on the application of Argentine law in the context of its 2005 and 2010 debt restructuring. Moreover, legal mechanisms to effectuate a default or a restructuring of debt are likely to vary from country to country, and may not exist in all cases. Accordingly, the United States takes no position as to whether the district court correctly concluded that the enactment of the Lock Law constituted a breach of the *pari passu* clause.

sovereign defaults could otherwise have on the global economy.

In response to the sovereign debt crises of the 1980s, the United States urged sovereign debtors to adopt economic policy reforms in conjunction with increased lending from the IFIs. In a subsequent initiative known as the Brady Plan, the United States explicitly recognized the role restructuring must play in resolving sovereign debt crises. The Brady Plan encouraged commercial banks to find alternatives to new lending in dealing with the sovereign debt problem, and called for debt and debt service reduction by banks. This policy was codified in the International Debt Management Act, 22 U.S.C. § 5324.

Over the past decade, the United States has recognized that the shift of the emerging market creditor base from commercial banks to bondholders has increased uncertainty surrounding the sovereign debt restructuring process and complicated decision-making for private creditors, the public sector, and sovereign debtors alike. Accordingly, the United States has been engaged in a concerted effort to promote greater orderliness and predictability in the restructuring process. The United States has advocated the incorporation of a package of new clauses into sovereign debt contracts that would provide for a more orderly restructuring process and facilitate countries' efforts to restructure their debt in order to reach more rapidly sustainable debt positions.

For example, the United States has encouraged the inclusion of collective action clauses in sovereign debt contracts, which would permit a super-majority of bondholders to amend a debt instrument even when a

minority creditor refuses to agree to the amendment. The United States considers the progress made in this initiative a demonstration that sovereign debt restructuring can be achieved within the existing framework of contractual relations and consensual negotiation.

Despite these actions to promote voluntary restructuring as the solution to sovereign debt crises, the growth of the secondary market for sovereign debt means that creditors have a wide range of financial interests. The disparate nature of creditor interests complicates the orderly resolution of sovereign debt crises, which depends on the voluntary actions of individual debtholders and the affected sovereign state in developing jointly negotiated solutions to balance of payment crises.

In this context, ensuring the certainty and predictability of sovereign contractual relations becomes essential. Indeed, U.S. sovereign debt policy implicitly recognizes the critical role of the contract in resolving a debt crisis. Restructuring negotiations must take place within a framework where creditors can seek recourse to the courts to enforce contractual obligations. Moreover, creditors must be assured that the terms of any new debt instruments issued pursuant to a restructuring plan will be legally enforceable. It would, however, harm the process that has evolved to address sovereign debt problems if creditors, in negotiating with debtors, also retained the option to litigate to obtain incorrect interpretations of standard terms that are not supported by commercial market practice. Because it is the United States' policy that neither party should be allowed to alter through litigation the terms of a

sovereign debt instrument, it is vital that such terms be interpreted according to settled market understanding.

Settled market understanding most clearly reflects the *ex ante* understanding of the parties at the time they entered their contractual relationship. In contrast, altering settled market understanding of existing debt instruments renders contractual relations less certain. International markets are adversely affected by uncertainty regarding provisions in sovereign debt instruments, particularly where, as here, it injects further unpredictability and disorder into the already complex problems posed by sovereign defaults. Such a lack of certainty could also discourage international lending to distressed sovereigns.

B. The District Court's Interpretation of the *Pari Passu* Clause Disrupts Settled Expectations, and Is Incorrect as a Matter of Law and Adverse to the United States' Policy Interests

The district court's construction of the *pari passu* clause in the December Orders is both contrary to the settled understanding of this standard contractual provision and at odds with the established framework for resolving sovereign payment crises through consensual restructuring of debt.

1. The Ratable Payment Interpretation of the *Pari Passu* Clause Is Incorrect and Creates Uncertainty in Sovereign Contractual Relationships

As an initial matter, by failing to analyze, let alone defer to, the market understanding of boilerplate language in a commercial instrument, the district

court's decision was contrary to New York law, which governs the interpretation of the loan documents at issue. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) (“[T]he creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital markets.”); *In re Southeast Banking Corp.*, 93 N.Y.2d 178, 183-84 (1999) (noting importance of settled marking understanding in construing terms of indenture instruments). Moreover, because *pari passu* clauses substantially similar to those at issue here have been common in sovereign debt instruments since the 1970s, adoption of the district court's novel interpretation is likely to disrupt financial markets for a considerable period.

a. Longstanding Market Practice Supports a Narrow Reading of the *Pari Passu* Clause

The United States accepts the established market understanding of *pari passu* clauses in sovereign debt instruments. “The international financial markets have long understood the [*pari passu*] clause to protect a lender against the risk of legal subordination in favor of another creditor” Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 Emory L.J. 869, 870 (2004); *see also id.* at 872 n.3; Rodrigo Olivares-Caminal, *Understanding the Pari Passu Clause in Sovereign Debt Instruments: A Complex Quest*, 43 Int’l Law. 1217, 1227 (Fall 2009) [hereinafter, “*Understanding the Pari Passu Clause*”]; Philip R. Wood, *Pari Passu Clauses—What Do They*

Mean?, 18 Butterworths J. of Int'l Banking and Financial L. 371, 372 (2003).

It is clear that the market does not understand the *de facto* actions or policies of a sovereign regarding payment of its debt obligations to affect the “rank” of debt within the meaning of the *pari passu* clause. To the contrary, market understanding has consistently reflected that a “borrower does not violate [the *pari passu*] clause by electing as a matter of practice to pay certain indebtedness in preference to the obligations outstanding under the agreement in which this clause appears.” Lee C. Buchheit & Ralph Reisner, *The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, 1988 U. Ill. L. Rev. 493, 497 (1988). The customary inclusion of *pari passu* provisions in sovereign debt instruments throughout the 1980s and 1990s was never viewed as a barrier to the resolution of sovereign defaults on foreign loans through the negotiation of consensual rescheduling and restructuring agreements. In fact, it was common practice throughout this period for sovereigns to exclude some debt from restructuring—such as debt owed to trade creditors or multilateral lending institutions—while restructuring other public debt. See Buchheit & Pam, *supra*, at 883.*

* This was consistent with historical sovereign lending practice. In his treatise, former Yale law professor Edwin Borchard described how the principle of equal treatment of sovereign debt was understood in the early twentieth century, before the term “*pari passu*” had entered the sovereign debt lexicon:

b. The Ratable Payment Interpretation of the *Pari Passu* Clause Deviates From This Settled Market Understanding

Notwithstanding this settled commercial understanding, in September 2000, a Belgian court in an *ex parte* proceeding relied upon the *pari passu* clause to enjoin payments by Peru through Euroclear to the holders of bonds issued under a restructuring

The principle of equality . . . does not signify uniformity of treatment. . . . While the private law of bankruptcy is governed by the principle of equality of claims in the distribution of the debtor's assets, differential treatment of the holders of foreign government bonds in case of default is the ordinary rule. The reason therein lies in the semipolitical nature of government loans and in the great variety of forms and purposes for which such loans are issued.

Edwin Borchard, 1 *State Insolvency and Foreign Bondholders* 337-38 (1951). Professor Borchard went on to note the variety of ways in which discrimination among classes of state obligations had been tolerated in the past. For example, creditors tolerated preferences in favor of certain other creditors in order for the state to maintain its basic functions (*e.g.*, salaries for public employees) and to conduct trade (*e.g.*, preferred payment of short-term trade credits over longer term external loan contracts). *Id.*

agreement. See *Elliot Assocs., L.P. v. Banco de la Nacion*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels, 8th Chamber, Sept. 26, 2000). The Belgian Court of Appeals held, without citation to any authority, that “the various creditors benefit from a *pari passu* clause that in effect provides that the debt be repaid *pro rata* among all creditors.” *Id.* at 3. The Peruvian government was ultimately forced to pay substantially all of the holdout creditor’s debt to avoid defaulting on its Brady Bonds. See *Understanding the Pari Passu Clause*, *supra*, at 1225.

The Belgian court’s construction of the *pari passu* clause deviated from well-established market practice and was viewed with almost universal consternation by international financial markets. See, e.g., Mark Weidemaier, Robert Scott & G. Mitu Gulati, *Origin Myths, Contracts and the Hunt for Pari Passu*, UNC Legal Studies Research Paper No. 1633439, at 5 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1633439 (“The decision sent shockwaves through the sovereign debt world”); Rodrigo Olivares-Caminal, *To Rank Pari Passu or Not to Rank Pari Passu: That is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga*, 15 Law and Business Review of the Americas 745, 746 (2009) [hereinafter “*To Rank Pari Passu*”]; Michael H. Bradley, James D. Cox & Mitu Gulati, *The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market*, 39 J. Legal Studies 289, 303 (2010) (“[T]he [Belgian] court’s decision came as a shock to the market and was clearly unanticipated.”).

Most commentators concluded that the Belgian court had misconstrued the *pari passu* clause in a way that would cause problems in the sovereign debt markets. *See, e.g.*, Financial Markets Law Committee, *Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law*, at 9-22 (2005) (A-1823–A-1849) (noting that the Belgian court’s interpretation would be unworkable and contrary to market practice); *To Rank Pari Passu*, *supra*, at 746; Weidemaier, Scott & Gulati, *supra*, at 2; Buchheit & Pam, *supra*, at 917; G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 640 (2001).

The Belgian government itself effectively overruled the *Elliot* decision in November 2004, by enacting legislation that precludes holdout creditors from obtaining orders blocking payments through Euroclear in future cases. *See* Belgium Law 4765 [C-2004/03482]; Bradley, Cox & Gulati, *supra*, at 9, 15 & n.33.*

* Although two other lower level courts have issued orders requiring a sovereign to make *pro rata* payments to holders of defaulted sovereign debt instruments, neither court engaged in any substantive consideration of the *pari passu* clause, and both orders were later vacated. A Belgian court enjoined Euroclear from making payments to holders of debt instruments issued by the Republic of Nicaragua, but this decision merely adhered to the precedent set by the *Elliot* decision. *Republic of Nicaragua v. LNC Investments and Euroclear Bank S.A.*, Docket No. 240/03 (Brussels Commercial Ct. Sept. 11, 2003). This decision was reversed on appeal on grounds unrelated to the

The one court to examine the *pari passu* clause in depth since the *Elliot* decision was issued expressed skepticism regarding its conclusion. In *Kensington Int'l Ltd. v. Republic of the Congo*, 2002 No. 1088, [2003] EWHC 2331 (Comm) (Commercial Ct. Apr. 16, 2003), the court denied an application for an injunction requiring Congo to make *pro rata* payments to its creditors. The court ultimately based its decision upon, *inter alia*, the excessive and intrusive nature of the injunction that was sought. *Id.* at ¶¶ 93-94. The court nonetheless observed that it gave “little weight” to the *Elliot* decision, which “was made upon an *ex parte* application,” *id.* at ¶ 63, and which was contrary to language in the Encyclopaedia of Banking Law stating that the *pari passu* clause is not violated “merely because one creditor is, in fact, paid before another,” *id.* at ¶ 67.

interpretation of the *pari passu* clause. In another case, a district court in California denied a judgment creditor’s motion for specific performance of the *pari passu* clause. Despite denying that motion, the court nonetheless enjoined the Democratic Republic of Congo from making payments on any debts unless proportionate payments were made to the plaintiff in that case. Order dated May 21, 2001, *Red Mountain Finance, Inc. v. Democratic Republic of Congo*, No. CV-00-0164 R (C.D. Cal.) (A-1369–A-1372). The district court’s order contained no reasoning and so it is unclear on what basis the court entered the injunction. In any event, the injunction was vacated after the parties arrived at a settlement while the case was on appeal. (A-2216–A-2225).

Like the *Elliot* decision, the district court's decision here failed to analyze market practices or commercial understanding of the *pari passu* clause, much less consider how its interpretation of the *pari passu* clause might affect the financial markets. Because the district court's interpretation of the *pari passu* clause disrupts settled expectations concerning the scope and effect of boilerplate language contained in many sovereign debt instruments, it is contrary to U.S. policy interests. See Gulati & Klee, *supra*, at 649-50.

2. The Ratable Payment Interpretation of the *Pari Passu* Clause Would Disrupt the Orderly Resolution of Sovereign Debt Crises

The district court's broad interpretation of the *pari passu* clause also imperils the United States' efforts to promote voluntary debt restructuring, along with macroeconomic reform and support as necessary from the IFIs, as the most effective way to resolve sovereign balance of payment crises while minimizing economic damage. Voluntary sovereign debt restructuring will become substantially more difficult, if not impossible, if holdout creditors are allowed to use novel interpretations of boilerplate bond provisions to interfere with the performance of a restructuring plan accepted by most creditors and to dramatically tilt the incentives away from consensual, negotiated restructuring in the first place.

Reinterpreting standard *pari passu* clauses after decades of settled market practice could change the balance of interests that, to date, has induced the majority of creditors and debtors to recognize a

mutuality of interest in finding jointly negotiated solutions to balance of payment crises. The ratable payment interpretation of the *pari passu* clause presents a classic collective action problem: no creditor will be willing to accept the reductions in debt necessary for a consensual restructuring plan if creditors are contractually guaranteed to receive the full amount of their outstanding loan obligation at some point in the future, when the sovereign inevitably makes payment on other external indebtedness. Moreover, if, as happened in *Elliot*, creditors can interfere with payments by sovereign debtors to those creditors who have already accepted a reduction in the sovereign's debt obligation, this will reduce the incentives of such creditors to agree to a restructuring.

At the same time, the knowledge that creditors might be able to rely upon the *pari passu* clause to leverage greater recoveries from sovereign debtors would encourage more creditors to pursue holdout litigation strategies. See *Understanding the Pari Passu Clause*, *supra*, at 1219. The threat of increased litigation by holdout creditors relying upon the *pari passu* clause to target the implementation of a debt restructuring plan undermines the orderly consensual restructuring process the United States has been at pains to foster for the past several decades.

Indeed, a broad construction of the *pari passu* clause could ultimately involve the federal courts in rendering determinations concerning payments on Argentina's debts of all kinds and in many countries, including in Argentina itself. This may force the district court to assume the role of a sovereign bankruptcy court, issuing stays on all outflow of Argentina's assets and

supervising the timing and amount of payments made by Argentina to its creditors.

Finally, the ratable payment interpretation could have the cascading effect of turning short-term and limited balance of payment problems into full-fledged sovereign defaults. It was partly for this reason that the Financial Markets Law Committee (“FMLC”), an independent committee of private sector English lawyers sponsored by the Bank of England, rejected the ratable payment construction of the *pari passu* clause as unworkable and contrary to market practice. FMLC, *supra*, at 13-15. The FMLC observed that, following the ratable payment theory to its natural conclusion could have dramatic consequences: Because the ratable payment construction of the *pari passu* clause prohibits the creation of preferences among creditors, as soon as a sovereign became unable to pay all of its external indebtedness, even temporarily, the sovereign’s only options would be to default on all of its outstanding obligations or violate the *pari passu* clause by prioritizing payments. *Id.* at 14. The *pari passu* clause should not be read to have such drastic implications.

3. The Ratable Payment Interpretation of the *Pari Passu* Clause Could Prevent Sovereign Debtors From Servicing Debts to International Financial Institutions

The ratable payment interpretation of the *pari passu* clause adopted by the district court could also impede the repayment of loans extended by IFIs to sovereigns experiencing unserviceable debt burdens. Although the district court’s holding that Argentina breached the *pari passu* clause by its terms is limited to

Argentina's payments to holders of exchange bonds, the logical implication of its decision is that any selective payment of external indebtedness by a sovereign debtor, including to IFIs, constitutes a violation of the *pari passu* clause.

The United States relies upon the IFIs to play a critical role in resolving sovereign debt crises. The IFIs were established by the international community to advance shared public policy interests in promoting global economic growth and stability. For example, the IMF—with U.S. urging—played a central role in the international financial community's efforts to tackle the Latin debt crises of the 1980s, to promote the transition of Eastern European and former Soviet Union economies to market-based systems, and to address the Asian financial crisis in the second half of the 1990s.

Most recently, the IMF has worked with private bondholders and European leaders to restructure Greece's sovereign debt, thereby preventing a disorderly Greek default. The IMF has provided critical support for economic reform programs in Greece, Ireland, and Portugal in partnership with Europe, actions that have helped limit the damage from the European financial crisis to the United States and to economies around the world.

The IFIs—with the encouragement of the United States and other members—provide financial support to reforming countries at times when private capital is unavailable. Continued financial support for nations facing balance of payment difficulties and undertaking needed reforms is vital to maintaining the stability of the international financial system. *See, e.g.*, International Monetary Fund, Policy on Lending into

Arrears to Private Creditors, available at <http://www.imf.org/external/pubs/ft/privcred/> (1999).

The IFIs would be hampered in their ability to serve this function were they no longer able to expect timely and complete payments from their borrowers. See John W. Head, *Suspension of Debtor Countries' Voting Rights in the IMF: An Assessment of the Third Amendment to the IMF Charter*, 33 Va. J. of Int'l Law 591, 603-04 (1993). Therefore, as a matter of established custom, sovereign debtors routinely service debts owed to IFIs—even though those debtors may lack the resources to pay their other obligations. This custom is well understood by the international financial community. See, e.g., Matthew H. Hurlock, *New Approaches to Economic Development: The World Bank, the EBRD, and the Negative Pledge Clause*, 35 Harv. Int'l L. J. 345, 365-66 (1994); Testimony of Deputy Assistant Secretary Mark Sobel Before the House Oversight Committee on TARP, Financial Services, and Bailouts of Public and Private Programs (Dec. 16, 2011), available at <http://www.hftreview.com/pg/newsfeeds/hftreview/item/30378/written-testimony-of-deputy-assistant-secretary-mark-sobel-before-the-house-oversight-and-government-reform-subcommittee-on-tarp-financial-services-and-bailouts-of-public-and-private-programs-what-the-euro-crisis-means-for-taxpayers-and-the-us-economy> (“The Fund is regarded as the world’s preferred creditor, meaning that the IMF’s member countries acknowledge and agree that it gets repaid first.”); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, div. I, Pub. L. No. 112-74, § 7071(b), 125 Stat. 786.1254 (2011) (directing the Secretary of the Treasury to “instruct the United States Executive Director of the [IMF] to seek to ensure that

any loan will be repaid to the IMF before other private creditors”). Any interpretation of the *pari passu* clause that would potentially prevent states from continuing to service their IFI debt during, or as they emerge from, financial crisis is contrary to U.S. interests.

POINT II

THE DISTRICT COURT’S ORDERS ARE IMPERMISSIBLY BROAD

The district court exceeded the permissible scope of its jurisdiction when it directed a sovereign state to marshal assets that are immune from the court’s exercise of its execution powers under the Foreign Sovereign Immunities Act of 1976 (“FSIA”) restrained the sovereign’s use of such immune property, and commanded the sovereign to refrain from altering its processes for servicing its debt obligations to third parties not before the court. In the context of the FSIA, such an injunction constitutes a “breathhtaking assertion of extraterritorial jurisdiction,” *Autotech Technologies LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007), and, as discussed in further detail below, is inconsistent with directly relevant Second Circuit precedent. Furthermore, the extraordinary intrusiveness of the Orders could have adverse effects on our foreign relations and pose reciprocal concerns with respect to U.S. government assets.

A. The Orders Contravene the Purpose and Structure of the FSIA

The injunctive relief ordered by the district court must be considered against the backdrop of the

statutory scheme established in the FSIA. The FSIA sets out the “sole, comprehensive scheme” for obtaining and enforcing a judgment against a foreign state in a civil case in the U.S. courts. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); Foreign Sovereign Immunities Act of 1976, House Report No. 94-1487, 5 U.S.C.A.A.N. 6604, 6610 (Sept. 9, 1976) [hereinafter H.R. 94-1487] (the FSIA “prescribes . . . [the] circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment”). Under the FSIA, a foreign state is immune from jurisdiction except as immunity is removed by statute, 28 U.S.C. § 1604, and foreign state-owned property is “immune from attachment arrest and execution except as provided in” 28 U.S.C. §§ 1610 and 1611, 28 U.S.C. § 1609. Accordingly, the FSIA does not provide for plenary enforcement of the orders of U.S. courts, but instead cabins courts’ enforcement authority to those mechanisms set forth in the statute. *Id.* §§ 1609-1611.

The FSIA’s presumption of enforcement immunity contains exceptions for foreign state property located “in the United States” that is “used for a commercial activity in the United States” and that meets one of seven other requirements, 28 U.S.C. § 1610(a). Sovereign property located outside of the United States plainly falls outside the court’s enforcement authority. *See, e.g., Walters v. Industrial and Comm. Bank of China, Ltd.*, 651 F.3d 280, 288-89 (2d Cir. 2011) (noting that “special protection [is] afforded to the property of a foreign sovereign” under the FSIA because the judicial seizure of sovereign property is viewed as a

greater affront to sovereignty than the exercise of jurisdiction over a state by itself); *Walters v. People's Republic of China*, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009) (citing cases). “The FSIA did not purport to authorize execution against a foreign state’s property . . . wherever that property is located around the world.” *Autotech*, 499 F.3d at 750.

The FSIA’s carefully circumscribed limits on the judiciary’s exercise of jurisdiction over sovereigns and foreign state property reflect a deliberate policy choice on the part of Congress. As Congress recognized at the time it enacted the FSIA, “enforcement [of] judgments against foreign state property remains a somewhat controversial subject in international law.” H.R. 94-1487, 5 U.S.C.A.A.N. at 6626. The judicial seizure of the property of a foreign state may well “be regarded as ‘an affront to its dignity and may . . . affect our relations with it.’” *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008). Accordingly, the provisions of the FSIA allowing execution against foreign state property impose limits on the extraterritorial exercise of jurisdiction by U.S. courts. *See, e.g., Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088-89 (9th Cir. 2007).

According to Argentina, “the Republic makes its payments on the restructured debt *outside the United States* when it transfers the necessary funds to a trustee.” Arg. Br. at 50. If plaintiffs were to reduce their claims to money judgment, they would be prevented from seeking to attach the funds utilized to pay the exchange bonds under the FSIA’s strictures on enforcement of judgments, as the funds at issue are located outside the United States. Presumably in an

effort to avoid these restrictions, plaintiffs-appellees chose instead to move for equitable relief that purports to constrain Argentina's use of such property.

A court may issue an injunction against a sovereign only if it is "clearly appropriate." H.R. 94-1487, 5 U.S.C.A.A.N. at 6621. An injunction restraining a sovereign's use of property that the FSIA expressly provides is immune from execution is inconsistent with the structure of the FSIA and thus not "clearly appropriate."

Although the injunctions at issue here do not formally effectuate a transfer of property interests, the February 23 Orders have the practical effect of requiring Argentina to transfer funds amounting to the balance of principal and interest owed to plaintiffs-appellees on the next occasion that it makes a payment on the exchange bonds. Courts are not permitted to achieve by injunction what they are prohibited from doing in the exercise of their limited execution authority under the FSIA. See *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983).

In *S&S Machinery Co.*, this Court considered the propriety of an injunction that restrained the use of assets that were immune from attachment under the FSIA. The Court squarely rejected the notion that a district court's jurisdiction over a foreign state permitted it to restrain the use of sovereign property that was not itself subject to the court's jurisdiction:

[S]uch [an injunction] could only have resulted in the disingenuous flouting of the FSIA ban on prejudgment attachment of assets belonging to a

‘foreign state’. . . . The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property. We hold that courts in this context may not grant, by injunction, relief which they may not provide by attachment.

Id. at 418; *see also Weston Compagnie de Finance et D’Investissement, S.A. v. Republic del Ecuador*, 823 F. Supp. 1106, 1115-16 (S.D.N.Y. 1993) (denying injunction that directed sovereign to return funds that had passed through New York but were now located abroad).

Courts have repeatedly resisted creditors’ attempts to evade the restrictions on enforcement set forth in the FSIA, even if creditors frame the collection method as an exercise of jurisdiction over the sovereign, rather than the sovereign’s property. For example, in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), the Ninth Circuit rejected a creditor’s argument that the court’s exercise of *in personam* jurisdiction over a sovereign provided it with authority to enter an order requiring the sovereign to assign foreign state assets located outside the United States, and hence immune from execution under the FSIA, to the creditor. *Id.* at 1130-32 (“The FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property.”); *see also Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian*, 218 Cal.

App. 3d 1058, 1094, 1099-100 (Cal. Ct. App. 1990) (rejecting argument that assignment order applying to assets worldwide would be “a valid exercise of the court’s personal jurisdiction” over state instrumentality, because such an order would “ignore a long-standing immunity under international law and under the FSIA,” and give the creditor what he could not achieve “through ordinary creditors’ remedies, namely, execution upon foreign property”); *cf. Walters*, 651 F.3d at 288-89 (“[T]he FSIA’s provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently.”).

To the extent that plaintiffs-appellees rely upon section 1606 as the basis for the district court’s authority to enter the injunctions, this argument is unavailing. Section 1606 establishes that, with respect to a claim for which a state is not entitled to immunity, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 1606. Yet section 1606 concerns “the scope of *liability*, [not] the scope of *execution*. Although [a state] may be found liable in the same manner as any other private defendant, the options for executing a judgment remain limited.” *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011) (rejecting argument that section 1606 provides authority to subject sovereign to broad discovery orders in aid of execution of judgment). Accordingly, section 1606 does not expand upon the enforcement remedies that are available against a sovereign defendant. *See Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 209 (5th Cir. 1994). Nor is it even clear that a U.S. court would have the authority to issue such

a broad injunction—which also purports to bind non-parties in Argentina—against a private party.

In sum, parties cannot avoid the limitations deliberately imposed by Congress on judicial execution authority and expand the scope of remedies available to them in an action against a sovereign simply by refraining from asking the court to reduce their claims to judgment. There is no indication in the statutory text or history that Congress intended for litigants to be able to sidestep sections 1609-1611 by seeking an injunction that restrains the sovereign's use of immune assets until a judgment is satisfied, rather than an order of execution against those same assets.

B. The Orders Are Harmful to the United States' Foreign Relations

In addition to being contrary to the purpose and structure of the FSIA, the February 23 Orders could cause heightened tensions in our foreign relations. The United States' views regarding the foreign policy implications of particular exercises of a court's jurisdiction under the FSIA are accorded deference by the courts. *See, e.g., Af-Cap*, 462 F.3d at 428 n.8; *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 69-74 (2d Cir. 2005).

As an initial matter, the same foreign relations concerns that animate the FSIA's restrictions on execution of judgments with respect to sovereign property located abroad exist whether the order is denominated an order of attachment or an injunction restricting the use of sovereign funds. Although there is a widespread acceptance in modern international law that foreign states' immunity from adjudication may be

restricted, “immunity from enforcement jurisdiction remains largely absolute,” and “a foreign State continues largely immune from forcible measures of execution against its person or property.” H. Fox, “International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States,” in M. Evans, ed., *International Law*, 364, 366, 371 (2003).

Moreover, the laws of many foreign nations do not even permit a court to enter an injunction against a foreign state, and the foreign state may expect the United States to extend to it the same respect and courtesy. It is important to recognize in this regard the strongly held view of many foreign states that they are not subject to coercive orders of U.S. courts. *See* Fox, *supra*, at 371 (“Nor may an injunction or order for specific performance be directed by a national court against a foreign State on pain of penalty if not obeyed.”). The potential for affront is particularly heightened where, as here, the U.S. court purports to control the foreign state’s conduct within its own borders. The breadth of the injunctions at issue here, which not only purport to exercise jurisdiction over foreign state property, but also have the effect of dictating to a sovereign state the implementation of its sovereign debt policy within its own territory, is particularly likely to raise foreign relations tensions.

The February 23 Orders are also problematic in their application to third parties. An order by a U.S. court directing third parties’ actions with respect to foreign property could lead to friction in our foreign relations by imposing obligations on foreign persons or entities with possession of foreign state assets. Such third parties might have inconsistent obligations with

regard to those assets as a matter of domestic law or by contract.

Finally, an order by a U.S. court authorizing execution against foreign state property could have adverse consequences for the treatment of the United States and its property abroad under principles of reciprocity. As the D.C. Circuit recognized in *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), because “some foreign states base their sovereign immunity decisions on reciprocity,” a U.S. court’s decision to exercise jurisdiction over a foreign state can “subject the United States to suits abroad” in like circumstances. The district court’s Orders restraining the use of foreign state property and purporting to direct the conduct of a sovereign state could encourage foreign courts to issue like orders against the United States and its property abroad.

CONCLUSION

For the foregoing reasons, the Orders should be reversed.

Dated: New York, New York
April 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 6924 words in this brief.

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*United States Attorney for the
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By: JEANNETTE A. VARGAS,
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EXHIBIT U

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3/5/2012

NML CAPITAL, LTD.,

Plaintiff,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

No. 08 Civ. 6978 (TPG)

No. 09 Civ. 1707 (TPG)

No. 09 Civ. 1708 (TPG)

AURELIUS CAPITAL MASTER, LTD. and
ACP MASTER, LTD.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

No. 09 Civ. 8757 (TPG)

No. 09 Civ. 10620 (TPG)

AURELIUS OPPORTUNITIES FUND II, LLC
and AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

No. 10 Civ. 1602 (TPG)

No. 10 Civ. 3507 (TPG)

(captions continue on following pages)

~~PROPOSED~~ ORDER PURSUANT TO FRCP 62(C)

----- X	
AURELIUS CAPITAL MASTER, LTD. and	:
AURELIUS OPPORTUNITIES FUND II, LLC,	:
	: No. 10 Civ. 3970 (TPG)
Plaintiffs,	: No. 10 Civ. 8339 (TPG)
	:
- against -	:
	:
THE REPUBLIC OF ARGENTINA,	:
	:
Defendant.	:
	:
----- X	
BLUE ANGEL CAPITAL I LLC,	:
	:
Plaintiff,	: No. 10 Civ. 4101 (TPG)
	: No. 10 Civ. 4782 (TPG)
	:
- against -	:
	:
THE REPUBLIC OF ARGENTINA,	:
	:
Defendant.	:
	:
----- X	
PABLO ALBERTO VARELA, et al.,	:
	:
Plaintiffs,	: No. 10 Civ. 5338 (TPG)
	:
- against -	:
	:
THE REPUBLIC OF ARGENTINA,	:
	:
Defendant.	:
	:
----- X	

-----X		:
OLIFANT FUND, LTD.,		:
		:
Plaintiff,		:
		:
- against -		:
		:
THE REPUBLIC OF ARGENTINA,		:
		:
Defendant.		:
		:
-----X		

No. 10 Civ. 9587 (TPG)

WHEREAS, in Orders dated December 7, 2011, and December 13, 2011, this Court found that, under Paragraph 1(c) of the 1994 Fiscal Agency Agreement (“FAA”), the Republic is “required . . . at all times to rank its payment obligations pursuant to Plaintiffs’ Bonds at least equally with all the Republic’s other present and future unsecured and unsubordinated External Indebtedness.”

WHEREAS, in its December 7, 2011 and December 13, 2011 Orders, this Court granted partial summary judgment to Plaintiffs on their claims that the Republic has breached, and continues to breach, its obligations under Paragraph 1(c) of the FAA by, among other things, “ma[king] payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under Plaintiffs’ bonds.”¹

WHEREAS, in Orders dated February 23, 2012 entered in the above-captioned actions (the “February 23, 2012 Orders”), this Court granted Plaintiffs’ motion for equitable

¹ The “Exchange Bonds” refer to bonds or other securities issued by the Republic pursuant to its 2005 and 2010 exchange offers.

relief as a remedy for such violations of the FAA pursuant to Rule 65(d) of the Federal Rules of Civil Procedure and the Court's inherent equitable powers.²

And WHEREAS the Republic intends to appeal the February 23, 2012 Orders and all underlying and/or associated orders to the U.S. Court of Appeals for the Second Circuit, and has moved for a stay of the February 23, 2012 Orders during the pendency of such appeal,

It is HEREBY ORDERED that:

1. Pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, the effect of the February 23, 2012 Orders is stayed until the U.S. Court of Appeals for the Second Circuit has issued its mandate disposing of the Republic's appeal of the February 23, 2012 Orders.

2. To secure Plaintiffs' rights during the pendency of the Republic's appeals of the February 23, 2012 Orders to the Second Circuit, it is ordered that the Republic shall not during the pendency of the appeal to the Second Circuit take any action to evade the directives of the February 23, 2012 Orders in the event they are affirmed, render them ineffective in the event they are affirmed, or diminish the Court's ability to supervise compliance with the February 23, 2012 Orders in the event they are affirmed, including without limitation, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without prior approval of the Court.

3. With consent of the Plaintiffs and on terms agreeable to the parties, the Republic shall file a motion in the Second Circuit requesting that the court of appeals accord the Republic's forthcoming appeal of the February 23, 2012 Orders expedited treatment in accordance with a schedule agreed upon by the parties.

² The Court granted to Olifant Fund, Ltd. the relief that it granted to the plaintiffs in the other above-captioned actions in a single order, dated February 23, 2012.

4. This Court shall retain jurisdiction to monitor and enforce this ORDER, and, on notice to the parties, to modify, amend, or extend it as justice requires to achieve its equitable purposes and to account for materially changed circumstances, including any failure by the Republic to abide by Paragraph (2) herein.

Dated: New York, New York
March 5, 2012

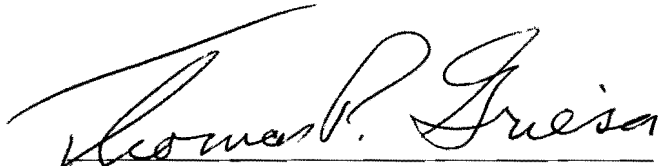

Thomas P. Griesa
U.S. District Judge

EXHIBIT V

05-1543-cv(L)

05-1544(CON)

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

NML CAPITAL, LTD.,

Plaintiff-Appellant,

—against—

REPUBLIC OF ARGENTINA,

Defendant-Appellee.

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

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NML CAPITAL, LTD.,

Plaintiff-Appellant,

- V -

THE REPUBLIC OF ARGENTINA,

Defendant-Appellee.

Docket Nos. 05-1543-cv (L), 05-1544 (CON)

RULE 26.1 STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), Plaintiff-Appellant NML Capital, Ltd. states that there is neither a parent corporation to NML Capital, Ltd., nor is there a publicly held corporation that owns 10% or more of its stock.

Dated: New York, New York
April 7, 2005

Respectfully submitted,

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By_

Kevin S. Reed

Attorneys for Plaintiff-Appellant NML Capital, Ltd.

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PRELIMINARY STATEMENT

The March 29, 2005 Order of the United States District Court (Griesa, J.), vacating and refusing to confirm an Order of Attachment granted by the District Court on March 21, 2005, should be reversed. The District Court's opinion in support of its March 29, 2005 Order is reproduced in the Joint Appendix at 1156-67, and in the Special Appendix attached hereto.

STATEMENT OF ISSUES PRESENTED

1. Where a potential judgment debtor owns a vested right to take delivery and assume ownership of a quantity of bonds, does the fact that the potential judgment debtor will have, among the full panoply of ownership rights, the further right, but not an obligation, to cancel the bonds negate the potential judgment creditor's right to attach the potential judgment debtor's interest in the bonds under the pre-judgment attachment provisions of New York law?

2. Where the potential judgment debtor asserts that pre-judgment attachment of consideration owed it under a contract may interfere with one or more of the uses to which the debtor had hoped to put that consideration, does such asserted disappointment render the consideration immune from pre-judgment attachment under New York law?

3. Does a potential judgment debtor's threat to destroy the value of property if it is seized under an Order of Attachment render the property not subject to pre-judgment attachment under New York law?

STATEMENT OF THE CASE

On November 7, 2003, Appellant NML Capital, Ltd. ("NML") filed the first of these actions, seeking to recover principal and interest due and owing on some \$170 million in defaulted bonds issued by the Republic of Argentina ("Argentina"). (A. 8-67). On February 28, 2005, NML filed the second of these actions, seeking to recover principal and interest due and owing on some \$32 million in Argentine Floating Rate Accrual Notes. (A. 68-89).

On March 21, 2005, NML, acting in both cases, sought and obtained from the District Court an *ex parte* Order of Attachment, pursuant to Rule 64 of the Federal Rules of Civil Procedure and the relevant provisions of the New York Civil Practice Law and Rules. The Order of Attachment directed the attachment of \$7 billion principal amount of Argentine bonds that had recently been tendered to Argentina in connection with a debt exchange offer Argentina is pursuing. (A. 489-93). The Order of Attachment also applied generally to property of Argentina within New York State that is subject to attachment under federal law and New York State law. *Id.*

On March 24, 2005, Argentina moved by Order to Show Cause to vacate the Order of Attachment. (A. 494-95). The District Court heard the motion on March 29, 2005 and, following a lengthy argument, vacated the Order of Attachment. NML believes the District Court's vacatur order (the "Order") is subject to appeal as of right, but, in an abundance of caution, NML asked the Court to certify its Order for appeal, pursuant to 28 U.S.C. § 1292(b). The District Court did so, in writing, on March 30, 2005. (A. 1168-69). The District Court also stayed the Order pending appeal. (A. 1165-66).

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the underlying actions between NML and Argentina under 28 U.S.C. § 1330, as Argentina is a Foreign State that has explicitly and unconditionally waived sovereign immunity with respect to actions to collect on the bonds held by NML and is, therefore, not entitled to immunity under 28 U.S.C. §§ 1605-07 or under any applicable international agreement.

On March 29, 2005, the District Court entered its Order vacating the *ex parte* Order of Attachment it had granted in favor of NML in these two actions on March 21, 2005. NML timely filed its notices of appeal from the Order on March 31, 2005. This Court has jurisdiction over NML's appeal from the Order pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. This Court also has jurisdiction over NML's appeal pursuant to 28 U.S.C. § 1292(a) because the Order dissolved an

injunction. Alternatively, this Court has jurisdiction over NML's appeal pursuant to 28 U.S.C. §1292(b) because the District Court entered a written order conditionally certifying the question presented in NML's appeal in the event that this Court concludes that the Order is not otherwise appealable under 28 U.S.C. §1291 or 28 U.S.C. §1292(a). In its certification order, the District Court ruled "that (a) an appeal of [the Order]. . . presents controlling questions of law on which there is substantial ground for a difference of opinion and that (b) an immediate appeal from the Order would materially advance the ultimate termination of the litigation." (A. 1168-69).

STATEMENT OF FACTS

Argentina's Default on its Foreign Debt

NML owns a beneficial interest in \$60,244,000 of a certain global bond issued by Argentina on February 3, 2000 (due in 2020), with interest accruing at 12% annually (the "12% Bond"), and a beneficial interest in \$111,909,000 of another global bond issued by Argentina on July 21, 2000 (due in 2030), with interest accruing at 10¼% annually (the "10¼% Bond"). (A. 438). NML is also the owner of \$32,000,000 principal amount of certain Floating Rate Accrual Notes issued by Argentina and maturing on April 10, 2005 (the "FRANs").¹ *Id.* The

¹ NML and entities under common control purchased the Argentine bonds and notes at issue in these actions for well over \$100 million. (A. 438). Virtually all of the 12% and 10¼% Bonds held by NML – more than 92% – were purchased prior to Argentina's default. *Id.* The FRANs were purchased on September 14, 2004. *Id.*

12% Bond, the 10¼% Bond and the FRANs were all issued under, and are subject to the terms of, a Fiscal Agency Agreement, dated October 19, 1994 (the “FAA”) between the Republic of Argentina and Bankers Trust Company, as Fiscal Agent. (A. 15-67, 439).

In December 2001, Argentina announced a “moratorium” on servicing its external debt. *See Allan Applestein TTEE FBO D.C.A. v. Argentina*, No. 02 Civ. 4124 (TPG), 2003 WL 22743762, at *3 (S.D.N.Y. Nov. 20, 2003); *Lightwater Corp. v. Argentina*, No. 02 Civ. 3804 (TPG), 2003 WL 1878420, at *2 (S.D.N.Y. Apr. 14, 2003). Since that time, it has failed to make any scheduled payment on more than \$80 billion of outstanding debt, including the 12% Bond, the 10¼% Bond and the FRANs. (A. 440).

Under the express terms of the FAA, Argentina’s declaration of a moratorium on servicing its debt, and its failure to make scheduled payments, constitute Events of Default entitling NML to declare “the principal amount of such Securities held by it to be due and payable immediately.”² (A.439-440).

² Section 12 of the FAA defines “Events of Default” to include “a moratorium on the payment of principal of, or interest on, the Public External Indebtedness of the Republic . . . declared by the Republic” and a failure by Argentina to make any scheduled principal or interest payment within 30 days of such payment’s coming due. (A. 34-35). Section 12 of the FAA further provides that following such a default, a holder of a bond or note may accelerate and demand payment of all outstanding principal, and Section 5 of the FAA provides that a beneficial owner of a bond or note issued under the FAA may obtain authorization, directly or

NML has issued such demands with respect to its 12% Bonds, its 10¼% Bonds and its FRANs, but payment has not been made. (A. 440). As of March 21, 2005, the outstanding principal and accrued interest owed to NML by Argentina on the 12% Bonds totaled \$85,293,846.67. (A. 438). The outstanding principal and accrued interest owed to NML on the 10¼% Bonds, as of March 21, 2005, totaled \$154,195,221.25. The outstanding principal and interest owed to NML on the FRANs, as of March 21, totaled \$121,576,649.92. *Id.* All told Argentina owes NML principal and interest amounting to more than \$361 million.

In order to collect on its Argentine debt, NML filed and is prosecuting the actions underlying this appeal.³ NML is but one of a number of Argentine bondholders that have looked to the District Court for assistance in compelling Argentina to meet its obligations. The cases filed by these bondholders have all been assigned to Judge Thomas P. Griesa, who has repeatedly held that “[t]he obligations of [Argentina] on the bonds involved in these lawsuits are

indirectly, from the holder of the bond or note to make such a demand. (A. 24, 35).

³ Argentina irrevocably waived any foreign sovereign immunity it may have had, both in the FAA and in the very securities upon which NML brought this action: “To the extent that the Republic or any of its revenues, assets or properties shall be entitled. . . to any immunity from suit, from the jurisdiction of any such court, . . . from attachment prior to judgment the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction” (A. 65; *see also* A. 47, 403, 418). Argentina has also expressly consented to personal jurisdiction in “any state or federal court in The City of New York.” (A. 46-47, 81, 403, 418).

unconditional. Sovereign immunity has been waived. [Argentina] defaulted on the bonds when it ceased to pay the interest.” *Applestein*, 2003 WL 22743762, at *2 (quoting *Lightwater Corp.*, 2003 WL 1878420, at *4); *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2003 WL 22120745, at *2 (S.D.N.Y. Sep. 12, 2003) (quoting *Lightwater Corp.*, 2003 WL 1878420, at *4); *Lightwater Corp.*, 2003 WL 1878420, at *4. Indeed, Judge Griesa has already granted summary judgment to five holders of Argentine bonds for the “principal amounts of their bonds plus accrued interest,” see *Lightwater Corp.*, 2003 WL 1878420, at *6; *EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2003 WL 22454934, at *4 (Oct. 27, 2003); *Applestein*, 2003 WL 22743762, at *3, and he has indicated that NML will soon have judgment on its claims, as well. (A. 1107).

The Global Exchange Offer

Since defaulting, Argentina has shown no real willingness to negotiate with creditors over the restructuring of its massive foreign debt. In September 2003, Argentina unveiled its first debt-restructuring proposal, which called for creditors to accept a 75% discount on outstanding principal. (A. 379). That “offer” provoked howls of protest from creditors, as, according to the World Markets Research Centre, “[n]o country had ever received a debt write-down of this size, and to add insult to injury the deal contained provisions for a return of

100% of multilateral institutions' principal.”⁴ *Id.* In response to creditors' protests, Argentine President Nestor Kirchner “repeatedly stated that his government has no intention of amending its current offer to bondholders.” (A. ____); *see also* Michael Casey, *Argentina's Lavagna, Nielsen Reiterate Tough Debt Stance*, Dow Jones International News, Dec. 12, 2003 (A. 380-81) (“the two top Economy Ministry officials responsible for Argentina's effort to restructure more than \$100 billion in defaulted debt reiterated their commitment to a tough stance with creditors”).

On June 1, 2004, the Minister of Economy and Production, Roberto Lavagna, announced a “final” proposal for the restructuring of Argentina's public external indebtedness (the “Global Exchange Offer”). (A. 443). The terms of the Global Exchange Offer generally called for holders of Argentina's external debt (the “Eligible Securities”) to exchange their debt for new securities (the “New Securities”) worth only about 34% of their pre-existing debt. Participating debtholders, in other words, will take an approximately 66% “haircut.”

The actual terms of the Global Exchange Offer are set forth in a Prospectus Supplement Argentina filed with the SEC on January 12, 2005. In the

⁴ As stated on its website, the World Markets Research Centre is “a leading global provider of business-critical information and is relied on by thousands of executives in hundreds of multinational corporations, financial institutions and governments across the world.” *See* http://www.wmrc.com/about_corp_bg.html.

introduction to the Prospectus Supplement, Argentina certified that the information contained therein “is true and correct in all material respects and is not misleading” (A. 205).

As detailed in the Prospectus Supplement, bondholders who participated in the Global Exchange Offer tendered their Eligible Securities to Argentina by arranging for the participant through which they held their securities to submit an “electronic acceptance notice” to the relevant clearing system.⁵ (A. 559). Receipt of the notice by the clearing system constituted instructions to the clearing system to transfer the bondholder’s securities from the account of the bondholder’s participant in the clearing system into an account that had been established at the clearing system by Argentina’s exchange agent, The Bank of New York (“BNY”), for the express purpose of receiving tendered Eligible Securities. (A. 259; *see also* A. 422 (obligating BNY to “establish[] and maintain[] accounts at the Clearing Systems designated by Argentina for purposes of executing the exchange of Eligible Securities for New Securities”)).

⁵ The vast majority of those who participated in the Global Exchange Offer held their securities in book-entry form, which means that they owned a beneficial interest of a global Eligible Security that was registered in the name of a clearing system, such as New York-based Depository Trust Company (or a clearing system’s nominee). Securities brokers and dealers that have accounts at such clearing systems are known as “participants” in the clearing systems and can hold beneficial interests in global securities directly. Others must hold their beneficial interests indirectly, through a participant, and their interests are tracked on the books of the participant. (A. 259).

According to the Prospectus Supplement, all such transfers of tendered Eligible Securities into BNY's accounts at the various clearing systems were completed within three days of the close of the period for bondholders to tender into the Global Exchange Offer on February 25, 2005. (A. 263).

In order to pressure bondholders into accepting its parsimonious restructuring offer, Argentina publicly stated that those who declined to participate in the Global Exchange Offer will have no other recourse to enforce their lawful claims on the bonds they hold. Indeed, on February 9, 2005, Argentina adopted legislation that (i) prohibits its government from making any future offer to exchange any Eligible Securities that are not tendered pursuant to the Global Exchange Offer; (ii) precludes the Government from entering into any "judicial, extra-judicial, or private" settlement with holders of non-tendered Eligible Securities; and (iii) requires the government to delist any such non-tendered Eligible Securities from any stock exchange, rendering them even more illiquid and less valuable. (A. 461-63). The legislation, moreover, was but a continuation of efforts by Argentina to ensure that bondholders will not be paid except on Argentina's terms. Such efforts have included removing assets from the United States, where they might be attached and used to satisfy judgments obtained by bondholders. In February 2004, Argentina's Cabinet Chief, Alberto Fernandez,

“confirmed that the assets of the country are safe from the threat of attachments requested by foreign creditors” (A. 456).

On March 18, 2005, Argentina announced that 76.15% of the Eligible Securities, having an aggregate face amount of approximately \$62 billion, had been tendered and accepted.⁶ (A. 867 (“Approximately U.S. \$ 62.3 billion . . . of Eligible Securities . . . were tendered and accepted for exchange.”)). Under the terms of the Global Exchange Offer, the tendered securities will remain in BNY’s accounts until the Global Exchange Offer is “settled”. (A. 259 (“tendered Eligible Securities will be held in the exchange agent’s account pending settlement of the exchange on the Settlement Date”)). Upon settlement, legal title to the securities will be transferred to Argentina and replacement securities will be deposited into bondholders’ accounts. (A. 268). Settlement was scheduled to occur on “April 1, 2005, or as soon as practicable thereafter.” *Id.* (“Settlement Date for the Offer . . . is expected to be April 1, 2005, or as soon as practicable thereafter”).

⁶ By contrast, no other significant foreign sovereign debt restructuring exchange offer in the past seven years has had an acceptance rate below 90%. (A. 444). For example, when Russia defaulted on and renegotiated \$31.6 billion in debt after its currency crisis in 1998, approximately 98% of bondholders accepted the arrangement, despite having to take a 36% discount on the face value of the previously-held securities. *Id.* Similarly, when Ecuador defaulted on and renegotiated about \$6.6 billion in debt in 1999, 97% of bondholders accepted the restructuring, despite the 40% discount to face value required. *Id.*

The Prospectus Supplement warns bondholders several times that tenders of Eligible Securities into the Global Exchange offer are “irrevocable and may not be withdrawn”. (A. 257, 209, 217, 238). Only a material change in the terms of the offer would have enabled bondholders to withdraw their tenders, and with Argentina having accepted all tenders, that is no longer possible. Thus, while tendering bondholders technically own legal title to their Eligible Securities until the Global Exchange Offer is settled, by tendering, they gave up their rights to their securities and vested Argentina with a right to accept their tenders, take title to their securities and issue them new ones in exchange.

Argentina’s March 18, 2005 acceptance of the tenders is irrevocable and binds Argentina to go forward with the exchange. (A. 258 (“Once Argentina has announced the acceptance of tenders . . . Argentina’s acceptance will be irrevocable.”)). Consequently, both the tendering bondholders and Argentina are now contractually bound to settle the Global Exchange Offer. *Id.* (“Tenders, as so accepted, shall constitute binding obligations of the submitting holders and Argentina to settle the exchange . . .”). Additionally, BNY, as the exchange agent, is contractually bound to effectuate the settlement. The Exchange Agent Agreement that BNY signed states that “upon acceptance of Tenders by Argentina,” BNY shall “deliver[] any Eligible Securities Tendered to Argentina in accordance with Argentina’s instructions” and shall “deliver[] the New Securities

to the Tendering Holders as provided in the Offer Materials and in accordance with Argentina's instructions." (A. 222).

The terms of the Global Exchange Offer do not specify what is to happen to the Eligible Securities after Argentina receives them. In a section of the Prospectus Supplement that purports to warn bondholders of the risks of not participating in the Global Exchange Offer, Argentina states it "intends to cancel" the tendered Eligible Securities, which could render the trading market for Eligible Securities that remain outstanding illiquid. (A. 238). Nowhere, however, does Argentina undertake an obligation to the tendering bondholders to cancel the Eligible Securities. In fact, in the FAA that governs many of the Eligible Securities, Argentina expressly reserves for itself the right to hold or sell securities that it issues and subsequently reacquires. (A. 31).

The Order of Attachment and Subsequent Proceedings

On March 21, 2005 – three days after Argentina irrevocably accepted the \$62 billion of bonds that had been tendered into the Global Exchange Offer and committed itself to issue New Securities to the tendering bondholders – NML, acting pursuant to Rule 64 of the Federal Rules of Civil Procedure and Section 6211 of the New York Civil Practice Law and Rules, sought and obtained an *ex parte* Order of Attachment from the District Court. The Order of Attachment authorized a pre-judgment levy upon any assets of Argentina subject to attachment

under New York and federal law sufficient to satisfy NML's anticipated judgments. In particular, the Order of Attachment authorized a levy upon \$7 billion in principal amount of the tendered Eligible Securities held in accounts maintained by BNY.⁷ *Id.* As required by CPLR 6211(b), NML moved to confirm the *ex parte* Order of Attachment on March 25, 2005.

On March 24, 2005, Argentina moved the District Court by order to show cause to vacate the Order of Attachment. (A. 494-95). In a brief filed in support of its motion, and during a lengthy argument held on March 29, 2005, Argentina principally argued (i) that the Eligible Securities are not attachable assets; (ii) that the Eligible Securities belong to the tendering bondholders and that Argentina has no present interest in them; and (iii) that Argentina has no future interest in the Eligible Securities, because it is bound to cancel them immediately upon receipt. NML chiefly responded by arguing that Argentina has a vested right to take delivery of the Eligible Securities upon the settlement of the Global Exchange Offer, which right is attachable under well-established principles of New

⁷ On March 28, 2005, BNY served a garnishee's statement in which it represented that it was not in possession of any property belonging to Argentina. (A. 1100-01). NML has not yet had an opportunity to take discovery of BNY but suspects that BNY's statement may reflect its adoption of Argentina's flawed argument that Argentina presently has no interest in the tendered bonds. Unless the Prospectus Statement that Argentina filed with the SEC is false, the more than \$62 billion principal amount of tendered Eligible Securities that Argentina accepted resides in accounts controlled by BNY pending the settlement of the Global Exchange Offer.

York law. NML further pointed out that Argentina is not, in fact, under any obligation to cancel the tendered securities but had at most expressed a non-binding intention to do so for its own benefit.

The District Court, after argument, agreed with NML that Argentina presently has a vested right to take delivery of the Eligible Securities upon settlement of the Global Exchange Offer and that such a right is ordinarily subject to attachment under New York law. (SPA. 3-4). The Court also held, however, that permitting the attachment of the Eligible Securities to remain in place would thwart Argentina's ability to extinguish them and thereby frustrate what the Court believed to be the "foundational" purpose of the Global Exchange Offer. (SPA. 5). Absent an ability to cancel the tendered Eligible Securities, the Court ruled, the purpose of the Global Exchange Offer would be frustrated, Argentina would be excused from its obligation to complete the Global Exchange Offer, and Argentina would therefore have no right to take delivery of the Eligible Securities. The Court thus held that, under the terms of the Global Exchange Offer, "the existence of the attachments would, if allowed to stand, negate the very contractual obligations that are cited as a basis for the attachments," and on that ground the Court granted Argentina's motion to vacate. (SPA. 6-7). The Court immediately stayed its vacatur order pending this appeal. (SPA. 10-11).

SUMMARY OF ARGUMENT

Argentina presently owns a right to take delivery of the irrevocably tendered Eligible Securities that it irrevocably accepted on March 18, 2005. The District Court correctly held that this right is an attachable property interest under New York law. The Court erred, however, in ruling that the attachment of a portion of the Eligible Securities would frustrate the purpose of the Global Exchange Offer – by supposedly preventing Argentina from canceling those securities – and thereby excuse Argentina from its obligation to complete the debt exchange and negate the right NML sought to attach, *i.e.*, Argentina's right to take possession of the tendered Eligible Securities.

The District Court failed to recognize that every attachment frustrates the debtor's intended use of the attached property, as the attachment remedy is designed to force a potential judgment debtor to divert assets he or she would prefer to use for other purposes to the satisfaction of pre-existing debts. The Court's refusal to sustain NML's attachment is thus tantamount to a ruling that contractual rights cannot be attached, which is contrary to governing New York law.

The Court also misconstrued the frustration of purpose doctrine by ruling that NML's requested attachment would provide grounds for Argentina to invoke the doctrine and call off the Global Exchange Offer. Frustration excuses

performance under a contract only where overwhelming and unforeseeable events, occurring through no fault of the defendant, completely destroy the value for which the defendant contracted. Here, however, the attachment that supposedly frustrates the purpose of the Global Exchange Offer is an entirely foreseeable consequence of Argentina's aggressive efforts to avoid paying NML and other bondholders who seek only to hold Argentina to its obligations. Moreover, it can hardly be said that NML's attachment deprives Argentina of the value of the Global Exchange Offer, because Argentina could still complete the exchange and discharge some \$55 billion of its existing foreign debt for approximately 30 cents on the dollar. Indeed, Argentina could also discharge the \$7 billion of attached debt if it bonded the judgments and potential judgments of the attaching creditors (which total approximately \$1.4 billion).

The fact is that Argentina does not want to pay its debts to NML and the other attaching creditors. Argentina has demonstrated as much by moving its assets out of this jurisdiction; by passing legislation to institutionalize a policy of resisting what it calls "hold out" creditors; and, now, by speciously claiming that NML's attachment will preclude completion of the Global Exchange Offer in order to persuade the District Court to vacate an attachment that would have secured NML's potential judgments.

Argentina comes to this Court seeking to further its efforts to avoid satisfying the debts it owes to NML and others. What Argentina ignores, and what it hopes this Court will ignore, is the principle that sovereign nations, no less than ordinary men and women and businesses, must honor their solemn commitments. So strong is that principle that the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 Comment a (1987) states that “*pacta sunt servanda*” – agreements must be honored – “is perhaps the most important principle of international law.” The Restatement invokes that principle with regard to treaties, but the same jurisprudential principle applies to private contracts. As one commentator has observed – in discussing another case in which Argentina tried to avoid honoring its financial commitments to private parties – “[*Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992),] implicates international legal principles of freedom of contract and *pacta sunt servanda* by upholding the ability to enforce the bond provision according to the parties’ expectations. . . . Combining these principles with the FSIA exceptions results in the advancement of an autonomous international commercial law.” Lawrence V. Ashe, *The Flexible Approach to the Foreign Sovereign Immunities Act in Weltover, Inc. v. Republic of Argentina*, 23 U. MIAMI INTER-AM. L. REV. 465, 483 (1992) (footnotes omitted). This Court, too, has recognized that “the United States has a strong interest in ensuring the enforceability of valid debts under the principles of

contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders.” *Pravin Banker Assocs. v. Banco Popular del Peru*, 109 F.3d 850, 855 (2d Cir. 1997).

In giving Argentina effective relief from its prior commitments – by vacating an attachment of assets that could be used to pay Argentina’s indisputably valid, freely contracted debts – the District Court mistakenly believed that Argentina may justifiably honor less than all of its commitments. If honoring Argentina’s commitment to plaintiff and also honoring commitments Argentina has made to others as part of the Global Exchange Offer is expensive or inconvenient for Argentina, it has only itself – and its cavalier attitude toward *pacta sunt servanda* – to blame. It is not the role of a United States court to relieve Argentina of the consequences of its own actions.

STATEMENT OF THE STANDARD OF REVIEW

Because this appeal calls upon the Court to review a decision of the District Court based on (i) an interpretation of certain contractual terms of Global Exchange Offer, and (ii) a legal conclusion that leaving the Order of Attachment in place would allow Argentina to invoke the frustration doctrine to avoid its contractual obligation to proceed with the Global Exchange offer, this Court’s review is de novo. As this Court has acknowledged, “the interpretation of a contract is generally a question of law and subject to . . . de novo review.”

Network Pub. Corp. v. Shapiro, 895 F.2d 97, 99 (2d Cir. 1990) (citing *Eddy v. Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947) (L. Hand, J.) (“Appellate courts have untrammelled power to interpret written documents.”)). A District Court’s legal conclusions and its application of facts to draw conclusions of law are also subject to *de novo* review. *Travellers Int’l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir. 1994).

ARGUMENT

THE DISTRICT COURT ERRED IN VACATING AND REFUSING TO CONFIRM ITS ORDER OF ATTACHMENT

A. Argentina’s Right to Receive the Irrevocably Tendered Eligible Securities Is an Attachable Property Interest

The District Court correctly observed that a vested contractual right to obtain property – such as Argentina’s right to take delivery of the tendered Eligible Securities – is itself an attachable property interest under New York law. By statute, the law of New York allows a plaintiff to obtain a pre-judgment attachment against “[a]ny debt or property against which a money judgment may be enforced . . .” CPLR 6201. Money judgments, in turn, may be enforced against “any property [of the defendant] which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . .” CPLR 5201(b).

The New York Court of Appeals has definitively ruled that CPLR 5201(b) permits the attachment of a contractual right to property. Thus, in *Abkco Industries, Inc. v. Apple Films, Inc.*, 385 N.Y.S.2d 511, 513-14 (N.Y. 1976), the Court of Appeals upheld the pre-judgment attachment of a defendant's contractual right to future proceeds from the distribution of the Beatles' film *Let it Be*. The Court straightforwardly ruled that because the defendant's right to those proceeds was assignable, it was attachable. *Id.* at 514; *see also Astrea United Investments, L.P. v. B.T. Onitiri*, No. 92 Civ. 582, 1992 WL 346353, at *3 (S.D.N.Y. Nov. 18, 1992) ("Attachment is available to reach funds in escrow accounts . . .").

Here, there can be no dispute that Argentina presently has an assignable right to delivery of the Eligible Securities. Under the plain terms of the Global Exchange Offer (as reflected in the Prospectus Supplement), bondholders' tenders of Eligible Securities are irrevocable and operated as a consent to transfer the securities to Argentina upon settlement of the exchange. (A. 263). Argentina accepted all tenders on March 18, 2005. (A. 867). That acceptance is likewise irrevocable and created an obligation on the part of Argentina to take the tendered securities and deliver new securities in exchange. (A. 258). The Prospectus Supplement is explicit in stating that tenders accepted by Argentina "shall constitute binding obligations of the submitting holders and Argentina to settle the exchange" *Id.* Argentina thus presently has an obligation to deliver new

securities to the tendering bondholders and a right to take delivery of the Eligible Securities. There is no basis to conclude that Argentina's right to the Eligible Securities is not assignable and, therefore, attachable. *See Pravin Banker Assocs.* 109 F.3d at 856 ("Under New York law, only express limitations on assignability are enforceable. . . . [T]o preclude the power to assign . . . clause must contain express provisions that any assignment shall be void or invalid if not made in a certain specified way.") (internal quotations omitted).

In the District Court, Argentina argued against attachment of its interest in the Eligible Securities by suggesting that debt cannot be the property of its issuer and, therefore, cannot be attached to secure a judgment against the issuer. In urging this proposition, Argentina made no effort to reconcile it with the well-settled rule that permits the attachment of *any* assignable property interest of a debtor that "has potential economic value to the creditor." *Supreme Merch. Co. v. Chemical Bank*, 520 N.Y.S.2d 734, 736 (N.Y. 1987). Argentina also failed to take issue with the obvious notion that the Eligible Securities, unless and until cancelled, are valid and freely tradeable securities that NML could use to generate cash to satisfy its judgments. Indeed, in the Prospectus underlying this Global Exchange Offer, Argentina categorized "outstanding [Argentine] Government bonds that the National Treasury repurchases but does not cancel" as

“financial assets”. (A. 872). Thus, Argentina itself characterizes its tradeable debt in its hands as a valuable asset.

As authority for the principle that “a debtor’s debts are not attachable assets,” Argentina cited but two cases to the District Court, one from 150 years ago and another from 40 years ago: *Coddington v. Gilbert*, 17 N.Y. 489 (1958) and *Ingersoll Rand Fin. Corp. v. First Chicago Int’l Banking Corp.*, 267 N.Y.S.2d 73, 74 (1st Dep’t 1966), *aff’d*, 286 N.Y.S.2d 276 (1967). Those old cases, however, cannot carry the burden Argentina would have them bear. At most, they establish a non-controversial rule that precludes a court from attaching inchoate debt obligations that have not yet been issued and sold into the marketplace – a rule that would be of no applicability here, since the Eligible Securities were validly issued into the marketplace, for consideration, years ago.

In *Coddington*, the New York Court of Appeals voided the attachment of railroad bonds that had been placed with the railroad’s agent but not yet sold to purchasers. *Coddington*, 17 N.Y. at 489. The court observed that the bonds, “until delivered, had no more validity than the undelivered note of an individual” and “could acquire no validity until delivered by the company or with its assent.” *Id.* To permit attachment of such inchoate obligations, the court reasoned, would “clothe [the sheriff] with power to execute obligations for those against whom he holds process, or to deliver for them obligations which they may have executed but

not delivered.” The court, in other words, refused to allow the sheriff to force the debtor to issue securities in order to satisfy his debts.

Ingersoll Rand, the other case cited by Argentina, is no different.

There, the court refused to allow the attachment of 20 drafts that the debtor had placed with the First Chicago bank for sale into the financial markets. *Ingersoll Rand*, 267 N.Y.S.2d at 74. The court held that “[u]ntil sold by First Chicago, the drafts acquired no validity. They were in the same category as the unused bonds in *Coddington*”⁸ *Id.*

Notably, neither *Coddington* nor *Ingersoll Rand* has ever been cited to support a holding that publicly tradeable debt issued by a judgment debtor may not be attached to secure a judgment. To the extent *Coddington* has been cited, it has been for only the proposition that *unissued* debt may not be attached or traded upon. *See Ingersoll Rand*, 267 N.Y.S.2d at 74; *Zimmerman v. Timmerman*, 193 N.Y. 486, 493 (1908); *Brownell v. Town of Greenwich*, 114 N.Y. 518, 530 (1889);

⁸ The court in *Ingersoll Rand* went on to say that “even if the drafts had been validly issued and delivered, they still would not be assets but liabilities of [the debtor].” *Ingersoll Rand*, 267 N.Y.S.2d at 74. Even if the court meant that assertion to signal that it would not have permitted the attachment of issued and delivered debt, it was mere *dicta*, advanced without any supporting authority or analysis and completely unnecessary to the court’s holding. The court, moreover, permitted the party seeking an attachment an opportunity to obtain discovery into the circumstances in which First Chicago had come into possession of the drafts, suggesting that the court understood that there could be circumstances in which the debt could be attachable. *Id.*

Germania Sav. Bank v. Village of Suspension Bridge, 16 N.Y.S. 98, 99 (2d Dep't 1893). *Ingersoll Rand*, meanwhile, has never been cited for any reason.⁹

B. Argentina's Inability to Cancel Attached Eligible Securities Does Not Render Argentina's Right to the Eligible Securities Unattachable

Argentina argued to the District Court that its right to take delivery of the Eligible Securities was valueless, and thus unattachable, because it was inextricably bound to an obligation to cancel the securities upon receiving them. The District Court correctly rejected this position and, in its decision, referred only to Argentina's putative "right" to cancel the Eligible Securities. (SPA. 4).

Argentina may hope to cancel the tendered Eligible Securities it acquires, but it is plainly not under any obligation to do so.¹⁰

⁹ Argentina also half-heartedly argued to the District Court that attachment of the Eligible Securities is precluded by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(d), because they are allegedly not property used for a commercial activity in the United States. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 615-17 (1992), however, the United States Supreme Court determined that Argentina's issuance, subsequent default and attempted restructuring of certain bonds was an act taken "in connection with a commercial activity" for purposes of the FSIA. That analysis is controlling here, since Argentina has collected, and is attempting to obtain, the Eligible Securities in order to restructure its public debt.

¹⁰ As noted above, the FAA under which many of the Eligible Securities were issued authorizes Argentina to reacquire its own securities and states that such securities may "at [Argentina]'s discretion, be held, resold or surrendered to the Fiscal Agent for cancellation." (A. 31). Nothing in the terms of the Global Exchange Offer limits Argentina's discretion by committing it to cancel the Eligible Securities. The Prospectus Supplement says only that Argentina "intends to cancel" the Eligible Securities it receives. (A. 238). Basic contract law would preclude a bondholder from twisting such precatory language into a contractual obligation. See *Brunner-Booth Fotochrome Corp. v. Kaufman*, 18 A.D.2d 160,

The Court went on, however, to attach incorrect legal significance to Argentina's right of cancellation. The Court ruled that the cancellation of the Eligible Securities was a "foundational" purpose of the Global Exchange Offer that would be thwarted by an attachment of the Eligible Securities. Tacitly invoking a rarely used doctrine of contract law, the District Court then held that the frustration of Argentina's purpose to cancel the Eligible Securities would excuse Argentina's obligation to go forward with the Global Exchange Offer and thereby destroy the contractual right NML sought to attach, Argentina's right to receive the Eligible Securities. This ruling was legal error.

First and foremost, the Court failed to realize that *every* attachment frustrates the debtor's intended use of the attached property; that is the *raison d'être* of the attachment remedy – to divert property from the debtor's preferred use to the payment of the debtor's debts. Virtually no debtor enters into a contract with a third party intending that the benefit thereof go to judgment creditors. The District Court's ruling that the attachment here was void because it would preclude Argentina from using the tendered Eligible Securities in the manner it anticipated

164 (1st Dep't), *aff'd*, 13 N.Y.2d 1077 (1963) ("a mere expression of intention or general willingness to do something on the happening of a particular event or in return for something to be received does not amount to an offer"); 22 N.Y. Jur. 2d s. 35 ("An intention to do an act is not a contractual offer to do it."); *see also Augat, Inc. v. Collier*, No. 92-12165-RCL, 1996 WL 110076, at *33 (D. Mass. Feb. 8, 1996) ("Expressions of present intention and use of words such as 'it is our intention' typically connote nonbinding provisions.").

is thus tantamount to a ruling that a plaintiff may not attach a contractual right to receive property. That result is contrary to established New York law that the Court was bound to follow. *See* Fed. R. Civ. P. 64 (requiring district courts to apply the law of the state in which they sit in determining the availability of remedies to secure satisfaction of judgments); *Abkco*, 385 N.Y.S.2d at 513-14 (contractual right to royalties is attachable under New York law).

Looking at the issue doctrinally, moreover, frustration simply does not apply in this context. This Court long ago recognized that, under New York law, a discharge of a party's contractual obligations on the grounds of frustration is "limited to instances where a virtually cataclysmic, wholly unforeseeable event renders the contract valueless to one party." *U.S. v. General Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974). Neither of those criteria is satisfied here.

NML's and other creditors' use of the attachment mechanism to secure debts that Argentina has announced it has no intention to pay can hardly be called "cataclysmic" or "unforeseeable." To the contrary, it is a natural and entirely foreseeable consequence of Argentina's conduct. *See 407 East 61st Street Garage, Inc. v. Savoy Fifth Avenue Corp.*, 296 N.Y.S.2d 338, 344 (N.Y. 1968) (frustration doctrine not applicable where frustration results from defendant's business decision and not from unanticipated circumstances); *Housman v. Media*

Technology Corp. Ltd., No. 95 Civ. 639 (JSM), 1996 WL 66121 (S.D.N.Y. Feb. 14, 1996) (same). Having put forth an exchange offer of historic unfairness, and having publicly proclaimed that it has removed its assets from the reach of those who choose not to accept the exchange offer, Argentina has every reason to expect that the creditors it seeks to defeat will take advantage of every possible opportunity to secure assets that can be used to pay the debts Argentina owes them. Indeed, the Prospectus Supplement governing the Global Exchange Offer specifically identifies as a risk factor the possibility that “hold-out creditors” may seek attachments or other legal remedies. (A. 239-40).

Additionally, the attachment of a portion of the tendered Eligible Securities by NML and other creditors does not render the Global Exchange Offer valueless to Argentina. The Order of Attachment restrains \$7 billion out of \$62 billion of tendered Eligible Securities. Even with the Order of Attachment in effect, Argentina can (and, by the terms of the exchange offer, must) still close the Global Exchange Offer and discharge \$55 billion of its outstanding debt – comprising approximately 89% of the tendered Eligible Securities – for roughly thirty cents on the dollar.

Moreover, Argentina, if it chose, could secure a discharge of the \$7 billion in restrained debt on those same terms by simply bonding the amount of the judgments and potential judgments held by NML and the other attaching creditors.

See CPLR 6222; *AMF Inc. v. Algo Distributors, Ltd.*, 369 N.Y.S.2d 460, 467 (2d Dep't 1975) ("section 6222 permits the debtor to regain possession of the property and to discharge the attachment by posting a bond and by guaranteeing that he will pay the amount of the judgment which may be recovered against him.").

Finally, to the extent the Order of Attachment results in the fact that some of the tendered Eligible Securities will be used to facilitate payment of the debts Argentina owes NML and the other attaching creditors, Argentina receives value in the form of a discharge of those debts. While that may not be value that Argentina hoped to receive from its Global Exchange Offer, Argentina may not be heard to claim that satisfaction of its just debts is of no value to it and frustrates its scheme to avoid paying those just debts by keeping its assets beyond the jurisdiction of the courts of New York. That scheme would indeed be frustrated by this attachment, but it is not a scheme that this or any court is bound to honor, much less take into account to deny the validity of creditors' well established legal rights.

These facts illustrate that the Order of Attachment does not place Argentina in a situation where it cannot go forward with the Global Exchange Offer. At most, the Order of Attachment created a situation where Argentina, for tactical and perhaps other reasons, does not want to go forward with the Global Exchange Offer. As detailed above, however, having irrevocably accepted

bondholders' tenders of Eligible Securities, Argentina is contractually obligated to settle the Global Exchange Offer by taking the Eligible Securities and issuing new ones to the tendering bondholders. That obligation is not discharged because Argentina finds the debt exchange to be somehow less attractive in light of the Order of Attachment. Rather, Argentina must meet that obligation. A failure to do so would not only constitute a breach of Argentina's contract with the tendering bondholders, it would also amount to a unilateral renunciation of Argentina's right to the Eligible Securities, which would be a deliberate destruction of the property NML attached. The law does not permit Argentina to destroy property that has been attached. The law also must not permit Argentina's threat to destroy attached property to void the attachment.

C. Regardless of Whether Argentina's Interest in the Eligible Securities Was Attachable, the Order of Attachment Should Remain in Place

In addition to specifically authorizing a levy upon \$7 billion principal amount of tendered Eligible Securities, the Order of Attachment vacated by the District Court also authorizes the attachment of any other property of Argentina that is attachable under New York and federal law. It was error for the Court to vacate this portion of the Order of Attachment based on findings relating solely to the attachability of the Eligible Securities.

Under New York law, a plaintiff may obtain an *ex parte* prejudgment attachment of the interests of a defendant if (i) it has stated a claim for a money

judgment; (ii) it has a probability of success on the merits; (iii) one or more grounds enumerated in CPLR 6201 exist; and (iv) the amount demanded exceeds all counterclaims known to the plaintiff. *See* CPLR 6201, 6211, 6212(a); *see also Bank Leumi Trust Co. of New York v. Istim, Inc.*, 892 F. Supp. 478, 481 (S.D.N.Y. 1995); *Itel Containers Int'l Corp. v. Companhia de Navegacao Lloyd Brasileiro*, No. 90 Civ. 8191 (CES), 1991 WL 12131, at *1 (Jan. 25, 1991). There is no requirement that an order of attachment identify specific property to be attached. CPLR 6212.

All four requirements for an *ex parte* attachment are met here, and the District Court found as much when it issued the Order of Attachment on March 21, 2005. The first requirement is met since NML has alleged claims for breach of contract based on Argentina's admitted failure to make payment on the 12% Bonds, the 10¼% Bonds and the FRANs, and the undisputed terms of the underlying agreement.

The second requirement is met because NML has a high probability – if not a certainty – of success on the merits. The Court has already ruled repeatedly that Argentina's defaulted foreign bonds are unconditional obligations upon which bondholders are entitled to recover. The Court, in fact, has already granted summary judgment to a number of bondholder plaintiffs, and at the March

29, 2005 hearing, the Court indicated that NML would soon have judgment as well. (A. 1107).

The third requirement is met under two different prongs of CPLR 6201. Under CPLR 6201(1), a court may grant a prejudgment order of attachment when “the defendant is a nondomiciliary residing without the state.” Argentina is not domiciled in the State of New York. Therefore, this part of Section 6201 is satisfied. *See Elliott Assocs., L.P. v. Republic of Peru*, 948 F. Supp. 1203, 1207 (S.D.N.Y. 1996) (holding that Peru is a nondomiciliary under CPLR 6201(1)); *Nat’l Am. Corp. v. Fed. Republic of Nigeria*, 420 F. Supp. 954, 955 & n.1 (S.D.N.Y. 1976) (Nigeria and its central bank are nondomiciliaries under CPLR 6201(1)) (Weinfeld, J.).

Under CPLR 6201(3), moreover, attachment may be granted when “the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff’s favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts.” As set forth above, Argentina has publicly stated that it has intentionally placed its assets beyond the reach of its creditors in the United States and elsewhere, and indicated its intention to continue to place its assets beyond the reach of creditors.

The fourth requirement is met since Argentina has no outstanding counterclaims for money damages against NML.

Accordingly, because all the elements required for *ex parte* pre-judgment attachment have been satisfied, it was error for the Court to vacate the Order of Attachment in its entirety.

CONCLUSION

For the foregoing reasons, the March 29, 2005 Order of the United States District Court vacating and refusing to confirm an Order of Attachment granted by the District Court on March 21, 2005 should be reversed, and the Order of Attachment should be reinstated and confirmed.

Dated: New York, New York
April 7, 2005

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,108 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements 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 2002 in 14-point Times New Roman.

Dated: New York, New York
April 7, 2005

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EXHIBIT W

Forbes



Agustino Fontevicchia, Forbes Staff
Bringing You The Bull And Bear Case From The Markets Desk

MARKETS | 11/26/2012 @ 2:52PM | 1,592 views

Fed's \$2.6T Payments System Risks Paralysis As Judge Orders Argentina To Pay Defaulted Bonds

The novelesque drama of [Argentina's](#) massive sovereign debt default a decade ago continues, and now it may threaten the Fed's payments system. After billionaire [Paul Singer's](#) hedge fund managed to get a court in [Ghana](#) to seize the [Argentine Navy's](#) flagship vessel, NML Capital got [New York](#) Judge Thomas Griesa to force Buenos Aires to cough up the cash to pay holdout bondholders in tandem with those that accepted two rounds of restructuring.



President Cristina Kirchner swears in Finance Minister Lorenzo: they both spoke against Judge Griesa's decision - Image credit: AFP/Getty Images via @daylife

There's a big problem with this ruling, which has already sparked the repudiation of the New York Fed, [Bank of New York Mellon](#), and those holding the restructured bonds: it could paralyze the Fed's largely automated payments system, which processes an average \$2.6 trillion a day. Furthermore, it could push Argentina into technical default and make Bank of New York Mellon, and several clearing corporations and agents legally liable if Buenos Aires attempts to pay the 93% mass of bondholders who took the 2005 and 2010 restructurings, and chooses to leave out the so-called "vulture funds."

Paul Singer's all-out offensive against Argentina is beginning to bear fruits, but it's taking its toll on third parties. After securing a court decision in Ghana that has the ARA Libertad [detained in the port city of Tema](#) until Buenos Aires pays \$20 million, NML Capital (which is affiliated to Singer's Elliott Management) and Aurelius Capital got an appeals court to support New York Judge Thomas Griesa to force Argentina to pay the hedge funds in full, including accrued interest.

The Fed's Fedwire service, in which 7,000 financial institutions "initiate funds transfers that are immediate, final, and irrevocable" and the Clearing House

Interbank Payments System are “the principal wholesale funds-transfer systems in the United States.” All of the major banks use Fedwire to handle large-value, time-critical payments, and Judge Griesa’s decision may slow volume to a trickle if it forces these thousands of transactions to be screened to make sure they don’t violate the ruling.

The South American nation defaulted on approximately \$100 billion in debt over 2001 and 2002 in the world’s largest sovereign debt default. Over two restructurings, about 93% of bond holders took a massive haircut on their holdings, accepting about 30 cents on the dollar. A few, like Singer’s NML, took the battle to the courts, and appear close to winning it.

Judge Griesa ordered Argentina to put \$1.33 billion in an escrow account, which will be used to pay NML and Aurelius as the holders of restructured bonds are paid in December. Appealing to the *pari passu* clause, which indicates all bondholders should be paid without preference, the court ruled that as Buenos Aires frees up \$3 billion to pay GDP warrants on December 15, it will have to pay the hedge funds, derogatorily dubbed “vulture funds” by Argentina president Cristina Fernandez de Kirchner, in full.

There are several twists to this story. Griesa seems to have enforced the ruling after Cristina Kirchner and finance minister Hernan Lorenzino called previous decisions “judicial colonialism” and vowed not to pay. This means that if Argentina doesn’t pay, then it will default on approximately \$24 billion in debt held by exchange bondholders according to the *Chicago Tribune*, and continue to owe \$12 billion to holdouts, according to Moody’s’ numbers; that’s \$36 billion, of the more than \$40 billion held as foreign reserves.

While it is highly unlikely that Argentina will pay the hedge funds, as Nomura’s analysts see it, which in turn has enraged those holding exchanged bonds, it poses a major problem for the third-party agents involved in the deal. NML got Griesa to take Bank of New York Mellon (the trustee through which restructured debt was paid), clearing corporations, operators of clearing systems, and settlement agents all as responsible if Argentina doesn’t pay the so-called vulture funds.

This has sparked a quick reaction by many parties that considered they are getting the short end of the stick. Beyond the aforementioned holders of exchange bonds, Bank of New York Mellon and even the New York Fed have asked the judge to revisit its decision.

Griesa’s ruling could “have operational ramifications that impede the smooth and efficient operation of the payments system” that processes more than 500,000 transactions a day for about 7,000 banks, NY Fed vice president Thomas Baxter expressed in a note. The Clearing House, which is backed by major commercial banks including Wells Fargo, JPMorgan Chase, Bank of America, and Citibank, also made it clear they didn’t approve of the decision.

Specifically, if all of these actors are seen as responsible for Argentina’s payment, or lack thereof, then the efficient and essentially automatic payments service would be slowed, disrupting the whole system. “The ‘flow of funds-transfer traffic’ should not be disrupted by creditor process, just as all automobile traffic on a busy highway should not be stopped so that a single car can be inspected,” read the letter. NY Fed officials didn’t comment further on the possible disruptive effects of Griesa’s decision.

At the end of the day, it all comes down to the purpose of debt restructurings and market functioning. Griesa’s decision upholds the rights of market

participants, but undermines the effectiveness of debt restructurings. Since the Argentine default, the use of collective actions clauses (CACs) to enforce restructurings has become the norm. With the possibility of a Greek default on the table, market participants have become more accepting of the use of debt forgiveness to achieve stability. This case, then, is one of the several moving parts that will help shape the future of sovereign default and debt restructuring. Everybody is else is just caught in the cross-fire.

This article is available online at:

<http://www.forbes.com/sites/afontevvecchia/2012/11/26/feds-2-6t-payments-system-risks-paralysis-as-judge-orders-argentina-to-pay-defaulted-bonds/>

EXHIBIT X

FINANCIAL TIMES

November 25, 2012 7:06 pm

Argentina shows the integrity of default

By Mario Blejer

Once again, Argentina finds itself at the centre of a dispute that could have far-reaching implications for sovereign debt markets, with last week's US court decision ordering it to repay hedge fund investors who had refused an earlier debt writedown.

The country has long been criticised for the unilateral nature of its decision to default on sovereign debt in 2002 – and for the manner in which it announced the decision. But there has been broad agreement that the debt reduction was inevitable in view of Argentina's unsustainable debt burden; and that, controversial as its implementation was, the successful restructurings of 2005 and 2010 played a critical role in restoring growth and financial stability in the economy.

Today, since the New York ruling essentially requires Argentina to disregard the results of the restructuring agreements, reached after gruelling negotiations, one may be forced to review the legitimacy of the process. This could have serious consequences not only for Argentina but, more important, for many recent and probably future debt relief cases.

Judge Thomas Griesa's decision is disruptive for capital markets, setting perverse incentives and running against fundamental financial principles – for two reasons.

The first is to do with the concept of risk premium and the tolerability of defaults. In most cases, sovereign debt is not a risk-free asset. Because a default can be a clear threat, albeit one that evolves over time, sovereign bond yields incorporate a risk premium (or country risk). Investors are free to choose the combination of risk and return that suits their needs and preferences. The provision of sovereign credit ratings by specialist agencies makes this point obvious.

But if investors are willing to accept higher risks in order to cash in on the additional spread, they cannot renege on the potential cost when the risk of default becomes a reality. Default, in this context, is not a crime but a legitimate, if unfortunate, part of the game. It is not consistent to benefit from a risk-taking premium and insist on full payment in all circumstances. The legal protection extended to bondholders by Judge Griesa goes against

the very nature of risk-taking. If all holdouts are eventually paid in full, the entire price-setting mechanism in sovereign bond markets is rendered inconsistent.

Second, enforcing full payment of creditors that reject a restructuring, while applying a hefty haircut to those accepting it, will make it impossible to complete a successful restructuring. Why agree to lesser terms if you will eventually be paid in full? Contracts must be honoured and terms respected but in some circumstances – as the current state of affairs in Europe proves – debt relief is indispensable to restore stability, which is beneficial to the country and the system at large. The New York ruling all but eliminates this leeway. It could make it impossible for debtors to win round enough investors to meet the required threshold in new bonds that include collective action clauses.

Moreover, let us not forget who the litigants in this case are. They are the so-called vulture funds, which profit from disrupting markets without providing the stabilising benefits that sometimes arise from speculative operations. By acquiring bonds at fire sale prices, then litigating until fully paid, they block the return to markets of countries that have successfully restructured. What is paradoxical in this case is that, while they insist on privileged treatment relative to the bond holders who accepted the restructuring, they seem to have been rewarded by Judge Griesa on the grounds of “*pari passu*”, or equal treatment.

Argentina shocked the global financial system in 2002 with what was then the largest default in history. But it managed to take advantage of debt relief to recover from a crippling economic collapse, restore stability and grow rapidly for a long time. Despite the warranted and unwarranted criticism, its experience proves that there are circumstances in which debt relief, far from being a crime, is an indispensable component of a successful stabilisation programme. The New York court decision, if upheld, would impair this instrument and thus limit the tools available to policy makers in Europe and beyond.

While the preservation of the integrity of judicial rulings is paramount, the unintended negative consequences of this case highlight the need to establish an international rule book of agreed procedures to guide and control sovereign debt negotiations. The International Monetary Fund should clarify its position regarding this issue in general, given its relevance to the functioning of sovereign markets, providing leadership and guidelines.

As for Argentina, following the restructuring it has shown – and should continue to do so – an ability and willingness to pay holders of the replacement debt issued to those that accepted the haircut. It should also use all legal recourses at its disposal to reverse the New York ruling, which could unfortunately hurt the rights of those that acknowledged the inevitable and accepted the exchange. If successful, this will relay a clear message to the international financial system.