

**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 AZQUERRETA,
CARMEN IRMA LAVORATO, CESAR
RUBEN VAZQUEZ, NORMA HAYDEE
GINES, MARTA AZUCENA
VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

Nos. 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)

ORAL ARGUMENT REQUESTED

**MOTION OF THE EURO BONDHOLDERS
FOR LEAVE TO INTERVENE AS INTERESTED NON-PARTIES**

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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure (“*Fed. R. App. P.*”) and Local Rule 27.1, Knighthead Capital Management, LLC, Redwood Capital Management, LLC, and Perry Capital LLC (each on behalf of one or more investment funds or accounts managed or advised by it) (collectively, the “Euro Bondholders”) submit this Motion for Leave to Intervene as Interested Non-Parties in the appeal of orders entered by the Southern District of New York, District Court Judge Thomas P. Griesa, on November 21, 2012 (the “November 21 Orders”).

PRELIMINARY STATEMENT

The Euro Bondholders are a group of investors that hold Euro-denominated bonds (“Euro Bonds”) issued by the Republic of Argentina (the “Republic”) and governed by the laws of England and Wales pursuant to a June 2, 2005 Indenture, as supplemented on April 30, 2010 (“Indenture”). The Euro Bonds are paid in euro, in Europe, and through a payment process that does not flow through the United States. The Euro Bondholders, together with other interested holders of Euro Bonds, hold over €1.2 billion of Euro Bonds. The total notional amount of Euro Bonds issued by the Republic of Argentina exceeds €10 billion. Thus, the Euro Bondholders represent a large and distinct group that is uniquely affected by the November 21 Orders’ unprecedented attempt to enjoin extraterritorial conduct and burden the rights and property of the Euro Bondholders, which are governed

by non-U.S. law. The virtually limitless scope of the November 21 Orders, which go far beyond the lawful jurisdiction of the district court, gives rise to specific legal issues pertaining to the Euro Bonds and Euro Bondholders that are separate and apart from those that will be raised by other parties. Accordingly, this Court should grant the Euro Bondholders leave to intervene in the appeal.¹

BACKGROUND²

In 2005 and 2010, the Republic underwent a voluntary debt restructuring and offered holders of its pre-existing debt the option to exchange their defaulted bonds for new bonds at a substantially reduced exchange rate (“Exchange Bonds”). As authorized by the Indenture, some of the Exchange Bonds issued by the Republic were Euro Bonds. *See* Clark Decl. Exs. 2-4. The Euro Bonds are governed by the laws of England and Wales, and the Republic explicitly and irrevocably submitted itself only to the jurisdiction of the courts of England or Argentina with respect to any proceedings related to the Euro Bonds. *See* Clark Decl. Ex. 2 (§§ 12.7-12.8); Ex. 3 (Exs. D.3 at R-14, D.5 at R-14); Ex. 4 (Exs. C.3 at R-12, C.8 at R-11,12). Payments on the Euro Bonds are made by the Republic

¹ As explained herein, the Euro Bondholders have a direct interest in the outcome of this appeal and should be granted leave to intervene. The Euro Bondholders, however, are not seeking to intervene in, or otherwise insert themselves as a party to, the proceeding in the district court.

² We refer the Court to its October 26, 2012 Opinion, which sets forth a fuller description of the relevant background. *See* Declaration of Christopher J. Clark, dated November 30, 2012 (“Clark Decl.”) Ex. 1.

to a bank in Argentina, transferred to a bank in Germany, and then distributed by European clearinghouses to the ultimate beneficiaries. *See* Clark Decl. Ex. 5 at ¶ 10. At no point in the payment chain do funds enter the U.S. or flow through U.S. entities.

Unlike the Euro Bondholders, Plaintiffs-Appellees refused to participate in the 2005 and 2010 bond exchanges and instead brought this action against the Republic for breach of its bond obligations, and on December 7, 2011, the district court granted partial summary judgment for Plaintiffs. On February 23, 2012, Judge Griesa entered an injunction that enjoined the Republic from making further payment on the Exchange Bonds until it concurrently or in advance made a ratable payment to Plaintiffs. Clark Decl. Ex. 6. Judge Griesa, however, went even further and enjoined “all parties involved, directly or indirectly, in advising upon, preparing, processing or facilitating any payment on the Exchange Bonds” from “aiding and abetting any violation . . . including any further violation by the Republic . . . such as any effort to make payments under the . . . Exchange Bonds” without also making a ratable payment to Plaintiffs. *Id.* at ¶ 2(e). The district court made no attempt at limiting the application of the February 23 injunction to persons or conduct within its jurisdiction, thus burdening the property of the Euro Bondholders, none of which was a party to that proceeding or given notice or an opportunity to be heard.

The Republic appealed to this Court, and the February 23 injunction was stayed pending appeal. On October 26, 2012, this Court issued an Opinion affirming the district court's order, but expressed "concerns" with the February 23 injunction, particularly its "application to third parties," and remanded the case to the district court to, among other things, "more precisely determine the third parties to which [the injunction would] apply before [this Court could] decide whether [its] application to them is reasonable." Clark Decl. Ex. 1 at 28.

On November 21, 2012, Judge Griesa, after expedited briefing and without notice to the Euro Bondholders, issued new orders, including an amended injunction that was practically identical to the February 23, 2012 injunction and went far beyond the jurisdiction of U.S. courts in attempting to enjoin extraterritorial conduct and disrupt the rights and obligations of the Euro Bondholders, whose Euro Bonds are governed by the laws of England and Wales and have no nexus to the United States. *See* Clark Decl. Exs. 7-10.

On their face, the November 21, 2012 Orders seek to enjoin the conduct of third parties around the world, including Clearstream Banking S.A., Euroclear Bank S.A. N.V. and the Euroclear System, the foreign clearinghouses that clear payments in euro on the Euro Bonds, and the Bank of New York Mellon S.A. N.V., a subsidiary of the Bank of New York Mellon that upon information and belief is incorporated in Belgium. *See* Clark Decl. Ex. 8 at ¶ 2(f). In fact, the

November 21 Order disrupts the entire payment process for the Euro Bonds, which is completely separate from the payment process for the U.S. Dollar-denominated bonds and occurs entirely through parties outside of the United States. *See* Clark Decl. Ex. 5 at ¶ 10.

ARGUMENT

The Euro Bondholders, as interested non-parties, should be granted leave to intervene in the appeal of the November 21 Orders. It is well-settled that a non-party may appeal a district court's judgment where it can state "a plausible affected interest" in the judgment. *Official Comm. Of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77 (2d Cir. 2006) (holding non-party had standing to appeal). This interest is particularly strong where, as here, a non-party has a "direct interest" in the property at stake. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127-28 (2d Cir. 2009) (holding non-party had standing to appeal where orders sought to attach and execute upon funds administered by non-party); *see also Karaha Bodas Co. L.L.C. v. Pertamina*, 313 F.3d 70, 82 (2d Cir. 2002) (holding non-party's allegation of ownership of property encompassed by an order constitutes an "affected interest"); *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (holding non-party who did not intervene in the district court had standing to appeal award of attorneys' fees where nonparty "ha[d] an interest that is affected by the judgment directing payment of the fee").

The Euro Bondholders have a direct interest in the outcome of the appeal. As explained above, they and other interested holders hold over €1.2 billion in Euro Bonds issued by the Republic, and their right to receive monies pursuant to those contracts has been placed in serious jeopardy by the November 21 Orders. Those Orders would prevent the alleged “agents and participants” of the Republic from disbursing the monies owed to the Euro Bondholders unless the Republic also paid in full the notes held by Plaintiffs-Appellees—even though none of those parties are “agents or participants” of the Republic or have any relevant connection to the United States.

The Court also should allow the Euro Bondholders to intervene because their rights and property were adjudicated without notice or an opportunity to be heard. By enjoining those who were not joined as parties, the district court went substantially beyond its lawful equitable powers. *See Alemite MFG. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930) (L. Hand) (holding that a court “cannot lawfully enjoin the world at large, no matter how broadly it words its decree . . . its jurisdiction is limited to those over whom it gets personal service and who therefore can have their day in court”); *Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975) (reversing order of contempt against non-party whose property rights were adjudicated by an injunction because “no man shall be subject to judicial

sanction without the opportunity for a hearing on the merits of the claims against him”).

The Euro Bondholders are especially aggrieved by the November 21 Orders which purport to enjoin extraterritorial conduct and property that is governed by the laws of England and Wales. Because the District Court made no attempt to tailor those Orders, they would apply to all of the Republic’s alleged “agents and participants” anywhere in the world—even parties that disburse monies to the holders of the Euro Bonds and reside outside of the United States, beyond the jurisdiction of the District Court.

The Euro Bondholders are uniquely situated to specifically address the extraterritorial effect of the November 21 Orders, which is contrary to U.S. law. Accordingly, the Euro Bondholders respectfully request that this Court grant it leave to intervene as interested non-parties in the appeal.

CONCLUSION

For the foregoing reasons, the Euro Bondholders respectfully request that this Court grant its Motion for Leave to Intervene as Interested Non-Parties to appeal the November 21 Orders. Should the Court, for any reason, deny this motion for leave to intervene, the Euro Bondholders, in the alternative, respectfully request that the Court grant them leave to join the appeal by filing a brief of *amicus curiae*.

December 4, 2012

Respectfully submitted,

By: /s/ Christopher J. Clark

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