UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL COMPLIANCE WITH SUBPOENA DIRECTED TO CLEARY GOTTLIEB STEEN & HAMILTON LLP

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

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Plaintiffs NML Capital, Ltd. ("NML"); Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., and Blue Angel Capital I LLC (collectively, the "Aurelius Plaintiffs"); Olifant Fund, Ltd. ("Olifant"); and Pablo Alberto Varela, et al. (the "Varela Plaintiffs," and together with NML, the Aurelius Plaintiffs, and Olifant, "Plaintiffs"), through their undersigned counsel, respectfully submit this memorandum of law in support of their motion, pursuant to Rules 26, 30, 37, and 45 of the Federal Rules of Civil Procedure, for an order compelling Cleary Gottlieb Steen & Hamilton LLP ("Cleary") to produce all documents responsive to the Subpoena To Produce Documents And To Testify At A Deposition In A Civil Action, dated November 26, 2012 directed to Cleary (the "Subpoena"), and to designate a witness for a deposition pursuant to Rule 30(b)(6).

PRELIMINARY STATEMENT

Through this motion, Plaintiffs seek to compel the disclosure of documents, and the designation of a witness for a Rule 30(b)(6) deposition, relating to the professed intention of defendant the Republic of Argentina ("Argentina") to violate the lawful orders of this Court that require Argentina to make ratable payments to Plaintiffs when it pays the holders of its performing bonds. Plaintiffs served a subpoena on Cleary, which sought documents and testimony relating to any plans, whether or not consummated, to effectuate this intention. During the meet and confer, Cleary represented that it did not have responsive documents or information. Cleary subsequently declined to confirm those representations and has refused to produce a single document or designate a witness (though the record now suggests that Cleary is in fact in possession of responsive documents and information), asserting that the discovery is irrelevant and protected by the deliberative process privilege. Neither contention has merit.

First, any plans that Argentina has developed or is developing to violate this Court's orders are directly relevant to this action. Argentina has been enjoined from developing any such plans, and the Court has retained jurisdiction to monitor Argentina's compliance with this obligation.

Second, the deliberative process privilege has been waived and is inapplicable. There are well-developed procedural requirements for asserting the deliberative process privilege, and Cleary's broad assertion of the privilege fails every one of these requirements. In addition, the deliberative process privilege is irrelevant because the documents and testimony sought by Plaintiffs are not protected by the privilege. Moreover, the deliberative process privilege is a qualified privilege, and can be overcome upon a showing of need. That showing is easily met here because discovery of the documents and communications sought by Plaintiffs is vital to preventing Argentina from attempting to evade this Court's orders. Finally, no privilege (including the attorney-client privilege) applies to the documents sought by Plaintiff because any such documents (if they exist) are in furtherance of a crime or fraud, and thus would not be entitled to the benefit of a privilege.

STATEMENT OF FACTS

I. The Court's Equal Treatment Orders

On February 23, 2012, the Court entered Orders in favor of Plaintiffs requiring Argentina to make ratable payments to Plaintiffs (the "February 23 Orders") whenever it makes payments on the securities that were issued in its 2005 and 2010 exchange offers (the "Exchange Bonds"). The Court also ordered that Argentina 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 of the Court.

February 23 Orders at 5.

On March 5, 2012, the Court stayed the February 23 Orders pending appeal (the "March 5 Order"), and ordered that:

> [T]he 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 Order at 4. The Court also "retain[ed] 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 its obligation not to evade the February 23 Orders.

On October 26, 2012, the United States Court of Appeals for the Second Circuit affirmed the February 23 Orders in part, and remanded two issues for further consideration by this Court. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012). On November 21, 2012, the Court entered an Opinion addressing the remanded issues (the "November 21 Opinion") and an Amended February 23 Order, which likewise prohibited Argentina from taking any action to evade the February 23 Orders, as amended. The Court also entered an Order Concerning the March 5, 2012 Order (the "November Stay Order"), which vacated the portion of the March 5 Order staying Argentina's obligation to make ratable payments, but which did not vacate Argentina's obligation not to attempt to evade the February 23 Orders, or this Court's retention of the right to monitor compliance with that obligation.

On November 28, 2012, the Second Circuit stayed this Court's November 21, 2012 orders pending appeal of the remanded issues (the "Second Circuit's Stay Order"). This stay had no effect on Argentina's continuing obligations under the March 5 Order, or on this Court's retention of the right to monitor compliance with those obligations.

II. Argentina's Stated Intention To Violate The February 23 Orders

This Court has already found that Argentina has stated an intention to violate the February 23 Orders:

> 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.

November 21 Opinion at 2-3.

Argentina implicitly acknowledged this intention when it submitted the Declaration of Francisco Guillermo Eggers, dated November 16, 2012 (the "Eggers Declaration"), which states

in a conclusory manner that Argentina is complying with the March 5 Order. The Eggers Declaration does not address whether (let alone deny that) Argentina is making plans to attempt to evade the February 23 Orders, which would itself be a violation of the March 5 Order. The Eggers Declaration also fails to state that Argentina would comply with the February 23 Orders in the event that they are affirmed.

III. Plaintiffs' Subpoena

On November 26, 2012, Plaintiffs served the Subpoena on Cleary, seeking three categories of documents. Declaration of Robert A. Cohen, dated December 19, 2012 (the "Cohen Decl.") at ¶ 2, Ex. A. First, it sought documents concerning any actions or plans, whether or not consummated, to evade or diminish the effect of the February 23 orders, or any steps taken to alter or amend the payment mechanisms used with respect to the Exchange Bonds. Second, it sought documents concerning payments on the Exchange Bonds. Third, it sought documents concerning transfers of funds in connection with such payments on the Exchange Bonds. The Subpoena also required the designation of a witness to be deposed, pursuant to Rule 30(b)(6). *Id.*

On December 3, 2012, Cleary served responses and objections to the Subpoena, refusing to produce a single document in response to the Subpoena. Cohen Decl. ¶ 3, Ex. B. On December 12, 2012, Plaintiffs met and conferred with Cleary regarding its responses and objections. The attorney appearing on behalf of Cleary, Carmine Boccuzzi, represented that (to the best of his knowledge) Cleary is not in possession, custody, or control of any documents responsive to the Subpoena, and that Cleary was not involved in any undocumented communications that could be discovered through a deposition. Mr. Boccuzzi agreed to make all inquiries necessary and appropriate to confirm those representations, and to send Plaintiffs a

letter, no later than Tuesday, December 18, 2012, regarding whether he could confirm those representations (in which case Mr. Boccuzzi would represent that a thorough inquiry was made) or, if he discovered responsive materials, whether Cleary would produce those materials or would stand on its objections. Cohen Decl. ¶ 4.

On December 14, 2012, Plaintiffs sent an email to Mr. Boccuzzi confirming Mr. Boccuzzi's representations and agreement, and requesting that Mr. Boccuzzi provide the confirmation that he promised before December 18, if possible. Cohen Decl. ¶ 5, Ex. C. On December 18, 2012, Mr. Boccuzzi sent a letter to Plaintiffs in which Mr. Boccuzzi did not object to the substance of Mr. Kirsch's summary of the December 12 meet and confer session, and instead objected only to its request to provide a response before December 18. Rather than providing a confirmation that no responsive documents or undocumented conversations exist, Mr. Boccuzzi simply reasserted Cleary's objections to the Subpoena – implicitly confirming that Cleary is in possession, custody, or control of materials responsive to the Subpoena. Cohen Decl. ¶ 6, Ex. D.

There are only two inferences that can be drawn from such conduct: that Mr. Boccuzzi's representations on December 12 were false and designed to delay Plaintiffs, or that Mr. Boccuzzi discovered responsive materials and did not wish to disclose that fact on December 18. Either way, an inference must be drawn that Argentina is, at a minimum, drawing up plans to violate the February 23 Orders if they are affirmed, and that Cleary has participated such efforts.

ARGUMENT

I. The Subpoena Seeks Information That The Court Has Already Ruled To Be A Proper Subject Of Inquiry.

The Court has expressly retained the power to monitor Argentina's compliance with its obligation not to take any actions to evade, diminish, or render ineffective the February 23

Orders. March 5 Order at 4. Nothing in the Second Circuit's Stay Order purported to stay any aspect of the March 5 Order, including Argentina's obligations and this Court's ability to monitor Argentina's compliance with those obligations. Given (as this Court has already found) that officials at the highest levels of the Argentine government, including President Cristina Fernández de Kirchner, have stated that Argentina intends to violate the February 23 Orders if they are affirmed on appeal, discovery into Argentina's plans is both necessary and appropriate to enable the Court to enforce its orders. All of the requests in the Subpoena – which seek information on the details of Argentina's current payment mechanism, and any plans it has made to attempt to evade the February 23 Orders with respect to future payments – seek information that is directly relevant to this issue.

Nothing in the Eggers Declaration changes Plaintiffs' need for the discovery sought in the Subpoena. The Eggers Declaration does not address whether (let alone deny that) Argentina is engaged in planning to attempt to evade the February 23 Orders (which is itself a violation of the March 5 Order), and it says nothing about whether Argentina intends to comply with the February 23 Orders if they are affirmed – and high-ranking Argentine officials have repeatedly stated that they will not do so. Plaintiffs thus should be allowed to take discovery into the subject, both to test the Eggers Declaration and to uncover Argentina's plans.

II. The Documents And Testimony Sought In The Subpoena Are Not Protected By Any Immunity Or Privilege.

The documents and testimony sought through the Subpoena are not protected by sovereign immunity or any privilege. First, the Subpoena in no way impinges upon Argentina's sovereign immunity. Second, even assuming that the deliberative process privilege applies to foreign sovereigns, it cannot apply to the documents sought through the Subpoena. The deliberative process privilege exists to protect the legitimate intra-governmental decision-making

process of the United States federal and state governments – not to protect a foreign state's discussions about unlawful attempts to evade court orders. Moreover, the deliberative process privilege is inapplicable here because of Cleary's complete failure to follow the procedural prerequisites for asserting the privilege, and because the documents and testimony sought by Plaintiffs do not satisfy the elements of the privilege. Third, if Argentina is developing plans to violate an order of this Court, any privilege would be vitiated by the crime-fraud exception.

A. The Subpoena Does Not Implicate Argentina's Sovereign Immunity.

There is no basis for Argentina or Cleary to assert that sovereign immunity bars the discovery sought here. Although Argentina has argued in the past that discovery concerning assets that might be subject to attachment or execution should be limited by principles of sovereign immunity, the Subpoena is not seeking asset discovery, so there is no basis upon which to invoke sovereign immunity. And even if the Subpoena were seeking asset discovery, the Second Circuit has already rejected objections to such discovery based upon sovereign immunity, particularly when the discovery is sought from third parties. As the Second Circuit held in *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012), "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules." *Id.* at 209. "Argentina does not (and could not) argue that the district court lacked subject matter or personal jurisdiction over it because Argentina expressly waived any claim to immunity in the bond agreements." *Id.* Thus, the Second Circuit held that compelling a non-party to comply with a subpoena "does not infringe on any immunity from the district court's jurisdiction that Argentina otherwise might enjoy."

Id.[1] The Second Circuit's logic applies with equal force to the Subpoena here, which like the subpoenas in *EM*, is directed to a non-party for purposes of enforcing relief entered by this Court.

B. The Deliberative Process Privilege Is Inapplicable.

Cleary categorically asserted that the Subpoena seeks information protected by the deliberative process privilege. However, a categorical invocation of the deliberative process privilege is procedurally deficient and substantively wrong. The information sought through the Subpoena is not subject to the deliberative process privilege, and even if it were, the privilege must be pierced under these circumstances.

1. Cleary Failed To Properly Assert The Privilege.

As an initial matter, Cleary's assertion of the deliberative process privilege is meaningless because it has no authority to do so. The deliberative process privilege may only be invoked by "the head of the governmental agency which has control over the information to be protected, after personal review of the documents in question," or alternatively, by "a subordinate in high authority who is competent to assess the confidential nature of the agency's documents." *Reino De Espana v. Am. Bureau of Shipping*, 2005 WL 1813017, at *12 (S.D.N.Y. Aug. 1, 2005). Cleary qualifies as neither. Even if it were able to claim the privilege, "the information or documents sought to be shielded must be identified and described," with the agency "provid[ing] precise and certain reasons for asserting confidentiality over the requested information." *Id.* Thus, even if the deliberative process privilege potentially applied to any

[1] On October 10, 2012, the Second Circuit denied Argentina's motion for rehearing, and it issued its mandate on October 17, 2012. The Second Circuit's ruling thus is final and binding.

responsive documents (and as Plaintiffs set forth below, it does not), Cleary and Argentina have failed to follow the necessary steps to assert it properly.

2. Argentina's Bad Faith and Misconduct Precludes Application of the Privilege.

"The deliberative process privilege is routinely denied in the face of allegations of official misconduct." *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 561 (S.D.N.Y. 2002); *see also In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) ("[W]here there is reason to believe the documents sought may shed light on government misconduct, the privilege is routinely denied, on the grounds that shielding internal government deliberations in this context does not serve the public's interest in honest effective government.") (citations and internal quotations omitted). Argentina did not in the Eggers Declaration address whether (let alone deny that) it is engaged in planning to attempt to evade the February 23 Orders – which is itself a violation of the March 5 Order – and Argentina has repeatedly stated that it will disregard the February 23 Orders if they are affirmed. *See* November 21 Opinion at 2-3. Neither Argentina nor its lawyers are entitled to withhold documents based on the deliberative process privilege in the face of Argentina's repeated bad-faith statements that it will not comply with this Court's lawful orders.

3. The Privilege Is Inapplicable Because the Requested Information is Not "Predecisional" or "Deliberative."

The deliberative process privilege "'is a qualified one,' and 'is not absolute.'" *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). Only documents that are "predecisional" and "deliberative" are protected by the privilege; thus, documents must "precede[], in temporal sequence, the decision to which it relates." *Reino De Espana*, 2005 WL 1813017, at *11. The privilege applies strictly to internal opinions, not facts. *See Envt'l Protection Agency v. Mink*, 410 U.S. 73, 87-88 (1973) ("memoranda consisting only

of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government"), *superseded by statute on other grounds*. Furthermore, "materials related to the explanation, interpretation or application of an existing policy, as opposed to the formulation of a new policy," are not protected by the deliberative process privilege. *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991).

The deliberative process privilege cannot provide blanket protection to all documents sought through the Subpoena. Plaintiffs are allowed discovery of all documents that merely reflect the facts of Argentina's decision-making process and its results – that is, the who, what, where, why, and how – because the deliberative process privilege, by its terms, applies only to documents that are both "predecisional" and "deliberative." In addition, to the extent Argentina has made a decision (consistent with its stated intention) to violate the February 23 Orders, any subsequently created documents would not be "predecisional." Moreover, any materials planning the implementation of such a policy – for example, planning ways to pay bondholders outside of the United States – would not be "deliberative" in nature.

4. Any Documents or Information Concerning Third-Party Communications Fall Outside the Scope of the Privilege.

The deliberative process privilege extends only to "intra-agency or inter-agency" communications of a government. It does not shield communications outside of the government that is attempting to assert the privilege. Only documents that are "intra-agency or inter-agency" in nature are protected. *See Dep't of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12, 15-16 (2001) (holding that the deliberative process privilege did not apply to ex-parte communications with non-government parties). Moreover, a government agency waives the deliberative process privilege by intentionally sharing with

anyone outside of the government documents or communications that otherwise would have fallen within the scope of the privilege. *Shell Oil Co. v. IRS*, 772 F. Supp. 202, 206-09 (D. Del. 1991).

Any responsive communications between Cleary or Argentina and anyone outside of the government, or documents shared with anyone outside of the government, plainly fall outside the scope of the deliberative process privilege or any other privilege. Therefore, for example, any information that Cleary has about Argentina's communications with people or entities concerning potential schemes to change the payment mechanism of the Exchange Bonds, is plainly discoverable.

5. Even If Applicable, The Privilege Should Be Pierced.

Even if the deliberative process privilege could be and has been properly invoked, it can "be overcome upon showing that the adverse party's need for disclosure outweighs the agency's interest in confidentiality." *Reino De Espana*, 2005 WL 1813017, at *12. Here, Plaintiffs have a clear need for the materials they seek. Argentina has repeatedly professed an intention to violate the February 23 Orders if they are affirmed. The Subpoena seeks the details of how Argentina intends to do this so that Plaintiffs can seek additional relief they need to prevent Argentina from doing so. In contrast, Argentina's sole interest in keeping its deliberations confidential is preventing the Court and Plaintiffs from learning how Argentina intends to violate a lawful order of this Court – which is not a legitimate interest at all.

C. No Privilege Is Applicable Because Of The Crime-Fraud Exception.

If Argentina and Cleary have engaged in any communications regarding ways in which to attempt to evade the February 23 Orders, those communications would not be subject to any privilege – including the attorney-client privilege – because of the crime-fraud exception. This is

true even if Argentina has not yet implemented a scheme for attempting to evade the February 23 Orders.[2]

It is well-settled that any communications in furtherance of an unlawful goal, such as a crime or fraud, are not privileged. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1983) (applying exception to legal advice "in furtherance of a fraudulent or unlawful goal"); *Zimmerman v. Poly Prep Country Day School*, No. 09 Civ. 4586 (FB), 2012 WL 2049493, at *17 (S.D.N.Y. June 6, 2012) (reviewing *in camera* documents relating to alleged fraud upon the court). "The crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client's communication." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1039; *Avramides v. First Nat'l Bank of Md.*, No. 87 Civ. 5732 (WK), 1997 WL 68559, at *1 (S.D.N.Y. Feb. 19, 1997); *Duttle v. Bandler & Kass*, 127 F.R.D. 46, 53 (S.D.N.Y. 1989). Moreover, "the fraudulent nature of the objective need not be established definitively; there need only be presented a reasonable basis for believing that the objective was fraudulent." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1039.

If Argentina is planning, strategizing, negotiating, or otherwise preparing to breach the February 23 Orders in the event that they are affirmed, all communications in furtherance of these efforts are not privileged. First, it is clear that violating a court order would fall within the broad ambit of the crime-fraud exception, which is not limited to crimes and the tort of fraud, but rather extends to all unlawful goals that a client is seeking to achieve. For example, in *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, the conduct upon which the privilege

[2] Of course, Cleary could only invoke the privilege to begin with in respect of documents that it shows are privileged. There has been no showing here that any of the documents requested by the Subpoena are privileged to begin with.

was pierced was a fraudulent conveyance. An entity repeatedly refused to obey an order compelling compliance with a subpoena, and then it sought to judgment-proof its assets in the United States in order to prevent monetary sanctions from being enforced against it. The transactions used to effectuate this scheme were, minimally, a fraudulent conveyance under the New York Debtor and Creditor Law – a form of unlawful behavior sufficient to invoke the crime-fraud exception. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1041. Similarly, in *Zimmerman*, the court rejected the theory that only the tort of fraud could support the crime-fraud exception, and pierced the privilege because of a fraud upon the court. *Zimmerman*, 2012 WL 2049493, at *17.

Second, it is irrelevant – as a matter of well-settled law – whether Argentina has implemented a scheme to attempt to evade the February 23 Orders. The test is whether communications were made in furtherance of an unlawful goal, whether or not completed, and whether or not successful. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d at 1039. Thus, the Eggers Declaration – which merely states that no scheme to violate the February 23 Orders is being implemented while appeals are pending, and says nothing about whether Argentina is developing plans to violate the February 23 Orders upon an affirmance – says nothing about whether the crime-fraud exception applies to Argentina's communications. If anything, the Eggers Declaration *supports* a conclusion that the crime-fraud exception applies because any responsive documents necessarily would be in furtherance of an ongoing or future crime or fraud, rather than merely reflecting a past crime or fraud.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue an order compelling Cleary to produce all documents responsive to the Subpoena, and to designate a witness to be deposed pursuant to Rule 30(b)(6).

Dated: New York, NY
December 19, 2012

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