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November 8, 2012

BY HAND

Honorable Thomas P. Griesa
United States District Court
Southern District of New York
500 Pearl Street, Room 1630
New York, New York 10007

Re: *NML Capital, Ltd. v. The Republic of Argentina*, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG) and 09 Civ. 1708; and related cases

Dear Judge Griesa:

We write in response to the letter-motion filed by NML Capital, Ltd. ("NML") and the plaintiffs in the above-captioned actions (together, "plaintiffs") on November 6, 2012 seeking (1) expedited resolution of the two remand issues identified by the Second Circuit in its decision of October 26, 2012 (the "October 26 Decision")[1] and (2) entry of an order stating that the Order dated March 5, 2012 staying the effect of the permanent injunctions entered against the

[1] The two issues identified by the Second Circuit for this Court's consideration are: (1) "the operation of the payment formula" in connection with the pari passu clause and any payments purportedly required by the clause, October 26 Decision at 29; *see also id.* at 11 (discussing possible ways "Ratable Payment" "could be read"), and (2) the application of the Orders issued on February 23, 2012 granting plaintiffs permanent injunctive relief pursuant to the pari passu clause to "third parties and intermediary banks." *Id.* at 29; *see also id.* at 28 ("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.").

Republic (the "Stay") is no longer in effect (the "Motion"). The Court should deny plaintiffs' Motion and set a reasonable schedule for the briefing and decision of the serious issues that the Court of Appeals has directed the Court to determine on remand.

First, plaintiffs are flat wrong in asserting that the mandate has issued and therefore the Stay of the permanent injunctions is no longer in effect. The Second Circuit in fact has not issued its mandate to this Court, *see* Docket, No. 12-105-cv (2d Cir. 2012), nor could it do so under the Federal Rules of Appellate Procedure, which provide that the mandate must issue *seven days after the time for the filing of a petition for rehearing has run. See* Fed. R. App. P. 41(b). Here, the deadline for the Republic to file its petition for rehearing and/or rehearing en banc is Friday, November 9, 2012 and, as the Republic explained in its letter of November 5, 2012 to Your Honor, the Republic expects to file a petition for rehearing and rehearing en banc on or before that date. Once the petition is filed, issuance of the mandate is further stayed pending resolution of the petition. *See Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) (stating that the mandate is automatically stayed until disposition of a petition for rehearing); *see also* Fed. R. App. P. 41(d)(1) ("The timely filing of a petition for panel rehearing [or] rehearing en banc . . . stays the mandate until disposition of the petition . . .").

Second, and in any event, the Stay continues to be in effect until the Second Circuit issues its mandate "disposing of the Republic's appeal . . . ." *See* March 5, 2012 Stay Order at 2. Apart from the fact that no mandate has issued following the October 26 Decision, that mandate will not dispose of the appeal, because the Second Circuit has indicated that it will automatically resume jurisdiction following this Court's adjudication of the two issues identified as requiring further review. *See* October 26 Decision at 29 ("Once the district court has conducted such proceedings *the mandate should automatically return to this Court* and to our panel for further consideration of the merits of the remedy without need for a new notice of appeal.") (emphasis added). The October 26 Decision thus makes clear that the Second Circuit's consideration of the issues on remand, which are essential to the issue of remedies, is part and parcel of its decision, and that its remand to this Court at this stage in no way "disposes" of the Republic's appeal.

Third, plaintiffs' assertion that the Stay should be "dissolved" because the Second Circuit "resolved every issue the Republic raised on appeal," Motion at 4, has no merit. To the contrary, the Second Circuit explicitly recognized that it was not clear (1) what conduct the permanent injunctions prohibit, *see* October 26 Decision at 11 ("We are unable to discern from the record how this [payment] formula is intended to operate"), and (2) to whom the injunctions apply, *id.* at 28 ("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."). The remand was precisely to consider and determine these open issues, following which the Court of Appeals explicitly stated that it would review this Court's determination of them.

Indeed, the notion that the Stay would expire before the Court has even determined the terms of the permanent injunctions and who they enjoin is bizarre on its face. At this point, and until the remand proceedings have been conducted and decided, no one knows what the ultimate injunctions will look like. The idea that there is a presently enforceable, unstayed injunction that someone could be punished by contempt for violating, when by definition its terms are not known, is a legal oxymoron. *See, e.g.*, *Lau v. Meddaugh*, 229 F.3d 121, 123 (2d Cir. 2000) (per curiam) ("Since an injunctive order prohibits conduct under threat of judicial punishment, fairness requires that the litigants receive explicit notice of precisely what conduct is outlawed.").

Fourth, there is no basis for plaintiffs' accusations that the Republic is changing the payment mechanisms of the Exchange Bonds. Motion at 1-2. The timing of plaintiffs' accusations – like their similar allegations in July of this year, in connection with their demand for expedited discovery – demonstrates plaintiffs' desire to create a false impression of urgency where none exists, based on newspaper hearsay that lack any factual basis. As the Republic reaffirmed on July 26, 2012 (*see* Ex. A hereto), the Republic has complied and is complying with the Stay, which remains in effect. *See* March 5, 2012 Stay Order at 2.

Finally, plaintiffs' assertion that they will suffer "severe[] prejudice" because continuance of the Stay will allow the Republic to go forward with its scheduled December payments to the Exchange Bondholders, Motion at 5, is unsupported hyperbole. NML did nothing while similar payments of equal magnitude were being made after the Republic's 2005 Exchange Offer, and future payments in similar amounts to the December payments are scheduled to run for many years to come. NML does not, because it cannot, point to any serious prejudice that it will experience if the Stay remains in place and the Court considers the remand issues on a sensible, non-expedited schedule that allows both the Republic and other interested persons, not least the holders of restructured debt and the intermediary institutions that receive payments on behalf of these holders, to be heard on these important issues.

The need for due consideration is patent here. The Second Circuit's directive makes clear that this Court's proceedings should, first and foremost, address the permanent injunctions' impact on third parties, including the Exchange Bondholders and intermediary banks, as well as the operation of the payment formula. October 26 Decision at 29. The need for serious examination of these issues is further demonstrated by NML's proposed revised "orders," which include breathtakingly broad categories of actors to which the permanent injunctions would apply. *See, e.g.*, Motion Ex. B1 at 6-7 (plaintiffs' proposed order purporting to restrain, *inter alia*, "the indenture trustees and/or registrars under the Exchange Bonds," "the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds," "the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds," and "any agents" of the foregoing as well as of other categories of listed third parties). Such broad and ill-defined categories demonstrate why plaintiffs' proposed orders are plainly inconsistent with the Court of Appeals' concern that the permanent injunctions be reasonably applied. *See* October 26 Decision at 28 ("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*") (emphasis added).

The Court should accordingly deny plaintiffs' Motion.

Respectfully submitted,

Carmine D. Boccuzzi Jr.

cc: Counsel of Record (by e-mail)

EXHIBIT A

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July 26, 2012

BY E-MAIL

Honorable Thomas P. Griesa
United States District Court for
the Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *NML Capital, Ltd. v. Republic of Argentina*, Nos. 08 Civ. 6878 (TPG) *et al.*; *Aurelius Capital Master, Ltd. v. Republic of Argentina*, Nos. 09 Civ. 8757 (TPG) *et al.*

Dear Judge Griesa:

We write in response to plaintiffs' July 19 letter concerning certain discovery recently served by plaintiffs in these actions.

By way of background, plaintiffs seek expedited discovery concerning the permanent injunctions entered by the Court on February 23 (the "Permanent Injunctions") and the March 5 Order in place pending appeal (the "March 5 Stay Order") in connection with the so-called *pari passu* clause. The March 5 Stay Order stayed the Permanent Injunctions pending appeal and provided that, during the pendency of the appeal, "the Republic shall not... take any action to evade the directives of the [Permanent Injunctions] in the event they are affirmed." *See* Order Pursuant to FRCP 62(c) at 2, dated March 5, 2012. The Republic pursued its appeal of the Permanent Injunctions and associated orders on an expedited basis, and the Second Circuit heard oral argument this past Monday, July 23.

On July 17, several days prior to the Second Circuit oral argument, plaintiffs served on the Republic Interrogatories and Document Requests (the "Interrogatories and Document Requests") and a Notice of 30(b)(6) Deposition (the "Deposition Notice"). The

discovery broadly seeks information and documents covering a nearly two-year period – from October 2010 to the present – concerning, *inter alia*, "any plan, proposal, idea, recommendation, or course of action, whether or not consummated, to make any payment" on the Republic's restructured debt other than through the trustee for the holders of interests in Exchange Bonds, Bank of New York Mellon ("BNY"), and "all plans, proposals, ideas, recommendations, or courses of action, whether or not consummated, to make any payment through Caja de Valores" – an Argentine securities depository – on any Exchange Bonds. *See* Interrogatories and Document Requests at 10; Deposition Notice at 6. Plaintiffs thus seek information going back *years* (*i.e.*, to October 2010) prior to the February 23 entry of the Permanent Injunctions now on appeal in the Second Circuit, despite plaintiffs' claim that the discovery is intended to determine whether the any "actions" have been taken to "evade" those injunctions, if affirmed. Indeed, the discovery speculates as to events that "may" or "might" happen in the event the Second Circuit affirms.

The Republic will serve on plaintiffs in the coming days its objection to the Deposition Notice, which demands the appearance of a witness on Tuesday July 31.[1] The Republic must otherwise respond to the Interrogatories and Document Requests by August 16. In the meantime, plaintiffs' request for a discovery conference is unnecessary and they have offered no basis to support their demand for expedited discovery.

First, plaintiffs' accusation that the Republic "may have violated" the Court's March 5 Stay Order is literally based on nothing. The newspaper article attached by plaintiffs as the sole basis for their July 19 letter does not say this. Moreover, I confirmed in writing to plaintiffs that the newspaper article is without factual basis, and that the Republic is of course aware of the Permanent Injunctions entered by this Court and is acting in compliance with the March 5 Stay Order. *See* Letter from Carmine D. Boccuzzi to Robert A. Cohen, dated July 16, 2012. Apparently trying to create an "issue," plaintiffs cavil that my July 16 letter is expressed in the present tense. So as to allay this purported concern and not waste the Court's time further, I can confirm that the Republic *has complied* with the March 5 Stay Order as well.

Second, plaintiffs have otherwise established no basis for expedited discovery. On July 20, plaintiffs separately served non-expedited discovery on BNY, the trustee for the Exchange Offer bondholders, seeking similar information.[2] Presumably, plaintiffs wish to

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[1] Apart from other problems with the Deposition Notice, there is no basis for deposing a representative of the Republic, as plaintiffs have not shown, and cannot show, any basis or need for oral testimony. *See In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998), *rev'd on other grounds by Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) ("Principles of comity dictate that we accord the same respect to foreign officials as we do to our own. Thus, absent some showing of need for oral testimony from [Greek cabinet ministers], the district court erred in authorizing their depositions.").

[2] For example, plaintiffs have likewise sought from BNY "all documents" from October 2010 to the present "concerning any plan, proposal, idea, recommendation, or course of action, whether or not consummated, to avoid the effect or the enforcement of the [*pari passu* Orders] or to alter the method

confirm that BNY remains as trustee for the bondholders, given plaintiffs' announced intention to serve the Permanent Injunctions on BNY and bring down upon that institution the full force of this Court's contempt power in the event plaintiffs are not paid in full. *See* Hr'g Tr. at 5:17-6:4; 45:13-14, dated Feb. 23, 2012 (counsel for plaintiffs stating that BNY will be "put on notice of this order," will be required to pay plaintiffs "as a condition to making the exchange bond offer payments," and that the bank will be "in contempt of the courts of the United States of America" if it does not pay plaintiffs). Again, BNY remains the trustee for holders of interests in Exchange Bonds, a factual point that plaintiffs no doubt already know and confirmation of which they are seeking from BNY.

Finally, the next payment date for the Exchange Bonds is hardly imminent – it is scheduled for September 30, 2012, *i.e.*, over two months from now. To the extent the Court believes any discovery is necessary at all, there is ample time to work out any issues without any expedition at all.

Respectfully,

Carmine D. Boccuzzi

cc: Counsel of Record (by e-mail)

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of payment on the Exchange Offer Securities in any way" (Request No. 5). Subpoena Duces Tecum served by NML Capital Ltd. and the Aurelius plaintiffs, dated July 20, 2012. Oddly, NML – this time not joined by the Aurelius plaintiffs – also separately served an extraordinarily broad second subpoena on BNY, requesting, *inter alia,* documents concerning the drafting and negotiation of the Republic's 2010 Exchange Offer (without any time limitation whatsoever) (Requests Nos. 1 and 2), "documents reflecting past, current or future efforts by Argentina, Cleary, or any other official, employee, agent, advisor, or representative of Argentina, to resist the attempts by creditors to enforce their contracts with and judgments against Argentina" (Request No. 4); documents concerning the structuring of "Argentina's business affairs to raise potential new funds or to exchange outstanding obligations" (Request No. 5); and documents "concerning opposition by Argentina or BNY to proposed legislation by the New York State Assembly or Senate from 2010 to the present" (Request No. 6). Subpoena Duces Tecum served by NML Capital, Ltd., dated July 20, 2012. The relevance of these latter NML topics to the Permanent Injunctions is, on its face, non-existent.