

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,

EXCHANGE BONDHOLDER GROUP,

Intervenor.

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

OPPOSITION OF DEFENDANT-APPELLANT THE REPUBLIC OF ARGENTINA TO PLAINTIFFS-APPELLEES' MOTION TO AMEND STAY

Of Counsel:

Jonathan I. Blackman
Carmine D. Boccuzzi
Sara A. Sanchez
Michael M. Brennan

CLEARY GOTTlieb STEEN & HAMILTON LLP
Attorneys for Defendant-Appellant
One Liberty Plaza
New York, New York 10006
(212) 225-2000

(Plaintiffs-Appellees Continued)

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.,

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	5
I. PLAINTIFFS' REQUEST TO CONDITION THE STAY ON THE REPUBLIC'S POSTING OF SECURITY IS THE EQUIVALENT OF THE DISTRICT COURT'S IMPROPER ESCROW REQUIREMENT THAT THIS COURT STAYED	5
II. PLAINTIFFS PROVIDE NO BASIS WHATEVER FOR THEIR DEMAND THAT THE COURT REVERSE ITS STAY ORDER OR SPEED THIS CASE TO JUDGMENT IN UNDER TEN BUSINESS DAYS	10
CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Morgan Guar. Trust Co. of New York v. Republic of Palau</i> , 702 F. Supp. 60 (S.D.N.Y. 1988)	8
<i>Richmark Corp. v. Timber Falling Consultants</i> , 959 F.2d 1468 (9th Cir. 1992)	8
<i>Sales v. Underwriters Ins. Co.</i> , No. 90 Civ. 7580 (CSH), 1995 WL 144783(S.D.N.Y. Apr. 3, 1995)	8
<i>Stephens v. Nat’l Distillers & Chem. Corp.</i> , 69 F.3d 1226 (2d Cir. 1996).....	7
<i>Texaco Inc. v. Pennzoil Co.</i> , 784 F.2d 1133 (2d Cir. 1986), <i>rev’d on other grounds</i> , 481 U.S. 1 (1987) ...	8
Rules and Statutes	
28 U.S.C. § 1609	7
28 U.S.C. § 1610	7

The Republic submits this memorandum in opposition to plaintiffs' motion, dated November 30, 2012, seeking to have this Court reverse its November 28 Order (the "Stay") staying the district court's November 21 Orders.¹

PRELIMINARY STATEMENT

In issuing its Stay of the district court's November 21 Orders, this Court properly averted the irreparable injury otherwise facing not only the Republic of Argentina but also exchange bondholders holding some \$24 billion in restructured debt and countless financial institutions. That imminent, irreparable injury arose from the unprecedented November 21 Orders, which conditioned the Republic's payment on its restructured debt on payment by the Republic of over \$1.3 billion (the full face amount of plaintiffs' defaulted debt, plus interest), including the immediate turnover of that sum into an escrow account, thereby imperiling service of the Republic's performing debt. Moreover, the November 21 Orders enjoined numerous third parties from transferring or receiving payment of restructured debt, without giving either those third parties or the Republic any opportunity for appellate review of the Orders. By requiring the Republic immediately to turn over

¹ Unless otherwise specified, defined terms have the meaning assigned in the Republic's emergency motion for stay, dated November 26, 2012 ("Republic Br."), and referenced exhibits are those attached to the Declaration of Carmine D. Boccuzzi, dated November 26, 2012. Additional exhibits are being submitted today as attachments to the Declaration of Carmine D. Boccuzzi, dated December 3, 2012 ("12/3 Boccuzzi Decl."). The Declaration of Matthew D. McGill, dated November 30, 2012, is referred to as "McGill Decl." and the Declaration of Sean O'Shea, dated December 3, 2012, is referred to as "O'Shea Decl."

into that escrow 100% of plaintiffs' monetary claims as a condition to making a single installment payment of interest on discounted debt to restructured debt holders, the district court's Orders, when unstayed, put the Republic in an impossible position. The Orders would strip the Republic of its appellate rights while requiring the Republic to take steps in violation of the FSIA, as well as the Republic's own internal law and public policy.

This imminent danger was sufficient to warrant this Court's action in granting the Stay. The Court, however, was presented with much more – namely, the emergency motions of the performing bondholders themselves,² as well as the papers submitted (and ignored) in the district court by The New York Clearing House Association (Ex. N), The Federal Reserve Bank of New York (Ex. L), The Bank of New York Mellon (Ex. K) and The Depository Trust Company (Ex. M). In contrast to the irreparable injury identified by these third parties, plaintiffs offered no basis for finding that they would suffer any harm if a stay issued.

The filings of numerous third parties, as well as the tide of materials submitted with the three stay petitions, uniformly and clearly demonstrated the harm facing these institutions, and the even broader crisis of unprecedented proportions that will be provoked by the requirement that the Republic make an immediate

² The Emergency Motion of the Exchange Bondholder Group, dated November 26, 2012, is referred to here as “EBG Br.”; and the Emergency Motion of Fintech Advisory, dated November 27, 2012, is referred to as “Fintech Br.”

payment it cannot fulfill. The unprecedented Orders imperiled not just numerous institutions, but also the process of orderly sovereign debt restructuring, the standing of New York as a financial center, and New York law. *See also* Joe Leahy, *Brazil warns on Argentina debt ruling*, Fin. Times, Nov. 29, 2012 (“Brazil’s central bank governor[] has warned that [the injunctions] ordering Argentina to pay so-called ‘holdout’ creditors sets a negative precedent that could hurt sovereign debt negotiations elsewhere.”) (12/3 Boccuzzi Decl. Ex. A); Stephen M. Davidoff, *In Court Battle, a Game of Brinkmanship with Argentina*, N.Y. Times, Nov. 27, 2012 (“The ability of a country to achieve a workout and avoid this type of guerrilla action just got harder and more uncertain at a time of debt restructuring in Europe. This is not supposed to happen. . . . [T]he spirit of the [FSIA] seems violated.”) (12/3 Boccuzzi Decl. Ex. B). By entering the Stay, this Court has allowed for an appropriate review of the interests and arguments of all of these parties – interests about which the Court expressed specific and pointed “concerns” in its October 26 Decision. *See* Oct. 26 Decision at 28 (Ex. Q).

Plaintiffs’ motion should be denied because it demands, as a condition to the continuation of the Stay, a bond that the Republic cannot and should not be required to post. Plaintiffs’ improper demand (rejected by the district court itself both in this case and all other cases involving the Republic) for security as a “condition” of the Stay is no different than the improper escrow requirement in the

November 21 Orders, which similarly compels the Republic to transfer into the United States assets immune from execution so that they are available to satisfy the full amount of plaintiffs' money damages claims. Under this Court's precedent, such measures – regardless of whether they are styled as pre-judgment security or an escrow – are plainly barred by the FSIA. The posting of a bond as security for plaintiffs' demanded payment in full is also, like the payment into an escrow, improper under Argentine law, which, based on principles of inter-creditor equity, forbids payment to plaintiffs on better terms than the restructured debt.

Plaintiffs in any event can point to no facts warranting an amendment to the Stay. There is certainly no basis for the claim that anything that occurred in the 48 hours after the issuance of the Stay (*i.e.*, the time it took plaintiffs to file their motion) warrants this Court essentially reversing itself. Plaintiffs' motion does nothing more than repeat their arguments before the district court – based on hearsay newspaper articles which the Republic has refuted in a sworn declaration – and claim that this constitutes an “emergency.” The Republic has not violated the conditions of the district court's original March 5 stay order (enjoining it from changing the method by which the exchange bonds are paid), and in fact has just made its scheduled December 2 interest payment in the same manner as its previous payments, and will continue to service its restructured debt *up until 2038*. Plaintiffs' claim of urgency and demand that the Republic be forced to post a bond in the

amount of over \$1.4 billion as a condition to making the December 15 payment on the restructured debt is yet another attempt to shield from appellate review, *inter alia*, the fact that such a requirement, whether phrased as an “escrow” or a “bond,” blatantly violates the FSIA, and is not based on any actual “emergency” that will result in harm to plaintiffs.

Plaintiffs’ demand, in the alternative, that the Court somehow resolve this appeal by December 15 (the date of the next payment on performing debt with which plaintiffs hope to interfere) is equally artificial. This is an attempt to create an erroneous rush to judgment that is unnecessary, unfair, and unworkable.

ARGUMENT

I. PLAINTIFFS’ REQUEST TO CONDITION THE STAY ON THE REPUBLIC’S POSTING OF SECURITY IS THE EQUIVALENT OF THE DISTRICT COURT’S IMPROPER ESCROW REQUIREMENT THAT THIS COURT STAYED

This Court’s Stay of the November 21 Orders was entered in the wake of three separate emergency motions by the Republic, the Exchange Bondholder Group, and Fintech Advisory Inc., each of which sought to prevent immense, immediate irreparable harm to themselves and numerous other third parties. As the Republic explained in its motion, the Court’s Stay of these Orders is necessary to protect those interests. *First*, the Stay is needed to preserve the Republic’s appellate rights. *See* Republic Br. at 8. *Second*, the Stay protects the Republic from being placed in an impossible position whereby it faces Orders threatening the service of

its legitimate debts unless the Republic simultaneously satisfies a bond payment requirement with which it cannot legally comply. *Id.* at 8-9. *Third*, the Stay prevents the Orders from interfering – prior to full appellate review – with the rights of the holders of over \$24 billion of the Republic’s restructured debt. *See id.* at 9; EBG Br. at 16-18; Fintech Br. at 5-6, 9. *Finally*, the Stay protects the public interest, because the Amended Injunctions would result in increased litigation and inject more confusion and uncertainty into New York’s payment system and future sovereign debt restructurings. *See Republic Br.* at 18-19.³

The Court should reject plaintiffs’ request to “amend” the Stay because it amounts to a demand that the Court reverse itself, and permit to go into immediate effect the district court’s unprecedented command that the Republic pay into an escrow account over \$1.3 billion prior to a December 15 scheduled interest payment on its restructured debt. *See Stay Op.* at 5 (Ex. F). Plaintiffs in fact demand a \$1.45 billion bond, *i.e.* a larger amount than that required by the district court in the November 21 Orders. *See Pls. Mot.* at 18 (requesting that the Republic post security that would be available to plaintiffs). For all of the reasons set forth in the Republic’s original Stay motion in this Court, as well as the Stay motions of the

³ As set forth in the emergency Stay petitions, the other factors supporting the Stay were satisfied as well. *See Republic Br.* at 10-20; EBG Br. at 5-14, 18-20; Fintech Br. at 4-9. Rather than burden the Court with additional briefing on these points, the Republic incorporates them here as further refutation of plaintiffs’ arguments in support of their meritless motion.

Exchange Bondholder Group and Fintech Advisory Inc., the Court should deny plaintiffs' request. *See* Republic Br. at 7-20; EBG Br. at 3-20; Fintech Br. at 4-10.

As an initial matter, plaintiffs' demand that the Republic post a \$1.45 billion security (again, their version of the district court's "escrow") as a condition of maintaining the Stay clearly violates the FSIA, which immunizes sovereign assets from attachment and restraint unless they are located in the United States and used for a commercial activity here. *See* 28 U.S.C. §§ 1609-1610. Requiring the Republic to post a security, and thus to "turn over" immune funds, plainly infringes on the immunity afforded sovereign assets not located in the United States and not used for a commercial activity here. *See* Oct. 26 Decision at 24-25 (injunctions that subject otherwise immune sovereign property to court dominion or control violate the FSIA). Indeed, the Court has previously recognized that the FSIA prohibits such pre-judgment security requirements. *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"). Thus when plaintiffs first asked that the district court condition its stay on the Republic's posting of a bond, the court appropriately denied that request, *see* Feb. 23 Tr. at 52:9-10 (A-2341) – as it has denied all such previous requests in the Republic's debt litigation. Plaintiffs' motion must be denied for this reason alone.

The few cases plaintiffs cite to support the proposition that the posting of security is not prohibited by the FSIA are inapposite. Aside from being from outside of this Circuit or otherwise lower court decisions pre-dating *Stephens*, they involve parties that had already obtained money judgments – something that plaintiffs have not done and refuse to do in the cases where they have asserted their “pari passu” claim. See Pls. Mot. at 19 (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *Sales v. Underwriters Ins. Co.*, No. 90 Civ. 7580 (CSH), 1995 WL 144783, at *1 (S.D.N.Y. Apr. 3, 1995); *Morgan Guar. Trust Co. of New York v. Republic of Palau*, 702 F. Supp. 60 (S.D.N.Y. 1988)).⁴ Plaintiffs’ request for “security” is thus nothing more than an attempt to recast their injunctive remedy as the equivalent of a money judgment and then obtain the equivalent of an attachment on immune assets to collect it.

Moreover, because the Republic cannot pay a bond under Argentine law, plaintiffs’ requested security requirement would be impracticable and lead to the same chain of events that would have caused irreparable harm if the Court had not issued the Stay. As the Republic stated in its emergency motion for a Stay,

⁴ Even where a plaintiff has obtained a money judgment, this Court has found that the posting of a bond is not necessarily required for a stay. See, e.g., *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154-55 (2d Cir. 1986), *rev’d on other grounds*, 481 U.S. 1 (1987) (the “inflexible requirement” for “denial of a stay of execution unless a supersedeas bond is posted” can be “irrational, unnecessary and self-defeating, amounting to a confiscation of the judgment debtor’s property without due process.”).

under Argentine law and public policy the Republic cannot pay plaintiffs on better terms than participants in the 2010 Exchange Offer, and accordingly it cannot post a bond that is based on paying plaintiffs on better terms. Nor would the Republic be able to make a payment on a bond from one day to the next without any budgetary basis. Because the Republic cannot post a bond, plaintiffs know that this conditioning of the Stay would lead to the same kind of crisis that had been previously averted by the Court's granting of the Stay. Plaintiffs' recasting of the district court's escrow requirement as the posting of a bond thus does not solve any of the significant problems raised by the November 21 Orders.⁵

⁵ Plaintiffs' request that "[a]t the very least, Argentina should be called upon to post security of \$250 million," and that if "Argentina refuses to post even that minimal security . . . that will amply demonstrate its intention not to comply with this Court's mandates and that the stay should be lifted [] as to Argentina itself" should be denied as well. Pls. Mot. at 4. It is not the magnitude of the payment, but the legal impropriety – both under the FSIA and Argentine law and policy – of plaintiffs' proposed "turnover" order that prevents Argentina from complying with it. Plaintiffs' contention that this Court has finally ruled on the propriety of the district court's Orders under the FSIA is wrong. The Republic's petition for panel rehearing and rehearing *en banc* is still pending, and in any event, the Court has not yet reviewed the November 21 Orders, including whether their requirement that the Republic pay over \$1.3 billion into a court-controlled escrow violates the FSIA - which it clearly does.

II. PLAINTIFFS PROVIDE NO BASIS WHATEVER FOR THEIR DEMAND THAT THE COURT REVERSE ITS STAY ORDER OR SPEED THIS CASE TO JUDGMENT IN UNDER TEN BUSINESS DAYS

Having granted the Stay, this Court has already recognized that the rights and interests it protects justify its entry. Plaintiffs provide no basis to support their request that the Court now – just days later – essentially reverse the Stay, or, in the alternative, enter an unreasonably expedited schedule.

Plaintiffs’ recycled accusations that the Republic is “developing” a “scheme” to pay the exchange debt through an “alternate structure,” Pls. Mot. at 1-2, were not only already before this Court when it issued its Stay ruling, but are also flat wrong and provide no basis for amending the Court’s Stay. Contrary to plaintiffs’ assertion, there is simply no “scheme” to pay the exchange bonds through some other method. In support of their motion, plaintiffs once again rely only on press statements that express alarm at the actions of the district court and engage in speculation about what could possibly happen next. The vast majority of these unsupported out-of-court statements are the very same statements plaintiffs used before the district court in obtaining the November 21 Orders, and the new articles plaintiffs cite say nothing credible about the Republic changing how exchange bonds will be paid.

Plaintiffs have used this tactic of citing unsubstantiated newspaper reports since they were originally before this Court in July, in an effort to create a

false sense of emergency so that the merits of the case are rushed along. The facts are that *nothing has changed* and *nothing will change* with respect to how the exchange bondholders are paid. The Republic has been litigating these issues since the February 23 Orders were entered, and in the 9 months since then, *nothing has changed* with regards to the payment of exchange bondholders. The Bank of New York Mellon (“BNYM”) is the trustee for holders of exchange debt, and would of course *know* of any planned change to its role or duties. There is *no such change*; BNYM indisputably *remains* the trustee for holders of restructured debt, a fact evidenced by its entreaties to the district court (which the district court ignored) that it be permitted to fulfill its obligations to the exchange bondholders, as opposed to being caught up in plaintiffs’ dragnet injunctions. *See* BNYM Brief, dated Nov. 16, 2012 (Ex. K).

The maintenance of the status quo (which in fact this Court’s Stay accomplishes) is further confirmed by the only piece of competent evidence in the record on this point, which is the sworn declaration submitted to the district court by the Republic. As the director of the Republic’s National Bureau of Public Credit of the Ministry of Economy, Francisco Guillermo Eggers, unequivocally confirmed, the Republic “*has complied, is complying, and will comply*” with the terms of the district court’s stay order of March 5, 2012. *See* Eggers Decl. ¶ 4, (emphasis added) (Ex. H). There can be no clearer refutation of plaintiffs’

allegation that the Republic is currently devising schemes to evade the injunctions than the Republic's statement that it has and will comply with the requirement 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." Mar. 5, 2012 Stay Order ¶2 (Ex. U).

While plaintiffs claim that the newspaper articles they cite demonstrate the Republic's subversive plans, the ongoing speculation found in these articles is just that: guesswork that reflects the continuing concern and fear created in the financial markets by the plaintiffs' unprecedented actions. *See, e.g.*, "The Government discusses to continue paying as usual in New York," *Ambito Financiero*, dated Nov. 13, 2012, with an English translation (McGill Decl. Ex. R).⁶

The Court should also deny plaintiffs' request to further expedite briefing and consideration of the appeal such that it be concluded prior to December 15. *See* Pls. Mot. at 19. The Court has already provided for an expedited appeal, which will have briefing done in under two months. The unrealistic expedited schedule that plaintiffs demand would unnecessarily force the

⁶ Moreover, "[t]here is no mechanism whereby the Republic could pay the Exchange Bondholders directly outside of the existing payment system; indeed, the Republic has no means to know the identities and holdings of all Exchange Bondholders even if it wanted to pay them through some other mechanism." Supplemental Decl. of Stephen Choi ¶ 5, dated Nov. 26, 2012 (O'Shea Decl. Ex. 23).

Court to resolve *in under 10 business days* numerous complicated issues that will have wide-ranging, precedential effects going forward, and would prevent numerous third parties from submitting their views to this Court (the very parties this Court expressed concerns about in the October 26 Decision). *See* Oct. 26 Decision at 28 (“Our concern about the Injunctions’ application to third parties does not end [with banks acting as intermediaries]. . . . [W]e 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.”) (Ex. Q). It would be impossible for the parties to appropriately brief the serious and substantial issues raised by the November 21 Orders in the short period of time requested by plaintiffs. The current briefing schedule, which is already expedited, expressly contemplates the filing of *amicus* briefs by interested third parties in recognition of the issues and interests at stake in this appeal. Plaintiffs should not be permitted to silence those third parties by imposing a schedule that prohibits them from expressing their views.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion.

Dated: New York, New York
December 3, 2012

Respectfully submitted,

CLEARY GOTTlieb STEEN & HAMILTON
LLP

By: /s/ Carmine Boccuzzi
Jonathan I. Blackman (jblackman@cgsh.com)
Carmine D. Boccuzzi (cboccuzzi@cgsh.com)

One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for the Republic of Argentina