

**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)

**EMERGENCY MOTION OF ICE CANYON LLC FOR LEAVE TO
INTERVENE IN APPEAL AS AN INTERESTED NONPARTY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, ICE Canyon LLC states that it is a limited liability corporation organized under the laws of Delaware with its principal place of business in California. There is neither a parent company to ICE Canyon LLC, nor a publicly held corporation that owns 10% of its stock.

Pursuant to Federal Rule of Appellate Procedure (“Fed. R. App. P.”) 27 and Local Rule 27.1, ICE Canyon LLC (on behalf of one or more investment funds or accounts managed or advised by it, “ICE Canyon”) submits this Emergency Motion for Leave to Intervene as an Interested Non-Party in the appeal of the orders entered by United States District Court for the Southern District of New York, District Judge Thomas P. Griesa, on November 21, 2012 (the “November 21 Orders”).

PRELIMINARY STATEMENT

This appeal presents fundamental questions concerning the constitutional, procedural, and statutory limits of a district court’s injunctive powers when those powers are extended to reach, and undermine the rights of, innocent third parties with no involvement in the conduct attempted to be remedied.

This Court has, without exception, already granted motions for leave to intervene in this appeal filed by some of the affected third parties, including an “Exchange Bondholder Group,” Fintech Advisory Inc. (another holder of exchange bonds), and the “Euro Bondholders.”¹ *See* Dkt. Nos. 482, 512, 552. The reasons for allowing these other third parties to intervene fully support intervention by ICE Canyon as well.

¹ On December 6, 2012, this Court also granted a motion by The Bank of New York Mellon, an indenture trustee for certain third-party exchange bondholders, to appear as a non-party appellant in this appeal. *See* Dkt. No. 544.

ICE Canyon holds or manages approximately €417 million in Euro-denominated GDP-linked securities (the “GDP-Linked Securities”), issued by the Republic of Argentina (the “Republic”) pursuant to the Trust Indenture dated as of June 2, 2005, as supplemented on April 30, 2010 (the “Indenture”). The November 21 Orders purport to prevent payment on the GDP-Linked Securities, even though they were not issued in the United States, are not payable in or through the United States, and are not subject to American law. If affirmed, the November 21 Orders would profoundly affect and undermine ICE Canyon’s interests.

Moreover, as a holder or manager of GDP-Linked Securities, ICE Canyon has unique interests that are not represented by any of the current parties or intervenors in this appeal. Unlike the other Exchange Bonds that are the subject of the November 21 Orders, ICE Canyon’s GDP-Linked Securities have no principal or interest and provide no certainty of payment of any kind. Rather, they represent a *conditional* right of payment, arising only in the event that the Republic’s Gross Domestic Product (“GDP”) meets certain targets. They are materially different in kind from the other Exchange Bonds, including in the ways in which the *Parri Passu* Clause may apply to them (if at all). Allowing ICE Canyon to intervene in this appeal therefore will provide this Court with important facts necessary to consider fully the issues raised by this appeal.

For these reasons, ICE Canyon hereby seeks leave to intervene and participate in this appeal as an interested nonparty.

BACKGROUND

ICE Canyon holds or manages approximately €417 million in GDP-Linked Securities issued by the Republic pursuant to the Indenture. Declaration of Nathan B. Sandler (“Sandler Decl.”) ¶ 2. The total notional amount of GDP-Linked Securities issued by the Republic exceeds €18 billion.

The GDP-Linked Securities have no direct connection to the United States. They are governed by English, Welsh, and/or Argentine law and provide for any disputes to be resolved in the courts of either England or Argentina. *See id.* Ex. C (“2010 Prospectus Supplement”), Ex. C.6 at R-14, ¶¶ 16-17. They are payable in Euros, *see id.* at R-5, ¶ 2 (requiring payments to be made “in the single currency adopted by those states participating in European Monetary Union”), and payments thereunder must be made through a paying agent in Western Europe, *see id.* at R-6, ¶ 2(d) (“So long as any of the Securities are outstanding, the Trustee shall appoint, at the expense of the Republic, a trustee paying agent and a transfer agent in a Western European city for payment on and transfers of the Securities”). This payment process lacks any nexus to the United States.

Further, the GDP-Linked Securities are unlike the other Exchange Bonds. Holders of the GDP-Linked Securities have no right to principal or interest

payments. *See id.* Ex. B (“2005 Prospectus Supplement”) at S-25 (“There are no principal payments in respect of the GDP-linked Securities. Holders will not receive any payments during the life or upon the expiration of their GDP-linked Securities other than as described below.”), S-33 (same). Rather, “[a]ny payments on the GDP-linked Securities are contingent upon the performance of Argentina’s GDP.” *Id.* at S-25; *accord id.* at S-33; 2010 Prospectus Supplement, Ex. C.6 at 1. Specifically, the Republic is required to make a payment on the GDP-Linked Securities only if (1) the Republic’s actual real GDP exceeds the “Base Case GDP” specified in the prospectus, (2) the annual growth in the Republic’s actual real GDP exceeds the growth rate in “Base Case GDP” reflected in the prospectus, *and* (3) the total payments made on the GDP-Linked Security do not exceed the payment cap for that security set forth in the prospectus. *See* 2005 Prospectus Supplement at S-26 to S-27; *see also id.* at S-33 (“In particular, for payments to be made in any given year, Argentina’s actual real gross domestic product for that year must exceed a specified amount and annual growth rate. Because the historical performance of Argentina’s gross domestic product may not be indicative of future performance, *you cannot be certain that these conditions for payment will be met every year, or at all.*”) (emphasis added).

ARGUMENT

It is well-settled in this Circuit that a nonparty may appeal a judgment (1) by which it is bound *or* (2) that affects its interest. *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 78 (2d Cir. 2006) (“There are . . . two exceptions to the rule prohibiting nonparty appeals. First, as the Supreme Court has recognized, a nonparty may appeal a judgment by which it is bound. Second, a nonparty may appeal if it has an interest affected by the judgment.”) (internal citation, quotation marks, and ellipsis omitted); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 81-82 (2d Cir. 2002) (same). Satisfying either criteria is sufficient to intervene.

First, the November 21 Orders purport to determine whether and, if so, under what circumstances ICE Canyon will be able to recover on any of its contractual entitlements as a holder or manager of GDP-Linked Securities. Second, the November 21 Orders plainly affect ICE Canyon’s interest by imposing a previously nonexistent precondition on ICE Canyon’s ability to collect the amounts potentially owed under the GDP-Linked Securities.

Under this Court’s case law, a nonparty need not actually “prove” that it has an interest affected by the judgment; rather, stating a “*plausible* affected interest” is sufficient. *WorldCom*, 467 F.3d at 78 (emphasis added); *see also SEC v. Certain Unknown Purchasers of the Common Stock of and Call Options for the Common*

Stock of Santa Fe Int'l Corp., 817 F.2d 1018, 1021 n.1 (2d Cir. 1987) (allowing nonparty investor to appeal settlement on ground that settlement “may affect” investor’s subsequent assertion of Rule 10b-5 claim). Here, the effect of the November 21 Orders on ICE Canyon’s interests could not be any more clear or direct. As was true in *Karaha Bodas*, ICE Canyon and the entities on whose behalf it acts undisputedly “owns the property encompassed by the [challenged] order [*i.e.*, the right to receive payment on the GDP-Linked Securities], [and] . . . this constitutes an ‘affected interest,’ which entitles the [nonparty] to join” the appeal. 313 F.3d at 82; *see also Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 128 (2d Cir. 2009) (holding that non-party had standing to appeal where orders sought to attach and execute upon funds administered by non-party).

The analysis above would hold true even if ICE Canyon’s interests were already represented in this appeal. *See Aurelius*, 584 F.3d at 129 (rejecting argument that intervention in appeal should be disallowed where interests of the nonparty are already “fully and amply protected”). In this case, however, ICE Canyon’s interests are *not* already represented. No party or intervenor appears to hold the GDP-Linked Securities affected by the November 21 Orders, and those securities are materially different – in ways that may impact the outcome on appeal – than the Exchange Bonds held by the other entities whom this Court already has permitted to intervene.

CONCLUSION

For the foregoing reasons, ICE Canyon respectfully requests that this Court grant this Emergency Motion for Leave to Intervene as an Interested Non-Party for the purpose of participating in the appeal of the November 21 Orders. In the alternative, ICE Canyon respectfully requests that the Court grant ICE the right to join the appeal by filing a brief of *amicus curiae*.

December 21, 2012

Respectfully submitted,

/s/ Meir Feder

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