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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 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.,

Plaintiffs-Appellees,

— v. —

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE, EXCHANGE BONDHOLDER GROUP, FINTECH ADVISORY INC.,

Non-Party Appellants.

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF INTERVENOR ICE CANYON LLC

(Appearances on Inside Cover)

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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.

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Intervenor ICE Canyon LLC (on behalf of one or more investment funds or accounts managed or advised by it, "ICE Canyon"), granted leave to intervene on December 28, 2012 [docket no. 645], submits this Brief to address the propriety of the November 21, 2012 Injunctions entered by the district court (Griesa, J.) as applied to "GDP-linked Securities" issued by the Republic of Argentina (the "Republic"), and specifically the Euro-denominated "GDP-Linked Securities" held or managed by ICE Canyon.

I. PRELIMINARY STATEMENT[1]

Although this Court previously remanded for the district court to clarify the operation of the Injunctions and their application to third parties, it remains critically unclear from the district court's opinions and orders on remand whether the amended Injunctions were intended to extend to the unique category of Euro-denominated "GDP-Linked Securities." Any such extension not only is entirely unnecessary to effectuate the district court's proposed injunctive relief, but would create numerous avoidable problems – including upsetting the settled expectations and due process rights of holders of these GDP-Linked Securities, violating the

[1] This Brief addresses facts and issues unique to the Euro-denominated GDP-Linked Securities. The Court's familiarity with the Republic's efforts to restructure the FAA Bonds and the general underlying facts of the case, as set forth in *NML Capital, Ltd. v. The Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) [*NML*], is assumed. Capitalized terms not defined in this Brief have the meanings given to them in *NML*.

presumption against extraterritoriality, and upsetting fundamental principles of international comity – entirely distinct from, but at least as significant as, those issues that have been raised by the party and non-party appellants. ICE Canyon submits this Brief to address those unique issues and seek clarification that, based on the undisputed facts in the record, the Injunctions do not and cannot apply to the Euro-denominated GDP-Linked Securities, even assuming that the Injunctions otherwise properly apply to the Exchange Bonds.[2]

To start, the GDP-Linked Securities cannot properly be characterized as, or included within the meaning of, the "Exchange Bonds"[3] that are the subject of the

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[2] To be clear, ICE Canyon believes that the district court also erred in issuing its Injunctions for reasons submitted by the appellants and other third-party intervenors (in particular, the Republic, Bank of New York Mellon, the Exchange Bondholder Group, Fintech Advisory, Inc., and the Euro Bondholders). ICE Canyon joins in those arguments here. ICE Canyon submits this Brief to demonstrate that, even if the district court did not err on the grounds raised in those other briefs, reversal is still warranted with respect to the Euro-denominated GDP-Linked Securities on account of the unique facts and circumstances applicable to those instruments. By submitting this Brief, ICE Canyon does not concede that any dispute concerning its rights under the GDP-Linked Securities is governed by U.S. law or should be determined in the U.S. courts. As set forth later in this Brief, the GDP-Linked Securities are expressly governed by the laws of England and Wales, and ICE Canyon reserves all its legal rights to proceed in the English courts in accordance with the Indenture.

[3] In this Brief, the term "Exchange Bonds" is used to refer to the actual bonds issued in connection with the Republic's restructuring, which are obligations separate and distinct from the GDP-Linked Securities. As discussed below, it is unclear from the district court's opinions whether it intended to include the GDP-Linked Securities – which are not bonds or indebtedness – within the meaning of the term "Exchange Bonds."

Injunctions. The GDP-Linked Securities are an entirely distinct form of financial instrument offered in the 2005 and 2010 restructurings as a separate incentive for entities to exchange their FAA Bonds into new Exchange Bonds. Unlike the Exchange Bonds (or the FAA Bonds or any other bonds), the GDP-Linked Securities have no principal balance, bear no interest, and are payable, if at all, only in undetermined amounts contingent on the future performance of the Republic's gross domestic product (GDP). They are properly characterized as derivatives or warrants, not debt – a fact made clear by the Indenture (as defined below) governing the GDP-Linked Securities. Extending the Injunctions to the GDP-Linked Securities is inconsistent with the purpose of the *Pari Passu* Clause and the language of the Indenture, would ensnare and punish investors who have no connection to the Republic's restructuring or this litigation, and is absolutely unnecessary in order to give effect to the district court's proposed injunctive remedy.

Further, even if the Injunctions were intended to apply to GDP-Linked Securities generally, they should be clarified to exclude the <u>Euro-denominated</u> GDP-Linked Securities, which are governed by English law that conflicts with this Court's interpretation of the *Pari Passu* Clause and are paid through a process occurring entirely outside the United States and involving only foreign entities. The district court in fact appeared to recognize that an entirely extraterritorial payment process was beyond the reach of its jurisdiction, stressing that the payment process for the "Exchange Bonds" "without question takes place in the United States." [SPE 1369][4] But the record is undisputed that the payment process for Euro-denominated GDP-Linked Securities does not take place in the United States, but rather occurs exclusively outside the United States through various foreign entities. Extending the Injunctions to the foreign payment process respecting foreign-currency denominated instruments that are governed by contrary foreign law would violate the presumption against extraterritoriality and principles of international comity.

Finally, to the extent the Injunctions are not clarified to exclude the Euro-denominated GDP-Linked Securities, the Court should remand this case in order to afford the holders of these instruments and the foreign entities involved in processing payments on them the opportunity to correct the numerous factual errors and omissions underlying the district court's opinions and to demonstrate that the Injunctions cannot logically or legally be extended to the Euro-denominated GDP-Linked Securities. Absent a remand, application of the Injunctions to the Euro-denominated GDP-Linked Securities would violate the

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4 "SPE __" refers to the Supplemental Appendix filed on December 28, 2012 [docket nos. 658-662], and "JA __" refers to the Joint Appendix filed on March 21, 2012 [docket nos. 125-142], in each case with reference to the relevant consecutive pagination where appropriate.

procedural due process rights of those holders and entities, none of whom was afforded adequate notice and an opportunity to be heard.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction over the district court's Injunctions and orders issued November 21, 2012, pursuant to 28 U.S.C. § 1292(a)(1) and the panel's retention of jurisdiction "for further consideration of the merits of the remedy without need for a new notice of appeal." *NML*, 699 F.3d at 265.

III. STATEMENT OF ISSUES PRESENTED

1. Whether the Injunctions should be interpreted as applying to GDP-Linked Securities, where those instruments were intended to be distinct from the Exchange Bonds given to FAA bondholders, possess none of the characteristics typical of bonds (including any fixed payment obligation or outstanding principal balance), do not constitute "indebtedness" of the kind contemplated by the *Pari Passu* Clause, were purchased by investors having no reasonable expectation that they and their investments might become ensnared in this litigation, and would add virtually nothing to the force of the district court's proposed injunctive remedy.

2. Whether the Injunctions should be interpreted as enjoining the payment process for Euro-denominated GDP-Linked Securities, where all such payments are to be made, processed, and received entirely outside of the United

States by foreign entities in foreign currency in accordance with foreign law, and where an injunction disrupting that process would violate the presumption against extraterritoriality and fundamental principles of international comity.

3. Whether, to the extent that the Injunctions are interpreted to apply to the Euro-denominated GDP-Linked Securities, holders of the instruments and the foreign entities involved in processing payments on them were deprived of due process and whether a remand is necessary in any event to correct the erroneous assumptions underlying the district court's orders as applied to these instruments.

IV. STATEMENT OF THE CASE

On October 26, 2012, this Court issued an opinion remanding this case to the district court for proceedings "to address the operation of the payment formula [pursuant to the *Pari Passu* Clause] and the Injunctions' application to third parties and intermediary banks." *NML*, 699 F.3d at 265. On November 21, 2012, the district court issued an opinion [SPE 1360] applying the *Pari Passu* Clause to the "Exchange Bonds" and a series of orders (the "<u>Injunctions</u>") enjoining "all participants in the payment process of the Exchange Bonds" from processing any payments made by the Republic in respect of the Exchange Bonds at a time when the Republic does not make a "Ratable Payment" to the plaintiffs on account of their FAA Bonds. [SPE 1378, 1386, 1390, 1400, 1404, 1411, 1415]

The district court did not specify whether the Injunctions were intended to apply to GDP-Linked Securities generally or Euro-denominated GDP-Linked Securities in particular.

V. STATEMENT OF FACTS

ICE Canyon holds or manages approximately €417 million in Euro-denominated GDP-Linked Securities [docket no. 620] issued by the Republic pursuant to the Trust Indenture dated as of June 2, 2005, as supplemented on April 30, 2010 (the "Indenture"). [SPE 628-759]

A. The GDP-Linked Securities Are Qualitatively Different Than the Exchange Bonds.

The GDP-Linked Securities were issued at the same time as, and in connection with, the "Exchange Bonds" referenced in the district court's opinions and orders. The GDP-Linked Securities, however, are not properly characterized as "bonds" themselves. In particular, the GDP-Linked Securities have no principal balance, bear no interest, and have no guarantee of any payment at all, as the prospectus describing the GDP-Linked Securities frankly warns:

> *Payments on GDP-linked Securities depend upon unpredictable factors, and it is possible that no payments will ever be made on the GDP-linked Securities.*
>
> There are no principal payments on the GDP-linked Securities, and all payments on the GDP-linked Securities are linked to the performance of Argentina's gross domestic product . . . . In order for any payments to be made on the GDP-linked Securities, certain benchmarks must be reached. 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.

[JA 709 (emphasis in original)]

Thus, rather than qualifying as a bond, the GDP-Linked Securities are analogous to a derivative or warrant representing a conditional right to payment in the event that the annual gross domestic product of the Republic exceeds specified benchmark levels.[5] The GDP-Linked Securities effectively enable holders to capture some "upside" in the event that the Republic's economic condition improves and its GDP performs better than the specified benchmarks. At the same time, holders have no right to payment if the Republic's GDP does not meet those benchmarks.[6]

The GDP-Linked Securities were issued as part of the Republic's restructurings as an extra incentive for holders to exchange their FAA Bonds for Exchange Bonds. In the 2005 restructuring, a GDP-Linked Security initially

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[5] The GDP benchmarks and operative terms of the GDP-Linked Securities are summarized on pages S-25 to S-28 of the 2005 Prospectus Supplement. [JA 701-704]

[6] In fact, no payments on the GDP-Linked Securities are currently anticipated through 2013.

"attached" to each new Exchange Bond that was issued in exchange for an FAA Bond[7] and then, six months after issuance, the GDP-Linked Securities "detached" from the Exchange Bonds and began to trade independently.[8] In the 2010 restructuring, the GDP-Linked Securities never attached to the Exchange Bonds at all and were independently tradable from the outset.[9] As a consequence, none of the GDP-Linked Securities now have any relationship to the debt obligations represented by the Exchange Bonds.

The FAA itself does not specifically reference instruments like GDP-Linked Securities (the concept of which did not exist in 1994, when the FAA was issued), and therefore provides no direct indication as to whether such instruments were intended to be included within the *Pari Passu* Clause (which, by its terms, applies only to "External Indebtedness"). Notably, however, when the Indenture (drafted eleven years after the FAA) references the GDP-Linked Securities, it differentiates them from "indebtedness."

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7 "Each GDP-linked Security will be originally issued as a single unit with the underlying Par, Discount or Quasi-par [each a type of Exchange Bond]. During the period of 180 days following the first day of the Settlement Date, each GDP-linked Security will remain attached to and trade as a single unit with the underlying Par, Discount or Quasi-par." [JA 701]

8 "Upon expiration of this 180-day period, the GDP-linked Securities and the underlying Pars, Discounts or Quasi-pars will automatically detach and will no longer constitute a single unit. Thereafter, the GDP-linked Securities will trade independently from the underlying Pars, Discounts or Quasi-pars." [JA 701]

9 [JA 968-972 (describing terms of 2010 issuance of GDP-Linked Securities)]

In particular, the very first clause of the Indenture draws a distinction between debentures, notes, bonds, and other evidences of indebtedness on one hand, and the GDP-Linked Securities on the other, reciting that: "WHEREAS, the Republic has duly authorized the execution and delivery of this Indenture to provide for the issuance from time to time of its debentures, notes, bonds, other evidences of indebtedness or its GDP-Linked Securities . . . ." [SPE 633] (emphasis added). As explained below, this distinction between indebtedness ("debentures, notes, bonds, and other evidences of indebtedness") and GDP-Linked Securities is consistent with the differing nature, purpose, and function of the GDP-Linked Securities and the Exchange Bonds.

B. The Euro-Denominated GDP-Linked Securities Have No Connection To The United States.

The GDP-Linked Securities were issued in denominations of U.S. dollars, Euros, or Argentine Pesos. ICE Canyon holds or manages Euro-denominated GDP-Linked Securities, which have no connection to the United States or United States law.

Among other things, the Euro-denominated GDP-Linked Securities are "governed by and construed in accordance with the laws of England and Wales without regard to principles of conflicts of laws." [SPE 742][10] Actions to enforce the Euro-denominated GDP-Linked Securities may be brought in "the courts of England and the courts of the Republic," to which the Republic irrevocably submits to jurisdiction. [SPE 742] The Republic's agent for service of process relating to the Euro-denominated GDP-Linked Securities is within the City of London. [SPE 743]

Perhaps most relevant for purposes of the Injunctions, the process of payment on the Euro-denominated GDP-Linked Securities occurs entirely outside of the United States among exclusively foreign entities:

- English registered owner. The registered owner of the Euro-denominated GDP-Linked Securities is The Bank of New York Depositary (Nominees) Limited, a United Kingdom company in London ("BNY London"). [SPE 623]

- Payment made in Argentina. The Republic makes payments on the Euro-denominated GDP-Linked Securities by transferring funds to a Euro deposit account at Banco Central de la Republica de Argentina. [SPE 623] [JA 2288]

[10] These citations are to the form of GDP-Linked Security used as the template for both the Dollar-denominated and Euro-denominated securities. The quoted text applies to the Euro-denominated versions.

- Payment transferred to Germany. The funds then are transferred to a Deutsche Bank account in Frankfurt, Germany, in the name of The Bank of New York Mellon S.A., N.V., a Belgian public limited liability company headquartered in Brussels ("BNY Brussels"). [SPE 624]

- Payments distributed by Euroclear or Clearstream. Finally, the funds are transferred to Euroclear Bank, S.A. N.V., a Belgian limited liability headquartered in Brussels ("Euroclear"), or Clearstream Banking S.A., a Luxembourg company ("Clearstream"), which distribute payments to beneficial holders. [SPE 623-624]

In contrast, payments on Dollar-denominated Exchange Bonds and Dollar-denominated GDP-Linked Securities do involve entities and accounts within the United States. [SPE 624-625]

C. On Remand, The District Court Failed To Consider Or Specify Whether The Injunctions Should Apply To Euro-Denominated GDP-Linked Securities.

In its initial decision, the district court held that the Republic had violated the *Pari Passu* Clause by making payments on the Exchange Bonds while defaulting on its obligations in respect of the FAA Bonds. *NML*, 699 F.3d at 254. To remedy that violation, the district court ordered that, "'whenever the Republic pays any amount due under the terms of the [exchange] bonds,' it must 'concurrently or in advance' pay plaintiffs the same fraction of the amount due to them (the 'Ratable Payment')." *Id.* (quoting district court orders). The district court extended this injunctive relief to "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds." *Id.* at 255 (quoting district court injunctions).

On appeal, this Court agreed with the district court that the *Pari Passu* Clause "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." *Id.* at 259 (emphasis in original). The Court, however, indicated that it was "unable to discern from the record precisely how [the district court's Ratable Payment] formula is intended to operate," and therefore remanded to give the district court "the opportunity to clarify precisely how it intends this injunction to operate." *Id.* at 254-55. The Court also expressed "concerns about the Injunctions' application to third parties" and therefore remanded – without passing on the propriety of such relief – so that the district court could "more precisely determine the third parties to which the Injunctions will apply" in order to enable the Court to "decide whether the Injunctions' application to them is reasonable." *Id.* at 264.

On remand, following an expedited hearing held before issuance of the mandate and without notice to or service of process on holders of the GDP-Linked Securities, the district court issued several opinions and a series of orders <u>expanding</u> the scope of its prior injunctive relief. As an initial matter, the district court observed, correctly, that whatever remedy it fashioned "must bear some reasonable relation to the *Pari Passu* Clause in order to be a sensible remedy. One definition of *pari passu* . . . is 'proportionally,' obviously referring to the use of the same proportion in paying down two kinds of debts." [SPE 1365-66] The district court then concluded that a remedy reasonably related to the *Pari Passu* Clause and its mandate of "proportionality" would be to prohibit the Republic from making <u>any</u> payment due and owing on the "Exchange Bonds", unless and until the Republic paid the <u>entire</u> amount of all principal and accrued interest on the FAA Bonds held by the plaintiffs. [SPE 1364-1365]

The district court's orders appear ambiguous as to whether GDP-Linked Securities are included within the "Exchange Bonds" subject to the Injunctions. The Injunctions broadly define "Exchange Bonds" as "the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers," [SPE 1381], but fail to specify whether GDP-Linked Securities are included to be included in the phrase "other obligations." Elsewhere, the district court defines "Exchange Bonds" more precisely as "new <u>debt</u> [issued] pursuant to exchange offers in 2005 and 2010," [SPE 1360 (emphasis added)], thereby seeming to exclude the non-debt GDP-Linked Securities. Moreover, the district court appears to assume that all of the Republic's obligations on the "Exchange Bonds" are in the nature of principal and interest payments.[11] The GDP-Linked Securities, however, have no principal and bear no interest, thus leaving it unclear whether the district court intended for GDP-Linked Securities to be included within its injunctive relief.

The district court's orders also appear ambiguous as to whether the Injunctions are intended to apply to the foreign entities involved in the payment process for Euro-denominated GDP-Linked Securities, which have no connection to the United States and are governed by conflicting foreign law. To start, the district court stated that the Injunctions enjoin "all participants in the payment process of the Exchange Bonds" from processing payments made by the Republic on those instruments. [SPE 1382] The district court then proceeded to identify registered owners, depositaries, nominees, and clearinghouses as within the scope of the injunction, specifically naming (among others) BNY London, Clearstream, and Euroclear – each of which is involved in the processing of payments on the Euro-denominated GDP-Linked Securities. [SPE 1382-1383]

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[11] "[A]t some time in December 2012, when Argentina makes the <u>interest</u> payments on the Exchange Bonds, amounting to a total of about $3.14 billion, Argentina will be required to pay plaintiffs approximately $1.33 billion," [SPE 1363 (emphasis added)]; "In December 2012, there are <u>interest</u> payments of approximately $3.14 billion due on the Exchange Bonds," [SPE 1364 (emphasis added)]; "What is owed in December 2012 to exchange bondholders are <u>interest</u> payments, which are part of <u>a series which will go on being paid until the maturity of the Exchange Bonds</u>," [SPE 1365 (emphasis added)].

Yet, the district court appears to have premised the extension of the Injunctions to those foreign entities on the assumption that the payment process for all "Exchange Bonds" "without question takes place in the United States." [SPE 1369] In fact, with respect to the Euro-denominated GDP-Linked Securities, it is undisputed that the payment process for these instruments occurs entirely outside of the United States, meaning that those Euro-denominated instruments should not have been included with the meaning of the term "Exchange Bonds" even if the district court had intended the Injunctions to apply to GDP-Linked Securities generally.

The Republic and others timely filed an appeal of the district court's orders, and this Court granted ICE Canyon leave to intervene as an interested non-party. [docket no. 645]

VI. SUMMARY OF THE ARGUMENT

On remand, the district court failed to consider unique characteristics of the Euro-denominated GDP-Linked Securities that, by the very terms of the opinion that explains the basis for injunctive relief, place those instruments outside the proper scope of the Injunctions. Thus, regardless of whether the Injunctions are affirmed as to the appellants or other third parties, it is necessary for this Court to clarify that the Injunctions do not apply to the Euro-denominated GDP-Linked Securities.

First, the GDP-Linked Securities do not constitute "indebtedness," are not fairly encompassed by the *Pari Passu* Clause, and should not be and need not have been brought within the already-broad injunctive relief that had been ordered. This Court reviews *de novo* the district court's interpretation of the scope of the *Pari Passu* Clause and its implicit conclusion that the clause applies to the GDP-Linked Securities, *Global Seafood Inc. v. Bantry Bay Mussels Ltd.*, 659 F.3d 221, 224 (2d Cir. 2011) ("Issues of contract interpretation are reviewed *de novo*."), and should reverse for the reasons stated in Section VII.A, below.

Second, as shown in Section VII.B, below, even if the district court intended to include (and properly did include) the GDP-Linked Securities within the scope of the injunctive relief that it ordered, the Injunctions should not be extended to reach Euro-denominated GDP-Linked Securities, whose payment involves exclusively foreign entities, occurs entirely outside the United States, and is governed by foreign law that conflicts with this Court's interpretation of the *Pari Passu* Clause.

In fact, the Injunctions very clearly were premised on the assumption that the enjoined conduct "without question takes place in the United States." [SPE 1369] That mistaken assumption led the district court to err in (apparently) concluding that it was appropriate to enjoin third parties involved in the processing of payments on the Euro-denominated GDP-Linked Securities. Because all such processing occurs outside of the United States and is conducted by foreign entities, the district court exceeded the scope of its jurisdiction and authority to the extent that it purported to enjoin those foreign entities from performing their contractual duties. Although this Court reviews the district court's issuance of the Injunctions for abuse of discretion, *NML*, 699 F.3d at 257, the Court should reverse where, as here, the district court's "ruling rests on an error of law [or] a clearly erroneous finding of fact," *United States v. Bengis*, 631 F.3d 33, 38 (2d Cir. 2011) (quotations omitted).

Third, as shown in Section VII.C, below, to the extent that the district court did intend to apply the Injunctions to Euro-denominated GDP-Linked Securities, the court violated the procedural due process rights of holders of those instruments and the foreign entities involved in processing payment on them, none of which was afforded notice and the opportunity to be heard. In the event that the Court chooses not to vacate the Injunctions entirely, it should remand in order to give those entities the ability to correct the numerous factual errors underlying the Injunctions as applied to the Euro-denominated GDP-Linked Securities.

Finally, ICE Canyon submits that the district court also erred in issuing its injunctions for reasons set forth elsewhere in the briefing this Court has received, including that (a) the district court's "ratable payment" remedy is inequitable and unrelated to the injury purportedly suffered by the plaintiffs;[12] (b) the Injunctions impermissibly infringe on the property rights of innocent third parties like holders of the GDP-Linked Securities;[13] and (c) the district court violated due process and exceeded the scope of its injunctive authority because the enjoined third parties were not named litigants, served with process, or in active concert or participation with the Republic.[14] However, even if the Court concludes that the district court did not err on those grounds, reversal is still warranted with respect to the Euro-denominated GDP-Linked Securities on account of the unique facts and circumstances applicable to those instruments.

VII. ARGUMENT

A. The District Court's Orders Should Be Interpreted And Clarified To Exclude The GDP-Linked Securities From The Injunctions.

The Injunctions should not be interpreted to apply to the GDP-Linked Securities, because these instruments do not constitute "indebtedness" and thus fall outside the FAA's *Pari Passu* Clause. Including the GDP-Linked Securities within the scope of the Injunctions would serve only to punish the holders of these

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[12] *See* Brief of the Republic [docket no. 657] ("Republic Br.") at 27-30.

[13] *See* Brief of Exchange Bondholder Group [docket no. 642] ("Exchange Br.") at 17-35; Brief of Fintech Advisory, Inc. [docket no. 652] ("Fintech Br.") at 25-35.

[14] *See* Republic Br. at 30-45; Exchange Br. at 36-44; Fintech Br. at 15-25; Brief of Bank of New York Mellon [docket no. 637] at 15-32.

instruments while doing nothing to effectuate the Republic's purported obligations under the *Pari Passu* Clause.

1. The GDP-Linked Securities Do Not Constitute Indebtedness Within The Meaning Of The *Pari Passu* Clause.

The *Pari Passu* Clause, both by its terms and conceptually, is meant to deal with debt – not indeterminable contingent obligations like the GDP-Linked Securities. In particular, the "Equal Treatment Provision" of the *Pari Passu* Clause – as interpreted by this Court – applies only to "[t]he payment obligations of the Republic" in respect of "its other present and future unsecured and unsubordinated External Indebtedness." *NML*, 699 F.3d at 251. The FAA defines "External Indebtedness" as "obligations . . . for borrowed money or evidenced by securities, debentures, notes or other similar instruments denominated" in foreign currency. [JA 171]

In other words, the *Pari Passu* clause properly applies to the Republic's obligations in respect of foreign-currency denominated debt, as this Court and the district court have observed. *NML*, 699 F.3d at 259 (*Pari Passu* Clause prohibits the Republic "from paying on other bonds without paying on the FAA Bonds") (emphasis added); *id.* at 250 ("[w]e hold that an equal treatment provision in the bonds bars Argentina from discriminating against plaintiffs' bonds in favor of bonds issued in connection with the restructurings") (emphasis added); *id.* at 259 ("the Equal Treatment Provision prevents Argentina as payor from discriminating against the FAA Bonds in favor of other unsubordinated, foreign bonds") (emphasis added).

Due to the plaintiffs' failure to join holders of GDP-Linked Securities to the litigation (and the resultant failure of the district court to hear the unique facts regarding the Euro-denominated GDP-Linked Securities), the district court appears to have proceeded on the mistaken assumption that all of the instruments and securities issued in connection with the Republic's 2005 and 2010 restructuring efforts (the so-called "Exchange Bonds") constitute debt.[15] In fact, however, the GDP-Linked Securities are not obligations for borrowed money and are not in the nature of securities, debentures, notes, or similar instruments that would evidence an obligation in respect of borrowed money or debt. As such, they do not fall within the scope of the *Pari Passu* Clause, which is intended to deal with the Republic's debt obligations. The non-debt nature of the GDP-Linked Securities is confirmed in a number of respects.

[15] This Court appears to have previously proceeded on the same mistaken assumption. *NML*, 699 F.3d at 252 ("Argentina initiated an exchange offer in which it allowed FAA bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar") (emphasis added); *id.* at 253 ("Argentina has made all payments due on the debt it restructured in 2005 and 2010") (emphasis added); [SPE 1360] ("This breach resulted from the fact that Argentina had issued new debt pursuant to exchange offers in 2005 and 2010 ('Exchange Bonds'), and was making the payments required on this new debt, but had declared that it would make no payments to those still holding the FAA Bonds.") (emphasis added).

First, the GDP-Linked Securities have none of the hallmarks of "debt." They have no principal amount, they do not accrue interest, and the Republic is not obligated to pay any specific amounts on them. Rather, the GDP-Linked Securities are payable, if at all, only in the event of future contingencies based upon the Republic's reported GDP and in amounts that cannot now be determined. As the Prospectus expressly warns, "*it is possible that no payments will ever be made on the GDP-linked Securities.*" [JA 709 (emphasis in original)] In other words, the GDP-Linked Securities do not represent "'an obligation, absolute and not contingent, to pay on demand or within a given time, in cash or another medium, a fixed amount.'" *Preslar v. Comm'r of Internal Revenue*, 167 F.3d 1323, 1330 (10th Cir. 1999) ("the IRS has defined 'indebtedness' as 'an obligation, absolute and not contingent, to pay on demand or within a given time, in cash or another medium, a fixed amount'") (quoting Treas. Reg. § 1.108(b)-1(c), 26 C.F.R. § 1.108(b)-1(c) (1998)); *see United States v. Maginnis*, 356 F.3d 1179, 1187 (9th Cir. 2004) ("One must actually secure the use or forbearance of money and pay interest therefor to create an indebtedness as defined in the Revenue Code.") (internal quotations omitted).

Rather, the GDP-Linked Securities are more in the nature of a derivative security (the payment stream for which depends upon the Republic's reported level of GDP and its reported GDP growth from year to year) or warrant (that becomes "in the money" only when the Republic's reported GDP exceeds the benchmark levels and growth rates). Indeed, the Prospectus expressly authorizes the Republic to issue "warrants", [JA 655-656], and specifies that, when issued, "[t]he warrants will be direct, unconditional and unsecured obligations of Argentina and <u>will not constitute indebtedness of Argentina</u>." [JA 656 (emphasis added)] The GDP-Linked Securities commonly are referred to as "warrants" in the marketplace,[16] and market observers have opined that those "warrants" are not debt capable of triggering credit default swap payments or cross defaulting other debt.[17]

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[16] *See, e.g.*, "Argentina confirms $3.52 bln payment on GDP-linked warrants," REUTERS, Dec. 13, 2012, *available at* http://www.reuters.com/article/2012/12/13/snippet-idUSL1E8ND66220121213; "Argentine GDP-warrant prices tumble on U.S. court ruling," REUTERS, Nov. 22, 2012, *available at* http://www.msnbc.msn.com/id/49930180/ns/business-stocks_and_economy/t/argentine-gdp-warrant-prices-tumble-us-court-ruling/#.UN-q6qVurdk; Drew Benson and Boris Korby, "Argentina's 'Scorching' Growth Helps GDP Warrants Trump Bonds on 28% Surge," BLOOMBERG, Aug. 10, 2010, *available at* http://www.bloomberg.com/news/2010-08-10/argentina-s-scorching-growth-helps-gdp-warrants-trump-bonds-on-28-surge.html.

[17] *See Emerging Markets Strategy, Argentina: Between A Court And A Hard Place*, Citi Research (Nov. 7, 2012) at 2 ("We do not believe GDP warrants should be included [with the scope of the injunctions regarding the *Pari Passu* Clause] since they do not classify as bonds or external indebtedness."); *Argentina: Initial Discussion On CDS*, Barclays Emerging Market Research (Nov. 27, 2012) at 3 ("The standard Latin America sovereign CDS contract specifies that only 'borrowed money' in the form of 'bonds' are eligible to trigger a credit event in respect of a contract. Arguably, the warrants are neither since they have no principal, their payments are not indexed to some fixed or floating interest rate, and they have an equity-like payout that is linked to the Argentina real GDP performance.").

Second, the earliest documentation relating to the creation of the GDP-Linked Securities differentiates them from "indebtedness." Because the concept of GDP-linked Securities did not exist in 1994, there is no indication in the FAA as to whether such instruments would (or could) be included within the scope of the *Pari Passu* Clause. The Indenture, however, clearly differentiates the GDP-Linked Securities from "indebtedness", drawing a distinction between the Republic's "debentures, notes, bonds, other evidences of indebtedness" on one hand and the GDP-Linked Securities on the other. [SPE 633]

Third, the non-debt nature of the GDP-Linked Securities is reinforced by the purpose of the instruments in the Republic's restructuring transactions. The Republic issued the GDP-Linked Securities as an inducement to holders of FAA Bonds to exchange at a material discount into Exchange Bonds. A GDP-Linked Security was "attached" to each new Exchange Bond that was issued in 2005 and then, six months after the exchange, "detached" to become an independent, freely tradable security, enabling the exchanging holder to realize value (independently from payments of principal and interest on the Exchange Bonds) should the Republic's economic condition improve from the benchmark levels set at the time of the exchange. The GDP-Linked Securities issued in 2010 were "detached" and independently tradable from the outset.

The GDP-Linked Securities thus functioned as a quasi-"equity incentive" – something that would induce bondholders to exchange by providing an equity-like instrument (where, for obvious reasons, the Republic could not issue equity itself) that would enable holders to realize "upside" in the event of future prosperity. *See* Republic Br. at 26 ("Argentina conducted a debt exchange offer consistent with its capacity for payment, and included GDP-linked [S]ecurities that provide a higher return if the country grows."); *id.* at 54 ("Argentina offered a restructuring package that provided an upside, in the form of GDP-Linked [S]ecurities, if the country grew."); *cf. United States v. Ostrander*, 999 F.2d 27, 29 (2d Cir. 1993) (warrants "described as 'equity sweeteners' or 'equity kickers' because they were designed to assist in the sale of the debentures and preferred stock").

From the time they were issued, it was contemplated that the GDP-Linked Securities would trade independently and that purchasers of these instruments would become owners of GDP-Linked Securities without simultaneously owning – if they ever owned – Exchange Bonds or FAA Bonds. As such, the equity-like GDP-Linked Securities have nothing to do with the core purpose of the *Pari Passu* Clause, which this Court found to be the protection from "discriminating against the FAA Bonds in favor of other, unsubordinated foreign bonds." *NML*, 699 F.3d at 259.

2. The Principle of Proportionality Further Supports The Conclusion That The *Pari Passu* Clause Does Not Apply To GDP-Linked Securities

Limiting the reach of the *Pari Passu* Clause to the Republic's debt obligations is logical – indeed, critical – because it literally makes no sense to apply the concept of *pari passu* obligations to instruments with no fixed payment amounts. "*Pari passu*" is Latin for "by equal step." It means "[p]roportionally; at an equal pace; without preference." BLACK'S LAW DICTIONARY (9th ed. 2009) (definition of "*pari passu*"). As the district court noted, the term *pari passu* in the FAA "obviously refer[s] to the use of the same proportion in paying down two kinds of debts." [SPE 1366]

Yet it is impossible to apply the concept of proportionality to the GDP-Linked Securities when those instruments have no fixed payment amount or schedule. The Republic could not plausibly have intended that its payment obligations in respect of the FAA Bonds would be made proportionate to its payment obligations in respect of the GDP-Linked Securities where the GDP-Linked Securities had no specified payment amount or schedule and where, in fact, the Republic might never have to make any payment whatsoever on the GDP-Linked Securities. One cannot apply the concept of ratable or proportionate payment to two obligations when the timing and amount of one of the obligations is indeterminate and unliquidated.

Indeed, the plaintiffs, the district court, and this Court each previously have recognized that the *Pari Passu* Clause cannot apply to <u>all</u> of the Republic's other foreign currency-denominated obligations, even those in respect of borrowed money. For example, as this Court observed, "plaintiffs have never used Argentina's preferential payments to the IMF as grounds for seeking ratable payments," *NML*, 699 F.3d at 260, despite the fact that the IMF debt (and any other "official" debt) is of the same legal ranking as the FAA bonds and, unlike the GDP-Linked Securities, has a principal balance and a fixed payment schedule.

Similarly, the plaintiffs have never asserted that the Republic's timely payment of smaller foreign-currency denominated debt – obligations in respect of dollar-denominated credit cards or trade vendors at foreign embassies and the like – somehow triggers the *Pari Passu* Clause notwithstanding the fact that those obligations literally qualify as External Indebtedness under the FAA. As with the unliquidated obligations in respect of the GDP-Linked Securities, it would be nonsensical to apply the concept of proportionality to those debts with variable amounts and variable payment dates and deadlines.

In fact, there is good reason why the *Pari Passu* Clause cannot be interpreted to apply to such obligations. Any such interpretation could have disastrous global consequences, as a default on bonds containing similar *pari passu* clauses theoretically would disable sovereign borrowers from making even routine payments on their foreign-currency denominated obligations and on "official" debt – undermining the function and purpose of the IMF and other institutions that lend to sovereigns with outstanding debt governed by New York law. As the United States previously observed, this "could have the cascading effect of turning short-term and limited balance of payment problems into full-fledged sovereign defaults." [SPE 970][18]

The foregoing demonstrates that the *Pari Passu* Clause must be interpreted narrowly and enforced in a manner that is practicable and in accordance with its core meaning and underlying purpose. Specifically, the clause should apply to that which it clearly was intended to apply – the Republic's material obligations in respect of actual debt for borrowed money evidenced by bonds, notes, or similar instruments – and nothing more.

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[18] As the United Kingdom Financial Markets Law Committee previously stated, "the consequence of [a broad interpretation of a *pari passu* clause] is that if the borrower is a sovereign state unable to service its foreign currency debt as it falls due, it will not be allowed to pay any of its senior creditors in full. These include the IMF, the World Bank and any of the other multilateral organisations that may have lent it money. The restriction potentially bites even wider than this and would prevent the borrower from paying in full creditors who have sold it commodities or licensed it intellectual property rights or from paying in full its government ministers, civil servants, police force, armed forces, judges and state teachers." Financial Markets Law Committee (Bank of England), *Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law* (2005) [JA 1824-1849 ("FMLC Study")] at 14 [JA 1840].

3. Including The GDP-Linked Securities Is Entirely Unnecessary To Effectuate The District Court's Injunctive Remedy

Even assuming that the *Pari Passu* Clause could be stretched to cover GDP-Linked Securities, there is no reason why the Injunctions need to include these instruments, and many reasons why the Injunctions should not.

The ultimate purpose of the district court's proposed injunctive remedy is to compel Argentina to make payments on the FAA Bonds. [SPE 1365] This remedial purpose would be amply served by an injunction limited to the Exchange Bonds (and excluding GDP-Linked Securities). There is no reason to stretch the Injunctions to the furthest imaginable reaches of the *Pari Passu* Clause (and beyond) – disrupting market expectations, harming investors who have no connection to the restructurings, and potentially creating much larger and more consequential financial problems – when more limited injunctive relief will have the same effect. Whether or not the district court's proposed injunctive remedy ultimately compels Argentina to make payments on the FAA Bonds, inclusion of the GDP-Linked Securities – which are highly contingent in nature and hold an indeterminate value – within the already-broad scope of the district court's Injunctions will have no material influence on that outcome.

Thus, because the GDP-Linked Securities do not represent obligations for borrowed money, because it makes no sense to apply the *pari passu* concept of proportionality to the contingent and indeterminate obligations in respect of the

GDP-Linked Securities, and because an extension of the Injunctions to GDP-Linked Securities could result in immeasurable harm to innocent third parties and innumerable additional financial problems, the district court erred in including the GDP-Linked Securities within the scope of its Injunctions to the extent that it purported to do so.

B. Even If The Injunctions Properly Reach GDP-Linked Securities, The District Court Erred In Enjoining Foreign Third Parties From Processing Foreign Payments On Euro-Denominated GDP-Linked Securities.

In the event the Court determines that the Injunctions may be applied to GDP-Linked Securities generally, due to the presumption against extraterritoriality and principles of comity those Injunctions must be limited to exclude the process of payment on the Euro-denominated form of these instruments.

1. The Injunctions Should Not Be Interpreted To Enjoin <u>An Entirely Extraterritorial Payment Process</u>.

It is undisputed that the process of payment on the Euro-denominated GDP-Linked Securities involves exclusively foreign entities and takes place entirely outside the United States. The registered owner of these instruments, BNY London, is a United Kingdom company. [SPE 623] In making payment, the Republic first transfers funds to a Euro deposit account at Banco Central de la Republica de Argentina. [SPE 623] [JA 2288] From there, funds are transferred to a Deutsche Bank account in Germany in the name of BNY Brussels, a Belgian company. Finally, funds are transferred to Euroclear, another Belgian company, or Clearstream, a Luxembourg company, for distribution to the beneficial holders.

Prior to the remand proceedings, the district court previously had indicated that Euroclear and Clearstream lay beyond the court's injunctive power and jurisdiction because they are foreign entities. [SPE 1097 ("I have a document on its face which has requests for injunctive relief about trust bonds held in Belgium and Germany. I can't do that.")] Yet the district court did precisely that on remand, apparently based on the mistaken premise that the payment process for all "Exchange Bonds" "without question takes place in the United States." [SPE 1369] That factual "finding" is simply incorrect with respect to the Euro-denominated GDP-Linked Securities, leading inexorably to the conclusion that the district court did <u>not</u> intend to enjoin the payment process with respect to those instruments.

Indeed, an interpretation of the district court's orders to exclude an entirely extraterritorial payment process is compelled by the presumption against extraterritoriality. That presumption is based on the respect that should be accorded the authority of a nation to adjudicate the rights of particular parties and to establish the norms of conduct applicable to events or persons inside its borders. *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-83 (2010) (no cause of action exists under section 10(b) of the Securities and Exchange Act of 1934 for alleged fraud perpetrated against foreign plaintiffs by foreign (and domestic) defendants with respect to transactions in foreign securities that took place on a foreign stock exchange); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248-58 (1991) ["Aramco"] (Title VII of the 1964 Civil Rights Act does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad) (superseded by statute on other grounds); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) ("Rules of the United States statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within, or having effect within, the territory of the United States."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403, Com. (g) (1987).

To the extent that it intended to act against this presumption, the district court was required to clearly and affirmatively indicate that the Injunctions were meant to apply to an exclusively foreign payment process. *Aramco*, 499 U.S. at 248. Because the district court failed to do so (and, indeed, stated its belief that the process "without question takes place in the United States"), the Injunctions should not be interpreted to reach the foreign payment process respecting the Euro-denominated GDP-Linked Securities. As the Supreme Court cautioned in *Aramco*, "[i]f we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption." *Id.* at 253.

2. Extending The Injunctions To Euro-Denominated GDP-Linked Securities Would Create Legal Conflict And Violate International Comity.

Interpreting the district court's orders to enjoin the process of payment on the Euro-denominated GDP-Linked Securities also would risk a serious conflict "between our laws and those of other nations which could result in international discord," *Aramco*, 499 U.S. at 248 – precisely what the presumption against extraterritoriality was intended to prevent.

The Euro-denominated GDP-Linked Securities are "governed by and construed in accordance with the laws of England and Wales without regard to principles of conflicts of laws," [SPE 742], and actions to enforce payment on the Euro-denominated GDP-Linked Securities may be brought in "the courts of England and the courts of the Republic," to which the Republic irrevocably submits to jurisdiction. [SPE 742]

English law interprets *pari passu* clauses like the one at issue in this case in a manner that diametrically conflicts with the way in which this Court has interpreted the *Pari Passu* Clause. As the United Kingdom Financial Markets Law Committee unequivocally has stated, "so far as English law is concerned, the wide 'payment' interpretation [of *pari passu* clauses] is incorrect and . . . the 'ranking' interpretation is the proper construction." FMLC Study at 2 [JA 1828] (emphasis added). The United States has observed in its amicus brief that the Court's interpretation of the *Pari Passu* Clause is contrary to "[t]he settled understanding . . . not only [of] the United States, but [also of] academics, governmental bodies, and market participants." [docket no. 653 at 2 (citing FMLC Study)]

This potential conflict between foreign laws – *i.e.*, ours and that of England – is more than just academic. It has the potential to sow financial confusion and result in further litigation here and abroad, and it makes it impossible for foreign investors investing in foreign instruments governed by foreign law and denominated in foreign currency to ascertain how those instruments will be enforced. Indeed, when a court in Belgium previously interpreted a *pari passu* clause in a manner similar to the interpretation affirmed by this Court, such chaos ensued that Belgium promptly passed a law reversing the decision and establishing that sovereigns would not be subject to injunctions against the payment of some but not all similarly-situated debt obligations. *See* Rodrigo Olivares-Caminal, LEGAL ASPECTS OF SOVEREIGN DEBT RESTRUCTURING 94 (Sweet & Maxell 2009).

An injunction against foreign entities performing contractual obligations in respect of the entirely foreign process of payment on the Euro-denominated GDP-Linked Securities may also cause friction in our country's foreign relations with England and other countries. As the United States submitted in its prior amicus brief, extending the Injunctions to the Euro-denominated GDP-Linked Securities could even have adverse implications for the treatment of the United States property that is abroad. [SPE 981]

This Court has emphasized that restraint should be exercised when an injunction could interfere with another nation's sovereignty, as is the case here. *See Bano v. Union Carbide Corp.*, 361 F.3d 696, 716 (2d Cir. 2004) ("Injunctive relief may properly be refused when it would interfere with the other nation's sovereignty."). As this Court has explained, a "federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere," but "this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." *Id.* British courts have similarly emphasized the delicacy of such matters, and the problems that could result from a U.S. court purporting to adjudicate English law rights under an English law contract. *See, e.g.*, *generally British Nylon Spinners v. Imperial Chem. Indus.*, [1953] 1 Ch. 19, 28 (Denning, J.) ("It would be a serious matter if there were a conflict between the orders of the courts of the United States and the orders of these courts. The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here.").

Even greater restraint must be exercised where, as is the case here, an injunction purports to enjoin innocent third parties – over which the district court may not even have personal jurisdiction – with no connection to the underlying dispute or litigation. For all these reasons, international comity requires interpreting the district court's orders so as not to enjoin the payment process for the Euro-denominated GDP-Linked Securities. *See Hartford Fire Ins. v. California*, 509 U.S. 764, 797-98 & n. 24 (1993) (weighing comity considerations, including whether relief ordered by an American court would conflict with foreign law); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (Marshall, J.) (doctrine of comity stands for the proposition that a statute "ought never to be construed to violate the law of nations, if any other possible construction remains"); *see also Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1050 (2d Cir. 1996) (principles of international comity counsel against applying the Bankruptcy Code's preference avoidance provision internationally).

For all of these reasons, the Injunctions should not be interpreted to reach the entirely foreign process of payment on the Euro-denominated GDP-Securities, and this Court should clarify that the district court's orders do not have that effect.

C. Even If The Injunctions Properly Apply To Euro-Denominated GDP-Linked Securities, Holders of The Securities And Other Third Parties Were Deprived of Notice And An Opportunity To Be Heard, And A Remand Is Necessary.

To the extent the Injunctions were intended to and properly do apply to Euro-denominated GDP-Linked Securities, the holders of these instruments and the foreign entities involved in processing payment on them were deprived of constitutionally mandated notice and an opportunity to be heard. In the event that the Court chooses not to clarify that the Injunctions exclude the payment process in respect of the Euro-denominated GDP-Linked Securities, a remand is necessary so that those holders and foreign entities can correct the record in respect of the erroneous assumptions underlying the district court's orders and demonstrate why the Injunctions should not and need not be extended to the Euro-denominated GDP-Linked Securities in order to effectuate the district court's intended remedial purpose.

The Supreme Court has admonished courts not to issue an "injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945). Either ignoring that admonition or failing to apprehend the potential scope of its orders, the district court issued broad injunctive relief that potentially deprives holders of Euro-denominated GDP-

Linked Securities of their property rights and exposes them to judicial action without notice or an opportunity to be heard.

The lack of notice is especially significant here, given the potentially sweeping reach of the injunctions to third parties who are far removed from the underlying events of the litigation and who could not reasonably have anticipated their present position given the unique nature of the Euro-denominated GDP-Linked Securities and the thoroughly foreign process of payment on those instruments.

In its prior opinion, this Court focused on the propriety of the Republic's "making payments on debt issued pursuant to its 2005 and 2010 restructurings without making comparable payments on the defaulted debt." *NML*, 699 F.3d at 250 (emphasis added). The district court has had a similar focus throughout the proceedings. [SPE 1360 (defining "Exchange Bonds" as "new debt [issued] pursuant to exchange offers in 2005 and 2010")] Yet, the GDP-Linked Securities are not debt, *see supra* Section V.A, and neither the district court's opinion nor its Injunctions ever reference GDP-Linked Securities.

ICE Canyon and the third parties arguably swept up within the scope of the injunctions could not reasonably have anticipated the extension of the Injunctions to purely foreign entities and payment processes. If the district court actually intended to include the Euro-denominated GDP-Linked Securities within the scope of the Injunctions, it was required to notify those entities of its intent do so, provide them an opportunity to protect their interests, and adequately articulate why the injunctions properly are applied to them. *See, e.g.*, *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 955 (4th Cir. 1999) ("Due process dictates and principles of fairness counsel that [non-party] be given an opportunity to challenge the district court's assertion of jurisdiction over it, particularly when the court specifically entered an injunction against [the non-party].") (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-12 (1969)); *Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975) ("No man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim against him.").

Principles of joinder reinforce the lack of due process and necessity for vacatur and remand here. The Republic could not adequately protect interests of holders of (and entities processing payment on) the GDP-Linked Securities because those interests diverge from the interests of other third parties whose rights to payment are directly addressed in the Court's injunctions. Fed. R. Civ. P. 19(b)(1) (requiring court to consider prejudice to nonparty). Although the plaintiffs could assert a claim for damages against the Republic without joining holders of (and entities processing payment on) the GDP-Linked Securities, joinder was necessary to assert a claim for injunctive relief against those third parties, particularly given the broad extraterritorial relief sought and granted by the district court. *See Herrlein*, 536 F.2d at 255 ("[Plaintiff] had the option at the time of the original action to bind [non-party] to the injunction by simply joining [non-party] as a party defendant."); *Legal Aid Soc'y v. City of New York*, 114 F. Supp. 2d 204, 220-21 (S.D.N.Y. 2000) (dismissing claims for injunctive relief where uniquely situated parties were not properly joined). If the Court determines that the district court's orders were intended to and properly could enjoin the process of payment on the Euro-denominated GDP-Linked Securities, it should remand so that the third parties subject to the Injunctions, and the beneficial holders of these instruments who are directly impacted by the Injunctions, properly can be joined and provided an opportunity to protect their unique interests.

In particular, on remand holders of (and entities processing payment on) the Euro-denominated GDP-Linked Securities should have the opportunity to present any and all evidence relating to whether they should or should not fall within the injunctive relief. This is particularly important given that the district court apparently intended to enjoin only payments on the Republic's debt instruments (*i.e.*, not GDP-Linked Securities) and believed that payment on those instruments took place within the United States (not true with respect to the Euro-denominated GDP-Linked Securities). *See Stahl v. City of St. Louis*, 687 F.3d 1038, 1041 (8th Cir. 2012) (ordinance violated due process where it did "not provide people with fair notice of when their actions are likely to become unlawful") (citing *FCC v.*

Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012)). In the event of a remand, the district court also should address whether the Injunctions already have sufficient force to accomplish their stated purpose – "to provide a remedy for Argentina's violation of the [*Pari Passu*] Clause" [SPE 1365] – such that an extension of the Injunctions to Euro-denominated GDP-Linked Securities would be needlessly punitive and disruptive for the innocent third parties who would be enjoined thereby.

VIII. CONCLUSION

For the foregoing reasons, the district court's orders should be reversed at least insofar as they purport to reach the Euro-denominated GDP-Linked Securities. In the alternative, this case should be remanded in order for holders of these instruments and other impacted third parties to present evidence and argument as to why those instruments should not fall within the scope of the Injunctions.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 9,451 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

/s/ Meir Feder
Meir Feder

Dated: January 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system on January 4, 2013.

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Meir Feder

Dated: January 4, 2013