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United States Court of Appeals

for the

Second Circuit

AURELIUS CAPITAL MASTER, LTD., AURELIUS OPPORTUNITIES FUND II, LLC, ACP MASTER, LTD., NML CAPITAL, LTD., OLIFANT FUND, LTD., BLUE ANGEL CAPITAL I 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, MARTZ AZUCENA VAZQUEZ,

Plaintiffs-Appellees,

– v. –

THE REPUBLIC OF ARGENTINA,

Defendant- Appellant,

CITIBANK, N.A.,

Movant-Interested Party-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT THE REPUBLIC OF ARGENTINA

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SUMMARY OF REPLY

Under the *pari passu* Injunctions[1] issued by the district court on November 21, 2012, and affirmed by this Court, holders of "Exchange Bonds" – *i.e.*, over $28 billion of Republic-issued debt for which BNYM acts as Trustee – have been prevented from receiving scheduled interest payments unless and until the Republic pays plaintiffs full principal and interest on their defaulted debt. The district court committed legal error, and otherwise abused its discretion, when it modified those Injunctions by extending them to reach payments on Argentine Law Bonds, processed by Citibank's Argentina branch, that are not mentioned or referenced in the Injunctions. The district court itself correctly observed, before it reversed itself, that the Argentine Law Bonds have been "treated differently . . . all along" from the Exchange Bonds. Payment on the Argentine Law Bonds is not properly enjoined, and the July 28 Order should accordingly be reversed.

First, all of the Argentine Law Bonds were issued exclusively in Argentina and are thus fundamentally different from the Exchange Bonds for which BNYM acts as Trustee that are covered by the Injunctions. It is beyond dispute that the vast majority of the Argentine Law Bonds – approximately $6.1 billion, or 72% of the total – were issued entirely outside the context of any

[1] Defined terms have the definitions assigned in the Republic's Opening Brief ("Republic Br.").

exchange offer. Because those bonds were issued as part of local debt issuances in Argentina having nothing to do with the 2005 or 2010 Exchange Offers, or any other restructuring for that matter (including approximately $1.75 billion of Argentine Law bonds issued as part of the settlement of disputes between Argentina and Repsol), they cannot be characterized as Exchange Bonds even under plaintiffs' definition of that term. Enjoining payment on the Argentine Law Bonds thus fails to align with the plain language of the Injunctions. This interference promises only more injury to third-party bondholders, financial institutions, and the Republic that is entirely unwarranted and unnecessary.

The district court initially recognized the overreach of plaintiffs' demands when it ruled that Citibank could pass on to its customers payments made on the Argentine Law Bonds. However, the court subsequently reversed course and extended the Injunctions to cover the Argentine Law Bonds, with the exception of those bonds issued to Repsol, which bear the same ISIN as bonds covered by the July 28 Order. That purported "narrowing" of the district court's Injunction modification, however, did nothing to cure the court's error, given that the only record evidence shows that bonds bearing the same ISIN are fungible and thus cannot be distinguished from each other.

Second, and consistent with the district court's (at least initial) recognition that the Argentine Law Bonds were always treated differently, is the

fact that they were never shown by plaintiffs – who bear the burden of proof if they are to obtain the extraordinary remedy of injunctive relief – to be properly subject to the Injunctions. Like the $6.1 billion in bonds issued outside of any exchange context, the remaining $2.3 billion of Argentine Law Bonds that were also offered exclusively within Argentina are fundamentally different from the Exchange Bonds that were the subject of this Court's two prior rulings. Those Argentine Law Bonds were issued in 2005 and 2010, but in transactions separate from those involving BNYM, and were offered solely in Argentina to prior holders of Argentine domestically-issued debt. Plaintiffs failed to prove – as was their burden – that these locally issued, Argentine law-governed bonds even constituted External Indebtedness subject to the *pari passu* clause. Nor could they, given that they are Domestic Foreign Currency Indebtedness ("DFCI"), a category of debt excluded from External Indebtedness that is thus beyond the scope of the *pari passu* clause and not properly subject to the Injunctions.

Finally, the equities weigh decisively against extending the Injunctions to enjoin payment to holders of beneficial interests in the Argentine Law Bonds. As an initial matter, the effect of the July 28 Order is entirely extraterritorial, as payment on the Argentine Law Bonds takes place in Argentina. Nor does the negligible benefit plaintiffs would receive from adding the Argentine Law Bonds to the $28 billion in bonds already covered by the Injunctions outweigh the serious

harm that extending them would cause to third-party bondholders, Citibank, and the Republic. This is particularly true here, where the district court realized the necessity of protecting third parties (at least as to the bonds initially issued to Repsol), but imposed a "solution" that is impossible to implement.

ARGUMENT

I. THE COURT HAS APPELLATE JURISDICTION

Jurisdiction over the appeals of the July 28 Order exists under 28 U.S.C. § 1292(a)(1), because that Order modified the Injunctions by extending them to apply to not just the Exchange Bonds payable to BNYM, but to the Argentine Law Bonds as well. *See Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010); *see also infra* II.A. (Injunctions affirmed by this Court apply only to Exchange Bonds payable to BNYM). This expansion of the Injunctions to billions of dollars of additional debt that was never considered or contemplated by either the parties or the courts was plainly not a "clarification" of the Injunctions' terms as plaintiffs contend, *see* Aurelius Br. at 21-29, but was a significant "modification" of them. *See Weight Watchers Int'l, Inc. v. Luigino's Inc.*, 423 F.3d 137, 141-42 (2d Cir. 2005) ("'[A] modification . . . substantially change[s] the terms and force of the injunction'") (internal citation and quotation marks omitted).

The Court also has jurisdiction over these appeals under 28 U.S.C. § 1291, because "the district court intended its [July 28] Order . . . to be its final decision in [plaintiffs'] case" with respect to the Argentine Law Bonds and Citibank. *Leftridge v. Conn. State Trooper Officer No. 1283*, 640 F.3d 62, 66 (2d Cir. 2011); *cf. Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 745 (7th Cir. 2007) (post-judgment enforcement proceeding treated as "free-standing lawsuit" and related order is "'final' for purposes of section 1291 if it 'dispose[s] of all issues raised in the post-judgment motion.'") (internal citation and quotation marks omitted).

II. THE DISTRICT COURT ERRED BY EXTENDING THE INJUNCTIONS TO EFFECTIVELY ENJOIN PAYMENT ON ALL ARGENTINE LAW BONDS

The Injunctions affirmed by this Court enjoining payment on restructured Republic debt apply by their express terms to Exchange Bonds payable to BNYM. *See* Amended Feb. 23, 2012 Order at 5-6, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Nov. 21, 2012) (A-1463-64) (naming as participants in Exchange Bonds' "payment process" "The Bank of New York Mellon," "The Bank of New York Depositary," "The Bank of New York (Luxembourg) S.A.," and the "Bank of New York Mellon (London)"); *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 239 (2d Cir. 2013) (relying on district court's description of BNYM payment process in affirming

Injunctions). The named Bank of New York entities are *not* involved in the payment process for the Argentine Law Bonds, and Citibank's Argentina branch, which serves as bondholder custodian for the Argentine Law Bonds, is not named in the Injunctions at all.[2]

The burden was on plaintiffs to prove below that the Argentine Law Bonds should also be subject to such drastic injunctive relief, but plaintiffs did not, because they could not, do so. Plaintiffs failed to demonstrate that the Argentine Law Bonds are Exchange Bonds, or that they are covered by the *pari passu* clause that the Injunctions purport to enforce. The July 28 Order's modification of the Injunctions to nonetheless interfere with the Argentine Law Bonds – while subjecting third-party bondholders, Citibank, and the Republic to hardship – was accordingly error. Plaintiffs' arguments to the contrary fail.

A. The Injunctions Apply Only To Exchange Bonds Payable To The New York Trustee, And Plaintiffs Did Not Demonstrate Otherwise

The Injunctions affirmed by this Court apply only to Exchange Bonds payable to BNYM, the New York Trustee for those bonds. Republic Br. at 20-23. Plaintiffs targeted only those bonds in their request for the Injunctions, and the district court's opinions and orders, and this Court's related decisions, thus

[2] Plaintiffs point out that in addition to the specific Bank of New York entities, the Injunctions also target "indenture trustees and/or registrars," NML Br. at 27, but as a bondholder custodian, Citibank Argentina is neither of those things.

necessarily likewise concerned only those bonds. Republic Br. at 21; *see also* NML Summary Judgment Br. at 18-19 n.12, Oct. 20, 2012, Dkt. # 230 (specifically targeting payments on 2005 and 2010 bonds transferred to BNYM); NML Renewed Specific Performance Br. at 7, Jan. 6, 2012, Dkt. # 361 ("Under the 2005 Exchange Offers, Argentina provides funds to the Bank of New York or that Bank's 'trustee paying agent'"); *id.* at 7 n.2 ("Under the 2010 Exchange Bonds, the Republic provides funds to BNY Mellon"); Pls. Remand Br. at 10-11, Nov. 13, 2012, Dkt. # 390 ("Argentina transfers funds to [BNYM]" when "making its payments on the Exchange Bonds" subject to the district court's orders).

This limitation was no accident; it provided some boundary to the extreme relief plaintiffs requested and was part and parcel of plaintiffs' argument that the Injunctions they demanded were somehow measured and appropriate. The limitation also cabined (at least somewhat) the number of third parties affected by the Injunctions. Plaintiffs are accordingly wrong to argue that the district court's self-described "clarification" in its June 27 Order, A-1851-52 – which recognized this limitation of the Injunctions – was in fact a "modification" of the Injunctions. NML Br. at 23-25. To the contrary, the "modification" occurred when the district court in its July 28 Order reversed itself and *extended* the Injunctions to cover the Argentine Law Bonds for the first time. *See* July 28 Order at 3-4 (SPA-3-4).

Recognizing that the record demonstrates that the Injunctions do not apply to the Argentine Law Bonds, plaintiffs urge the Court to ignore their repeated, exclusive focus on Exchange Bonds payable to BNYM, and look instead within the Injunctions' "four corners," because the Injunctions' terms are purportedly "plain." NML Br. at 23-24. But, as the district court itself acknowledged in taking the unusual step of including in the Injunctions a paragraph expressly inviting third parties to seek clarification of the extent of their application, *see* NML Injunction ¶ 2(h) (A-1464-65), the scope of the Injunctions is far from "plain." Accordingly, "a reviewing court may properly examine the entire record for the purpose of determining what was decided." *United States v. Spallone*, 399 F.3d 415, 424 (2d Cir. 2005) (internal citation and quotation marks omitted); *see also id.* at 422 (court may look to record when order "is subject to more than one plausible construction").

Plaintiffs' contention that the meaning of "Exchange Bonds" in the Injunctions is "plain" rests on an overbroad definition of that term that includes *all* bonds that plaintiffs now say were issued pursuant to the 2005 and 2010 Exchange Offers. *See* NML Br. at 24. That definition sweeps far too broadly. For example, plaintiffs themselves concede that Peso-denominated bonds issued in 2005 and 2010 (when the Exchange Bonds for which BNYM acts as Trustee were issued) should not and cannot be subject to the Injunctions because they do not constitute

External Indebtedness covered by the *pari passu* clause. *See* Hr'g Tr at 4:3-4, *NML Capital v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. July 22, 2014) (July 22, 2014 Hr'g Tr.) (A-2121); FAA at 16 (A-391) (defining "External Indebtedness" as obligations, *inter alia*, payable "in a currency other than the lawful currency of the Republic"). But under the "four corners" definition of Exchange Bonds that plaintiffs propose here, those same Peso-denominated bonds *would* be subject to the Injunctions. This contradiction alone defeats plaintiffs' proposed definition of "Exchange Bonds."

Moreover, plaintiffs fail to demonstrate, because they cannot, that the Argentine Law Bonds were issued pursuant to the same "Exchange Offers" that produced the Exchange Bonds payable to BNYM, as opposed to separate domestic transactions. To the extent there is any ambiguity in the Injunctions' reference to "the" bonds issued pursuant to the Exchange Offers (NML Injunction ¶ 2(a) (A-1462)), the better reading is that the Exchange Bonds covered by the Injunctions are those that were actually the subject of the proceedings before the court. Although plaintiffs contend that the Injunctions' text demonstrates that the district court somehow *intended* the orders to reach the Argentine Law Bonds, *see* NML Br. at 23-24, notwithstanding the lack of any supporting language, that is not the case. Over 20 months after the Injunctions were entered, at the argument concerning plaintiffs' motion for reconsideration of the June 27 Order, the district

court expressed surprise that any of the Argentine Law Bonds might constitute Exchange Bonds at all. *See, e.g.*, July 22, 2014 Hr'g Tr at 5:4-6 (A-2122).

The district court clearly did not intend that the Injunctions apply to bonds it did not even know existed. Further, beyond the lack of any basis in the Injunctions themselves, extending the Injunctions to cover the Argentine Law Bonds is improper because the *pari passu* clause applies only to "External Indebtedness," FAA at 2 (A-377), and the definition of External Indebtedness expressly excludes DFCI, which the FAA defines to include specific issuances of foreign-currency denominated debt (*e.g.*, dollar-denominated debt), debt issued in exchange for such debt, or any other foreign-currency denominated debt offered exclusively within Argentina, FAA at 12 (A-387), such as the Argentine Law Bonds. *See, e.g.*, Republic Br. at 24 ("The Order should be vacated because it extends the Injunctions to debt "issued in a purely domestic Argentine exchange for defaulted local debt."); Letter from C. Boccuzzi to Judge Griesa at 1 n.1, dated July 27, 2014 (A-2180) (Argentine Law Bonds are not External Indebtedness because "that term excludes from its scope 'Domestic Foreign Currency Indebtedness,' which includes securities . . . 'offered exclusively within the Republic of Argentina.'"). By seeking to extend the Injunctions to DFCI, plaintiffs go well beyond the reach of the *pari passu* clause, which is the purported basis for the Injunctions.

B. The Argentine Law Bonds Are Neither Exchange Bonds Nor External Indebtedness

There is no basis for extending the Injunctions to bar payment on the Argentine Law Bonds. Republic Br. at 24-30. The Argentine Law Bonds do not share the "Exchange Bond" characteristics enumerated in the Injunctions, *see supra* II.A., and they are not properly subject to the *pari passu* clause because they are not External Indebtedness. Plaintiffs cannot contest that the more than 72% of the Argentine Law Bonds issued outside the context of any exchange offer to Repsol and other entities are not Exchange Bonds. And the district court itself similarly recognized that the Argentine Law Bonds issued to Repsol were not properly subject to the Injunctions. July 28 Order at 3-4 (SPA-3-4). The Injunctions accordingly cannot apply to those bonds.

Nor should the rest of the Argentine Law Bonds, many of which are indistinguishable from the bonds issued outside of any restructuring context, be subject to the Injunctions. Contrary to plaintiffs' assertion, Aurelius Br. at 31, those bonds are not "Exchange Bonds" as defined in the Injunctions because they are not payable to BNYM and were offered exclusively in Argentina. *See* Republic Br. at 16. The Court should accordingly vacate the July 28 Order. *See*

Brooks v. Giuliani, 84 F.3d 1454, 1467 (2d Cir. 1996) (injunctions may "'not impose unnecessary burdens on lawful activity.'") (internal citations omitted).[3]

Plaintiffs' failure to establish that the Argentine Law Bonds are properly subject to the Injunctions follows from the fact that they differ fundamentally from the bonds expressly covered by the Injunctions. *See* Republic Br. at 27. Unlike the Exchange Bonds payable to BNYM and targeted by the Injunctions, the Argentine Law Bonds were issued in transactions separate from those involving the New York Trustee, and solely in Argentina to prior holders of Argentine domestically-issued debt. Moreover, the Argentine Law Bonds are not governed by the Trust Indenture. They are governed by separate instruments issued under Argentine Presidential Decrees, *see* Argentine Presidential Decree No. 1735/2004, dated Dec. 9, 2004 (English translation) (A-1498-1503); Argentine Presidential Decree No. 563/2010, dated Apr. 29, 2010 (English translation) (A-1512-1524). They are sitused and payable in Argentina, are governed by Argentine law, and do not provide for submission to the jurisdiction of U.S. courts.

[3] Because injunctions may not unnecessarily bar lawful activity, plaintiffs are wrong to contend that the Injunctions, which purport to enforce the *pari passu* clause, can reach more broadly than the clause itself and prohibit activity not even arguably covered by the provision. *See Forschner Grp., Inc. v. Arrow Trading Co., Inc.*, 124 F.3d 402, 406 (2d Cir. 1997) ("[T]he essence of equity jurisdiction has been the power to grant relief no broader than necessary to cure the effects of the harm caused by the violation . . . and to mold each decree to the necessities of the particular case." (internal citations and quotation marks omitted)).

Republic Br. at 27-28. Citibank acts as custodian for the bondholders and payment is complete upon receipt of the funds by Citibank in Argentina. Finally, neither this Court, nor the district court, ever found that payment on these bonds gives rise to a breach of the *pari passu* clause, or that the balance of the equities favors enjoining payment on them, on top of the more than $28 billion of Exchange Bonds already subject to the Injunctions. *See* Republic Br. at 28.

Unable to dispute the existence of these fundamental differences between the Argentine Law Bonds and the Exchange Bonds subject to the Injunctions, plaintiffs instead argue that these differences are somehow irrelevant. NML Br. at 19-20. But as made clear above, the text of the Injunctions demonstrates that they apply only to Exchange Bonds issued as part of the Republic's 2005 and 2010 Exchange Offers that are payable to BNYM. *See* Injunctions ¶ 2(a), (f) (A-1462-64).

Plaintiffs also failed to demonstrate that the Argentine Law Bonds are External Indebtedness (the only type of debt subject to the *pari passu* clause). Nor could they have done so: Argentine Law Bonds that were issued in 2005 and 2010 are DFCI, which is excluded from the definition of External Indebtedness, because they were issued in exchange for debt that is expressly defined in the FAA as DFCI. *See* FAA at 12 (A-387) (defining as DFCI, *inter alia*, a list of specific bond series, as well as bonds issued in exchange for those bonds); Prospectus

Supplement 2005 Annex A, A-1-A-11 (A-768-787) (listing DFCI bonds eligible for exchange); Prospectus Supplement 2010 Annex A, A-1-A-17, https://www.sec.gov/Archives/edgar/data/914021/000090342310000252/roa-424b5_0428.htm (listing DFCI bonds eligible for exchange). Moreover, all Argentine Law Bonds otherwise constitute DFCI because they were offered only domestically. *See* Prospectus Supplement 2005 at S-9, S-39 (A-668, 699-700); Prospectus Supplement 2010, S-15, https://www.sec.gov/Archives/edgar/data/914021/000090342310000252/roa-424b5_0428.htm.

First, the Argentine Law Bonds were issued in Argentina, and the issuance was governed by Presidential decrees and a Spanish-language document called a *Procedimiento* that set forth the exchange terms and conditions, rather than by the exchange offer documentation prepared for the concurrent exchange offers outside Argentina. Republic Br. at 5. *Second*, the Argentine Law Bonds are governed not by the Trust Indenture, but by the Presidential decrees and Spanish-language instruments issued pursuant to those decrees. *Third*, the bonds were deposited with, are registered in the name of, and are cleared and paid through Central de Registro y Liquidación de Instrumentos de Endeudamiento Público ("CRYL"), an Argentine clearing system "of transactions involving *Bonos del Tesoro de Argentina* and other debt securities of Argentina governed by Argentine law." Prospectus Supplement 2005 at S-75 (A-736). *Fourth*, bonds tendered in

exchange for the Argentine Law Bonds could only be tendered (directly or indirectly) through Caja de Valores S.A., and the exchanges were settled in Argentina through CRYL. *Fifth*, neither BNYM nor any other New York indenture trustee or fiscal agent participated, or participates, in any aspect of the issuance or the payment process of the Argentine Law Bonds. Republic Br. at 27-28. *Finally*, the offer and sale of the Argentine Law Bonds were not registered with the SEC under the Securities Act; for Securities Act purposes, they were treated as offshore securities offerings because they were domestic Argentine offerings.

The classification of the Argentine Law Bonds as DFCI and not External Indebtedness reflects a distinction that is made not only in the *pari passu* clause but in the market for sovereign debt more generally. Like the rest of the Republic's domestic indebtedness – and unlike the Republic's Exchange Bonds payable to BNYM and other External Indebtedness – the Argentine Law Bonds include the prefix "ARARGE" in their ISIN. Prospectus Supplement 2005 at S-104-5 (A-765-66). They do not contain *pari passu* clauses, negative pledge covenants, events of default, acceleration provisions, or provisions for amendments or otherwise for bondholder meetings. *See* Prospectus Supplement 2005 at S-21, S-33, S-70-71 (A-681, 693, 731-32); Prospectus Supplement 2010 at S-42, S-61, S-103, S-113, https://www.sec.gov/Archives/edgar/data/914021/0000903423100

00252/roa-424b5_0428.htm. Nor do the Argentine Law Bonds include a submission to the jurisdiction of foreign courts, either in the United States or elsewhere. Republic Br. at 5. All of the attributes of the Argentine Law Bonds are fully consistent with the rest of the Republic's debt offered exclusively in Argentina. These significant differences between the Republic's external and domestic indebtedness are widely recognized in the financial markets.

Rather than try to meet their burden to show that the Argentine Law Bonds were External Indebtedness and thus subject to the *pari passu* clause, plaintiffs contend that the Republic "waived" the argument that the Argentine Law Bonds do not constitute External Indebtedness. NML Br. at 28 n.4. But it was *plaintiffs'* burden to show that the Argentine Law Bonds were External Indebtedness properly subject to the Injunctions. It is black-letter law that parties moving for reconsideration of a court order, as plaintiffs did below, bear the burden of showing "controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Here, although plaintiffs insisted below that the Injunctions apply to the Argentine Law Bonds because those Bonds are "External Indebtedness," July 22, 2014 Hr'g Tr. 7:1-7 (A-2124), they did not, because they could not, prove that assertion.

The Court should accordingly vacate the July 28 Order: the Argentine Law Bonds are neither "Exchange Bonds" as that terms is defined in the Injunctions, nor "External Indebtedness" subject to the *pari passu* clause. However, if the Court believes that additional facts would facilitate the resolution of the questions raised by Citibank's and the Republic's appeals, the Court should remand to allow for further development of the record, as necessary.[4] *See Wastemasters, Inc. v. Diversified Investors Servs. of N. Am., Inc.*, 159 F.3d 76, 79 (2d Cir. 1998).

C. The Equities Weigh In Favor Of Vacating The July 28 Order

The equities otherwise weigh decisively against extending the July 28 Order so that it interferes with the rights of holders of billions of dollars of debt that has nothing to do with the *pari passu* litigation. Republic Br. at 28. The Order restrains the Republic from acting within its own territory, which courts should avoid because of the possibilities of discord and conflict with the authorities of another country. *Id*. at 29. Moreover, the practical effect of the Order – extending the Injunctions to holders of additional billions of dollars of the Republic's debt – will cause substantial hardship to third parties, the international

[4] If plaintiffs are correct that there are issues on appeal that "require further development below," Aurelius Br. at 36, then a remand is the appropriate remedy.

payment system, and the Republic, while conferring minimal benefit on plaintiffs. *Id*.

Plaintiffs contend that there is nothing inequitable about holding the Republic to a contractual promise, NML Br. at 40, and that vacating the Order would undermine the Injunctions by providing the Republic with a tactic to violate them at will. *Id*. at 58. But the *pari passu* clause of the FAA does not confer on holders of FAA debt *any* rights vis-à-vis the treatment of domestic debt holders. And while plaintiffs hypothesize that if the Court vacates the July 28 Order, the Republic will be more likely to relocate its payment stream to Argentina, this speculation cannot apply to payment mechanisms that were in place well before the district court issued the *pari passu* Injunctions. Accordingly, the Court should find that the equities weigh in favor of the Republic and vacate the July 28 Order.

This is particularly true where the "fix" to the third-party problem that the district court imposed in the July 28 Order – finding a means to distinguish between bonds issued to Repsol and "exchange bonds" – exposes holders of $6.1 billion of Argentine Law Bonds that plaintiffs cannot contend are Exchange Bonds to the risk of not receiving the payments to which they are unquestionably entitled. Republic Br. at 25. The Order requires the parties to distinguish between bonds with the same ISIN, which are, by definition, indistinguishable, *id*. at 25-27, and ignores entirely the other $4.35 billion in Argentine Law Bonds issued to entities

other than Repsol outside of the restructuring context.[5] Aurelius Br. at 14-15; NML Br. at 25. The Order should be vacated because its practical effect will be to enjoin payment on billions of dollars of bonds that have nothing whatsoever to do with the *pari passu* litigation.

Plaintiffs cannot dispute that the Argentine Law Bonds issued to Repsol and others outside of any exchange context are not Exchange Bonds. Instead, they argue that even if the Court affirms the July 28 Order, these Bonds, which make up over 72% of the bonds at issue in this appeal, will be unaffected by the Amended Injunctions because it is possible to distinguish them from other Argentine Law Bonds with identical ISINs. NML Br. at 55-56. Notably, plaintiffs *do not* argue that bonds with the same ISIN are distinguishable; they argue only that the Republic and Citibank have not carried their "heavy burden" to show that is the case,[6] *id*. at 56, ignoring that the only record evidence is that bonds with the

[5] Plaintiffs argue that the equities would be somehow different following a sale by Repsol of the Argentine Law Bonds issued to it by the Republic, Aurelius Br. at 10, 37, but the same hardship would accrue to any subsequent transferee. *See, e.g.*, *Citibank, N.A. v. Tele/Res., Inc.*, 724 F.2d 266, 269 (2d Cir. 1983) ("Insofar as an assignment touches on the obligations of the other party to the underlying contract, the assignee simply moves into the shoes of the assignor.") (internal citation omitted).

[6] Plaintiffs' assertion that the Republic is "able to distinguish between at least some Argentine-law Bonds that are Exchange Bonds and other Argentine-law Bonds," NML Br. at 55, misses the point. Different series of Argentine Law Bonds are

(continued . . .)

same ISIN are *indistinguishable*. *See* Declaration of Federico Elewaut ¶ 4, dated July 28, 2014 (A-2191-92). Plaintiffs assert that the Elewaut Declaration is "conclusory," NML Br. at 55, but cannot point to anything in the record below that rebuts Mr. Elewaut's statement that distinguishing between bonds with the same ISIN is "operationally impossible." A-2191-92.

In the alternative, plaintiffs argue that the Order should be affirmed because the Republic made a "calculated choice to frustrate enforcement of the Injunction by blurring the distinction between bonds covered by the Injunction and others." NML Br. at 57. Plaintiffs' argument again ignores the reality of the financial markets and the facts of this case, including that issuing additional bond interests under a given ISIN is a typical market practice, and one that benefits bondholders by providing them with additional liquidity. *See* Republic Br. at 27. Sovereign borrowers – including the United States – regularly issue fungible debt. *See, e.g.*, TreasuryDirect, *Treasury Reopenings*;[7] Monetary Authority of Singapore, *Information for Investors Applying for Reopened SGS Bonds*, (Aug. 17, 2012);[8] Japanese Government Bonds Monthly Newsletter, Ministry of Finance, Japan,

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distinguishable, but bonds of the same series – which can and do include both types of Argentine Law Bonds at issue in this appeal – are not.

[7] https://www.treasurydirect.gov/instit/auctfund/work/reopenings/reopenings.htm (last visited Sept. 5, 2014).

[8] http://www.sgs.gov.sg/~/media/SGS/Reopened%20Bonds.

(July/August 2014).[9] It is a common practice designed to ensure liquidity. *See, e.g.*, Practical Law Company, *Why Do Issuers Conduct Reopenings?*.[10]

In this case, plaintiffs contend that the issuances outside the context of any restructuring were due to connivance or scheming by the Republic. *See* NML Br. at 56-57. But the vast majority of those bonds ($4.35 billion) were issued years *before* the Injunctions were entered. Republic Br. at 4-5 (bonds issued at various points from 2007 to 2011). And plaintiffs have no basis for attacking the issuance of bonds to Repsol as part of the resolution of the Republic's disputes with Repsol (including litigation in the district court). Plaintiffs simply overreach in seeking to extend the scope of the *pari passu* Injunctions to the Argentine Law Bonds. Permitting this overreaching will only create more market confusion[11] and harm to third-party bondholders, Citibank, and the Republic. The July 28 Order should accordingly be vacated.

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[9] http://www.mof.go.jp/english/jgbs/publication/newsletter/jgb2014_0708e.pdf.

[10] http://us.practicallaw.com/8-503-1219?q=reopening.

[11] *See, e.g.*, Floyd Norris, *The Muddled Case of Argentine Bonds*, N.Y. Times, July 24, 2014, *available at* http://www.nytimes.com/2014/07/25/business/rulings-add-to-the-mess-in-argentine-bonds.html?_r=0.

CONCLUSION

For the foregoing reasons, the Court should vacate the July 28 Order.

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September 5, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B) because it contains 4,884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

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