15-1060-cv(L)

15-1047-cv (CON), 15-1052-cv (CON), 15-1056-cv (CON), 15-1059-cv (CON), 15-1061-cv (CON), 15-1067-cv (CON), 15-1073-cv (CON), 15-1074-cv (CON), 15-1075-cv (CON), 15-1084-cv (CON), 15-1095-cv (CON), 15-1106-cv (CON)

United States Court of Appeals

for the

Second Circuit

AURELIUS OPPORTUNITIES FUND II, LLC, AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs-Appellees,

– v. –

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

BRIEF OF DEFENDANT-APPELLANT THE REPUBLIC OF ARGENTINA

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Plaintiffs-Appellees.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Other Authorities

PRELIMINARY STATEMENT

The March 12, 2015 Order from which the Republic of Argentina ("Argentina" or the "Republic") appeals (the "March 12 Order") denied requests to modify the so-called *pari passu* injunctions affirmed by this Court (the "Injunctions"). The Injunctions bar payment on certain restructured Republic debt unless the Republic pays plaintiffs in full on their defaulted debt. Specifically, the March 12 Order refused to exclude from the Injunctions' scope payment on $8.4 billion in principal outstanding amount of locally issued Republic debt governed by Argentine law (the "Argentine Law Bonds"), which the district court had belatedly and improperly swept in with the $28 billion of restructured Republic debt governed by New York and English law that was the subject of the proceedings that led to the Injunctions (the "Exchange Bonds").

Initially, the district court correctly recognized that the Argentine Law Bonds should *not* be subject to the Injunctions because they are fundamentally different from the Exchange Bonds. *See* Order, dated June 27, 2014 (the "June 27 Order") (SPA-21-22). However, the district court then reversed course without explanation and on July 28, 2014 granted plaintiffs' motion for partial reconsideration (the "July 28 Order"), ruling that the Argentine Law Bonds *are* subject to the Injunctions because $2.3 billion of them were issued in the context of debt exchanges. This Court thereafter dismissed the Republic's appeal from the

July 28 Order on the ground that it was a "clarification," rather than a "modification," of the Injunctions, and returned the case to the district court for further proceedings. *See Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 14-2689(L), slip op. at 2 (2d Cir. Sept. 19, 2014), ECF No. 170.

Once back in the district court, Citibank N.A. ("Citibank"), whose Argentine branch was a custodian for the Argentine Law Bonds, was joined by the Republic in moving to modify the Injunctions to exclude payment on those bonds. Citibank and the Republic argued, *inter alia*, that the Argentine Law Bonds cannot be covered by the Injunctions because they are not "External Indebtedness" – the defined term for debt that is subject to the *pari passu* clause that the Injunctions purport to enforce. Although discovery and supplemental briefing demonstrated the merits of this position, the district court denied the motion.

First, the district court erroneously held that it was "irrelevant" whether or not the $2.3 billion of Argentine Law Bonds issued in exchange for defaulted debt even qualified as External Indebtedness – thus divorcing the Injunctions from the contract provision to which they are necessarily wed.

Second, the district court further held, incorrectly, that the majority of that same $2.3 billion subset of the Argentine Law Bonds in any event *are* External Indebtedness – in spite of evidence to the contrary – and are therefore subject to the *pari passu* clause.

Finally, the district court ignored entirely the remaining $6.1 billion of Argentine Law Bonds that were not issued in any exchange, thus utilizing the Injunctions – in a situation not previously presented – to bar payment on those bonds despite the fact that they are plainly neither Exchange Bonds nor External Indebtedness.

The Court should reverse these errors, vacate the March 12 Order, and hold that the Injunctions do not apply to payments on the Argentine Law Bonds.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the underlying actions against the Republic under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1605(a)(1) (SPA-31, SPA-32), because the Republic is a foreign state. The Republic filed timely notices of appeal of the March 12 Order on April 6, 2015. *See, e.g.*, Notice of Appeal, *Aurelius Opportunities Fund II, LLC v. Republic of Argentina*, No. 10 Civ. 1602 (S.D.N.Y. Apr. 6, 2015) (A-10036).

As this Court held in denying plaintiffs' motion to dismiss, jurisdiction exists over these appeals under 28 U.S.C. § 1292, because the March 12 Order "denied a motion that, on its face, sought to modify an injunction." Order at 1, *Aurelius Opportunities Fund II, LLC, et al. v. Republic of Argentina*, No. 15-1060(L) (2d Cir. June 2, 2015), ECF No. 95 (citing *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 141-42 (2d Cir. 2005)).

ISSUES PRESENTED FOR REVIEW

1. In determining whether the $2.3 billion of Argentine Law Bonds issued in exchange for defaulted debt is subject to the Injunctions, did the district court err in holding that it was "irrelevant" whether those bonds constitute External Indebtedness, even though the *pari passu* clause that the Injunctions purport to enforce applies only to External Indebtedness?

2. Did the district court err when it held in the alternative that the Injunctions apply to payments on that $2.3 billion of Argentine Law Bonds because the majority of them constitute External Indebtedness in any event?

3. Did the district court err when, in refusing to modify the Injunctions, it enjoined without analysis payment on the remaining $6.1 billion of Argentine Law Bonds issued outside the context of any exchange, which are not subject to *either* the contract provision the Injunctions purport to enforce *or* the terms of the Injunctions themselves?

STATEMENT OF THE CASE

A. The Injunctions Purport To Enforce The *Pari Passu* Clause

In November 2012, the district court entered Injunctions to specifically enforce the *pari passu* clause in the Republic's debt documentation as applied to External Indebtedness. *See* Injunctions ¶¶ 1-2 (SPA-24-39). Section 1(c)

of the FAA contains the *pari passu* clause that serves as the basis for the Injunctions. That provision states:

> The Securities [issued under the FAA] will constitute (except as provided in Section 11 below) direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* and without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated *External Indebtedness* (as defined in this Agreement).

See FAA at 2 (A-473) (emphasis added).

In plaintiffs' own words, they obtained the Injunctions in order to enforce their purported rights under the "equal treatment provision" of the *pari passu* clause. NML Summ. J. Br. at 1, 9, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Oct. 20, 2010), ECF No. 230. The Injunctions bar the holders of Exchange Bonds from collecting the scheduled interest payments on the Exchange Bonds payable to Indenture Trustee Bank of New York Mellon ("BNYM"), unless the Republic makes a "Ratable Payment" of full principal and interest to plaintiffs on their defaulted debt. Those Exchange Bonds were issued in its 2005 and 2010 voluntary exchanges for defaulted debt governed by the Republic's 1994 Fiscal Agency Agreement ("FAA"). Injunctions ¶ 2 (SPA-26-29).

The proceedings that led to the Injunctions never addressed the $8.4 billion of Argentine Law Bonds, $6.1 billion of which had nothing to do with any exchange, and none of which is covered by the *pari passu* clause. Those prior proceedings addressed *only* Exchange Bonds governed by New York and English law on which payment of principal and interest is made to BNYM. *See*, *e.g.*, NML Summ. J. Br. at 18 n.12, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Oct. 20, 2010), ECF No. 230 (specifically targeting payments on 2005 and 2010 bonds to BNYM); NML Renewed Specific Performance Br. at 7, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Jan. 6, 2012), ECF No. 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 (same; 2010 Exchange Bonds); Pls. Remand Br. at 10-11, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Nov. 13, 2012), ECF No. 390 ("Argentina transfers funds to [BNYM]" when paying on the Exchange Bonds subject to the Injunctions).

Accordingly, neither the district court in the decisions leading up to the Injunctions, nor this Court in its two opinions discussing them, addressed any issues dealing with the Argentine Law Bonds – which are Domestic Foreign Currency Indebtedness ("DFCI") under the FAA – and which are governed by Argentine law and paid exclusively in Argentina. *See* Injunctions ¶ 2 (SPA-26-29)

(naming as participants in the New York-law governed Exchange Bonds' "payment process" "The Bank of New York Mellon," "The Bank of New York Depository," "The Bank of New York (Luxembourg S.A.)," and the "Bank of New York Mellon (London)").

B. The *Pari Passu* Clause Excludes DFCI From Its Scope

As made clear by the plain terms of the FAA's *pari passu* clause, Republic debt must constitute "External Indebtedness" under the FAA in order to be subject to the *pari passu* clause and the Injunctions enforcing it. *See* FAA at 2 (A-473); Opinion at 6, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Nov. 21, 2012), ECF No. 424 ("Nov. 21 Opinion") (explaining that *pari passu* injunctions "must bear some reasonable relationship to the *Pari Passu* Clause in order to be a reasonable remedy").

The FAA defines "External Indebtedness" to mean Republic obligations denominated "in a currency other than the lawful currency of the Republic," *e.g.*, U.S. Dollars, "provided that no Domestic Foreign Currency Indebtedness . . . shall constitute External Indebtedness." FAA at 16 (A-487). The fact that an obligation of the Republic is denominated in U.S. dollars – like the fact that non-Argentine persons may have an indirect beneficial interest in that obligation – is accordingly not enough to bring the obligation within the scope of

the *pari passu* clause. In order to be covered by the *pari passu* clause, the obligation must also *not* constitute DFCI.

Under the FAA, DFCI is defined to include, *inter alia*, four categories of debt:

> (1) seven listed types of Republic debt offered and issued in Argentina;[1]
>
> (2) any indebtedness issued in exchange for such listed debt;
>
> (3) any debt payable in a foreign currency "which is . . . offered exclusively within the Republic of Argentina," and
>
> (4) any debt payable in a foreign currency "which is . . . issued in payment, exchange, substitution, discharge or replacement of indebtedness payable in the lawful currency of the Republic."

Id. at 17 (A-488). The FAA thus recognizes a variety of circumstances in which Republic debt denominated in dollars is DFCI (and therefore *not* External Indebtedness).

[1] Those include (a) Bonos del Tesoro issued under Decree No. 1527/91 and Decree No. 1730/91, (b) Bonos de Consolidación issued under Law No. 23,982 and Decree No. 2140/91, (c) Bonos de Consolidación de Deudas Previsionales issued under Law No. 23,982 and Decree No. 2140/91, (d) Bonos de la Tesorería a 10 Años de Plazo issued under Decree No. 211/92 and Decree No. 526/92, (e) Bonos de la Tesorería a 5 Años de Plazo issued under Decree No. 211/92 and Decree No. 526/92, (f) Ferrobonos issued under Decree No. 52/92 and Decree No. 526/92, and (g) Bonos de Consolidación de Regalías Hidrocarburíferas a 16 Años de Plazo issued under Decree No. 2284/92 and Decree No. 54/93. *See* FAA at 17 (A-488).

C. The Republic's Argentine Law Bonds Are DFCI

The Argentine Law Bonds at issue in these appeals, which were issued from 2005 to 2014, are comprised of four series of bonds with the International Securities Identification Numbers ("ISIN") ARARGE03E113 (the "113 Bonds"), ARARGE03E097 (the "097 Bonds"), ARARGE03G688 (the "688 Bonds"), and ARARGE03G704 (the "704 Bonds"). These bond series have an outstanding aggregate principal amount of approximately $8.4 billion, *see* Chart Listing Outstanding Amounts of Each ISIN (A-1019). The Global Certificates that represent each of these series of Argentine Law Bonds are, and always have been, deposited with, registered in the name of, and cleared and paid through Central de Registración y Liquidación de Instrumentos de Endeudamiento Público ("CRYL"), an Argentine securities depositary located in Buenos Aires, Argentina. *E.g.*, Prospectus Supplement 2005 ("2005 ProSupp") at S-19 (A-2555); Prospectus Supplement 2010 ("2010 ProSupp") at S-5 (A-2989).

1. $2.3 Billion Of The Argentine Law Bonds Were Issued In Exchange For Defaulted Debt That Was Payable In Argentine Pesos

In refusing to modify the Injunctions to exclude $2.3 billion of Argentine Law Bonds issued in the Republic's 2005 and 2010 debt exchanges, the district court misunderstood the governing FAA's definition of DFCI.

The indebtedness that the Republic defaulted on in 2001 included 57 series of obligations governed by Argentine law that the Republic had offered locally in Argentina.[2] The characteristics of these 57 series of bonds are fundamentally different from the External Indebtedness that the Republic issued pursuant to the 1994 FAA prior to its 2001 default. For example, the defaulted indebtedness that was eligible to be exchanged for performing Argentine Law Bonds, like the Argentine Law Bonds themselves, and unlike the Republic's External Indebtedness, does not provide for the submission to the jurisdiction of foreign courts, including U.S. courts, and does not contain *pari passu* clauses, negative pledge covenants, events of default, acceleration provisions, provisions for amendments or otherwise for bondholder meetings, or provisions for tax gross-ups. FAA at 3, 15-16, 29-30 (A-474, 486-87, 500-01).

Another important distinction between DFCI and the Republic's External Indebtedness is that, as Argentine-law governed debt, like all debt

[2] These 57 series of defaulted Argentine-law governed bonds, as originally issued, were "offered exclusively in Argentina" under the FAA's definition of DFCI because they were either directly placed through local financial institutions, *see, e.g.*, Joint Resolution 241/2001 and 82/2001, dated Aug. 22, 2001 (A-1805), publicly placed in Argentina through authorized participants and intermediaries (whether by public auction or otherwise), *see, e.g.*, Resolution 483/1998, dated Oct. 23, 1998 (A-2002), issued in local exchange offers for outstanding eligible securities, *see, e.g.*, Resolution 143/2001, dated May 24, 2001 (A-1863), or issued to pay or cancel local liabilities, such as pension fund liabilities, liabilities to Argentine provinces, or to guarantee obligations with local financial institutions, *see, e.g.*, Decree 2284/1992, dated Dec. 9, 1992 (A-2270).

governed by Argentine law, it was and is subject to the Republic's legislative and judicial processes. Long before the Republic's debt exchanges, the Argentine economy suffered massive capital flight, including of U.S. dollars, as a result of the Republic's 2001 economic collapse. To arrest the worst effects of the collapse, including the potential for widespread insolvency of Argentine individuals, corporations, and financial institutions, the Republic ended the then-existing dollar-to-peso parity and permitted devaluation of the Argentine peso. *See, e.g.*, Ross P. Buckley, *Why are Developing Nations So Slow to Play the Default Card in Renegotiating their Sovereign Indebtedness?*, 6 Chi. J. Int'l L. 345, 351 (2005) ("The principal cause" of the Argentine recession "was the one-to-one peg of the peso to the U.S. Dollar that, in time, had led to the peso becoming severely overvalued and to Argentina's exports becoming increasingly uncompetitive."); Paul Krugman, *Crying with Argentina*, N.Y. Times, Jan. 1, 2002 ("The best hope for an Argentine turnaround was an orderly devaluation, in which the government reduced the dollar value of the peso and at the same time converted many dollar debts into pesos.").

As a measure implemented to deal with the financial crisis, in 2002 the Republic exercised its right under Argentine law to make payable in pesos obligations governed by Argentine law that were previously payable in dollars, including the 57 securities that were eventually eligible for exchange for Argentine

Law Bonds in 2005 and 2010. *See, e.g.*, Argentine Presidential Decree No. 471/2002, dated Mar. 8, 2002 (A-8535); Resolution 50/2002, dated May 30, 2002 (A-8571); Resolution 55/2002, dated Apr. 15, 2002 (A-1768); *see also* Republic of Argentina, Annual Report (Form 18-K) at 133 (Oct. 27, 2009) (A-1508). This currency conversion – often referred to as "pesification" – applied to both Argentine and non-Argentine citizens and institutions and was held constitutional by the Argentine Supreme Court in April 2005.[3] In so holding, the Argentine Supreme Court emphasized the financial crisis in response to which the decrees and resolutions were enacted, as well as their nondiscriminatory application to all holders of Argentine law debt. *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 5, 2005, "Galli, Hugo Gabriel y otro c. Poder Ejecutivo Nacional s/ amparo" (Arg.) (A-1562).

As a result of pesification, any indebtedness issued in exchange for these 57 series of defaulted Argentine-law governed bonds, including the $2.3 billion of Argentine Law Bonds issued in the 2005 and 2010 exchanges, constitute DFCI because – as set forth in subparagraph (iii)(b) of the FAA's definition of

[3] That the terms of the Argentine Law Bonds may be affected by – indeed changed by – Argentine legislation and rulings by the Argentine judicial branch highlights the fundamental distinction between the Argentine Law Bonds and bonds, like the defaulted FAA bonds and the New York-law governed and English-law governed Exchange Bonds, *i.e.* laws of jurisdictions outside of the Republic.

DFCI – they were exchanged for indebtedness payable in pesos. FAA at 17 (A-488).

Twenty-one (21) of the 57 series of defaulted Argentine-law governed bonds also constitute DFCI because they are expressly identified as DFCI in subparagraph (i)(a)-(g) of the FAA's definition of DFCI. *Id.*; *see* Chart Listing DFCI Bonds under Subparagraph (i) (A-1016).[4] All 57 series were eligible for exchange in 2005 and 2010, and a considerable amount were exchanged for the Argentine Law Bonds at issue here.

2. The Remaining $6.1 Billion Of Argentine Law Bonds Were "Offered Exclusively" In Argentina

During the period from 2007-2014, the Republic, like other sovereigns, offered debt in its local markets subject to domestic law. Beginning in 2007, the Republic locally offered the 113 Bonds – one of the four series of bonds

[4] The Chart Listing DFCI Bonds under Subparagraph (i) included at A-1016-17 details the Laws, Decrees and Resolutions that authorize the issuances of these 21 series. They are: Argentine Presidential Decree 2284/1992, dated Dec. 2, 1992 (A-2270); Argentine Presidential Decree 54/1993, dated Jan. 21, 1993 (A-2264); Law 23,982, dated Aug 22, 1991 (A-2320); Argentine Presidential Decree 2140/1991, dated Oct. 10, 1991 (A-2298); Argentine Presidential Decree 684/1993, dated Apr. 13, 1993 (A-2258); Resolution 261/1992, dated Feb. 1992 (A-2282); Argentine Presidential Decree 52/1992, dated Jan. 6, 1992 (A-2292); Argentine Presidential Decree 526/1992, dated Mar. 27, 1992 (A-2276); Argentine Presidential Decree 726/1997, dated Aug. 7, 1997 (A-2016); Resolution 389/1997, dated Sept. 9, 1997 (A-2010); Argentine Presidential Decree 1318/1998, dated Nov. 13, 1998 (A-1994); Law 25,401, dated Dec. 29, 2000 (A-7758); Resolution 111/2001, dated May 14, 2001 (A-7765).

at issue in this appeal – in several "reopenings" of that series pursuant to local issuance resolutions ("Local Issuance Resolutions").[5] A reopening is the issuance of additional amounts of a previously-issued security and is a common market practice that benefits beneficial owners because the newly-issued securities are fungible with the original securities, which makes the issue size larger and thus the securities of that series more liquid. *See, e.g.*, *Reopening Previous Issues of Debt Securities*, Practical Law Company, http://us.practicallaw.com/8-503-1219 ("Issuers and underwriters may conduct reopenings to increase the size of the particular series of security to improve its liquidity in secondary market trading."); *Treasury Reopenings*, TreasuryDirect, www.treasurydirect.gov.instit/auctfund/work/reopenings/reopenings.htm.

Under the procedures set forth by the Treasury and Finance Secretaries in the Annex to Joint Resolution 205/2007 and 34/2007 (the "Authorizing Resolution"), the Republic issued $4.33 billion in additional 113 Bonds in these reopenings through either one of two mechanisms: a local public

[5] *See* Argentine Presidential Decree No. 1735/2004, dated Dec. 9, 2004 (original issuance) (A-1700); Joint Resolution 205/2007 and 34/2007, dated June 5, 2007 (A-1540); Joint Resolution 449/2007 and 94/2007, dated Nov. 26, 2007 (A-1535); Joint Resolution 62/2010 and 21/2010, dated Mar. 15, 2010 (A-1421); Joint Resolution 77/2010 and 29/2010, dated Mar. 31, 2010 (A-1416); Joint Resolution 198/2010 and 57/2010, dated July 26, 2010 (A-1396); Joint Resolution 175/2011 and 45/2011, dated May 30, 2011 (A-8639); Joint Resolution 242/2011 and 68/2011, dated July 18, 2011 (A-8644); and Joint Resolution 364/2011 and 98/2011, dated Sept. 28, 2011 (A-8649).

auction or a direct placement. *See* Authorizing Resolution, dated June 5, 2007 (A-1540). The Republic also reopened the 113 Bonds when, in 2014, it issued such bonds to Spanish oil company Repsol, S.A. ("Repsol") in an outstanding principal amount of $1.75 billion as partial consideration for the resolution of various claims asserted by Repsol against the Republic. *See* Resolution 26/2014, dated Apr. 30, 2014 (A-1118). All of these transactions occurred exclusively in Argentina.

Pursuant to the Authorizing Resolution, public auctions begin with a proposal for an issuance submitted by Argentina's National Office of Public Credit ("ONCP"). Authorizing Resolution, Annex ¶ 1.1 (A-1542). Upon receiving approval for the proposal, the ONCP publishes on the Ministry of Economy's website, at least one day before the auction, a press release in Spanish inviting potential purchasers to submit bids. *Id.* at Annex ¶ 1.2-3. Bidders may participate only through the Mercado Abierto Electrónico ("MAE"), an electronic securities and currency trading market located in Argentina, and are required to be registered members of one of two Argentine securities markets – Bolsa or MAE – and to have CRYL accounts at Banco Central de la República Argentina ("BCRA"). *Id.* at Annex ¶¶ 1.4, 1.6 (A-1543). Other investors can participate *only* by using a registered member as their agent. *Id.* at Annex ¶ 1.6.c. After the auction, ONCP communicates the results through MAE, and an office within ONCP drafts a corresponding Global Certificate representing the new securities and delivers the

Global Certificate to CRYL, which CRYL then holds throughout the life of the bonds. *Id.* at Annex ¶¶ 1.11, 1.13.1 (A-1544). Later the same day, BCRA credits the purchase amounts to the National Treasury and credits the beneficial interests in the bonds to the Registered Accounts of Authorized Intermediaries. *Id.* at Annex ¶ 1.13.2.

Direct placement issuances, like auction issuances, also take place solely in Argentina. *Id.* at Annex ¶ 2 (A-1544-45). In a procedure similar to the auctions, ONCP proposes a placement and, upon receiving approval, debits the BCRA account of the participant financial entity for deposit with the National Treasury and drafts the corresponding Global Certificate to be sent to CRYL. *Id.* As with auctions, CRYL holds the Global Certificate throughout the life of the bonds.

As discussed above, the most recent reopening of the 113 Bonds occurred in May 2014, when the Republic issued those bonds to Repsol in an outstanding principal amount of $1.75 billion pursuant to a settlement agreement. *See* Resolution 26/2014, dated Apr. 30, 2014 (A-1118); Repsol Settlement Agreement, App'x I to Annex IV (A-1295-97). The Repsol bonds were offered pursuant to Argentine resolutions, setting forth direct placement procedures similar to those in the Authorizing Resolution as described above. *See* Resolution 26/2014, dated Apr. 30, 2014 (A-1118). The parties' negotiations took place in

Argentina, and the agreement was signed and closed in Argentina. *See* Repsol Settlement Agreement at 4, 19, 35, 101 (A-1126, 1141, 1157, 1223). Accordingly, the Repsol bonds, like the other $4.33 billion of Argentine Law Bonds issued in local public auctions and private placements, were offered exclusively in Argentina and are thus DFCI under the FAA. *See* FAA at 17 (A-488).

D. Previous Proceedings Involving The Argentine Law Bonds: The June 27 And July 28 Orders

In advance of a scheduled June 30, 2014 interest payment on the Argentine Law Bonds, Citibank renewed a previous motion for clarification of the Injunctions, asking the district court to confirm that the Argentine Law Bonds were not subject to those orders. The Republic joined, arguing that the Argentine Law Bonds are fundamentally different from the Exchange Bonds covered by the Injunctions, had never been the subject of these proceedings, and, with respect to $6.1 billion of the Argentine Law Bonds (approximately 72% of the total debt at issue here), were not issued in any exchange. In the June 27 Order, the district court granted Citibank's motion and held that the Injunctions "do not as a matter of law prohibit payments by Citibank, N.A.'s Argentine branch" on Argentine Law Bonds, *i.e.*, "Peso- and U.S. Dollar-denominated bonds—governed by Argentine law and payable in Argentina—that were issued by the Republic of Argentina in 2005 and 2010." June 27 Order at 2 (SPA-22).

Plaintiffs asked the district court to reconsider the June 27 Order with respect to the U.S. dollar-denominated Argentine Law Bonds, arguing that they should be subject to the Injunctions because they constitute "External Indebtedness" covered by the *pari passu* clause. On July 28, 2014, the district court granted plaintiffs' motion and reversed itself without explanation. July 28 Order at 4 (SPA-20). However, recognizing the lack of any basis to interfere with bonds issued outside the context of any exchange, the July 28 Order instructed the parties to "devise a way to distinguish between the [113 Bonds issued in connection with the Republic's settlement with Repsol] and the exchange bonds before the next interest payment is due" in September. *Id.*

Citibank's and the Republic's appeals from the July 28 Order were dismissed on September 19, 2014 for lack of appellate jurisdiction, based on this Court's conclusion that the July 28 Order was a "clarification," rather than a "modification," of the Injunctions. *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 14-2689(L), slip op. at 2 (2d Cir. Sept. 19, 2014), ECF No. 170. The Court stated that its dismissal of the appeals was not "intended to preclude Citibank from seeking further relief from the district court." *Id.*

E. The March 12 Order At Issue In These Appeals

After the Court's September dismissal, Citibank – joined by the Republic – promptly moved to modify the Injunctions on the grounds that, *inter*

alia, the Argentine Law Bonds could not be subject to the Injunctions as a matter of law because, under the plain language of the FAA, they are DFCI and thus excluded from the scope of the *pari passu* clause that the Injunctions enforce.

At a September 26, 2014 hearing, the district court stated that the Injunctions should apply "only to the [FAA] bonds and the bonds that were issued in exchange for those bonds in 2005, 2010." Sept. 26, 2014 Hr'g Tr. at 48:8-9, 11-13 (A-1083); *accord* Sept. 10, 2014 Hr'g Tr. at 12:10-13 (A-1103) ("[W]hat I was dealing with, [in] the proceedings this summer was bonds issued in Argentina expressly subject to Argentine law, something completely different from what was covered in the injunction."); Sept. 19, 2014 Hr'g Tr. at 7:16-20 (A-460) ("It was my view and still is my view that the Argentine law bonds issued in Argentina, payable in Argentina, [and] subject to Argentine law, are different from the bonds subject to the [Injunctions]. And whether they're payable externally or not, the factors I've talked about make them different."). However, notwithstanding that it is undisputed that the Argentine Law Bonds are not FAA bonds and were not issued in exchange for FAA bonds, the district court deferred ruling on the motion.

Conceding that the existing record provided no basis for the Injunctions to cover the Argentine Law Bonds, plaintiffs emphasized at the hearing that "the record is not complete," and that there was a need to "conduct [] discovery with respect to the difference between these [Argentine Law] bonds and

the other bonds." Sept. 26, 2014 Hr'g Tr. at 22:18-19, 45:8 (A-1057, 1080). The district court accordingly ordered discovery and supplemental briefing "in order to allow the parties and nonparty Citibank the time necessary to present a sufficient record," *id.* at 51:22-24 (A-1086), and over the next several months, the parties exchanged tens of thousands of pages of documents.[6]

After further briefing and another hearing, the district court issued the March 12 Order, in which the court erroneously refused to modify the Injunctions. The court held that the Injunctions cover the $2.3 billion of Argentine Law Bonds issued in exchanges, while ignoring entirely the $6.1 billion of 113 Bonds that were issued in other contexts but are effectively enjoined because they are fungible with the 113 Bonds issued in the exchanges. As to the Argentine Law Bonds issued in exchanges, the district court stated that the operative paragraph of the Injunctions speaks in terms of "Exchange Bonds" and not "External Indebtedness," and incorrectly concluded that those bonds are therefore covered by the Injunctions regardless of "whether or not" they constitute External Indebtedness – *i.e.*,

[6] Citibank was permitted to process the September 30, 2014 and December 31, 2014 interest payments pending resolution of the motion. *See* Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Nov. 10, 2014), ECF No. 714; Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Sept. 26, 2014), ECF No. 683.

regardless of whether they are subject to the *pari passu* clause that the Injunctions purport to enforce. March 12 Order at 11 (SPA-11).

Beyond its remarkable conclusion that it is irrelevant whether the Argentine Law Bonds issued in exchanges constitute DFCI, the district court erroneously held that the majority of the bonds are not in fact DFCI (although the court did acknowledge that up to 17% of the Argentine Law Bonds issued in the Republic's exchanges *are* DFCI). March 12 Order at 9 (SPA-9). The district court further erred as a matter of law by failing to account for the fact that approximately 72% of the Argentine Law Bonds – *i.e.*, approximately $6.1 billion – are *neither* Exchange Bonds nor External Indebtedness.

These appeals followed, and on June 2, 2015 the Court denied plaintiffs' motion to dismiss for lack of appellate jurisdiction, finding that jurisdiction exists under 28 U.S.C. § 1292 because the district court "denied a motion that, on its face, sought to modify an injunction." Order at 1, *Aurelius Opportunities Fund II, LLC, et al. v. Republic of Argentina*, No. 15-1060(L) (2d Cir. June 2, 2015), ECF No. 95 (citation omitted).

SUMMARY OF ARGUMENT

The March 12 Order refused to modify the Injunctions to exclude $8.4 billion of Republic issued Argentine Law Bonds that are either beyond the scope of the *pari passu* clause that the Injunctions purport to enforce, beyond the terms of

the Injunctions themselves, or both. No basis in law or equity exists for such a result.

First, the district court erred in holding that the Injunctions bar payment on the $2.3 billion of Argentine Law Bonds issued in exchange for defaulted debt *regardless* of whether they constitute External Indebtedness or DFCI. The *pari passu* provision applies *only* to External Indebtedness, as that term is defined in the FAA, which expressly *excludes* DFCI. The district court in effect thus ruled that specific performance orders need not have any basis in the underlying contract at issue. That conclusion was plain error.

Second, the district court erred in holding in the alternative that the majority of those same bonds constitute External Indebtedness under the FAA. The record is clear that those Argentine Law Bonds are in fact DFCI under at least two separate prongs of the 1994 FAA's definition of that term:

(1) The bonds were issued in exchange for pesified indebtedness, *i.e.*, debt payable in pesos, the lawful currency of the Republic. *See* FAA at 17, subparagraph (iii)(b) (A-488) (DFCI includes indebtedness "issued in payment, exchange, substitution, discharge or replacement of indebtedness payable in the lawful currency of the Republic").

(2) Certain of the bonds were "issued in exchange, or as replacement, for the indebtedness referred to in [subparagraph] (i)." *Id.*, subparagraph (ii) (A-

488). The district court acknowledged as much in noting that up to 17% of the $2.3 billion of Argentine Law Bonds issued in exchanges "were issued as replacements for one of the seven bonds specified in the definition of DFCI." March 12 Order at 9 (SPA-9).

Third, the district court erred in failing to conduct any analysis whatever of the remaining $6.1 billion of Argentine Law Bonds – all of which are 113 Bonds – that were not issued in connection with any exchange and that were clearly offered exclusively in Argentina and thus are DFCI under the FAA. *See* FAA at 17, subparagraph (iii)(a) (A-488). There is simply no basis to interfere with payment on these bonds under either the language of the Injunctions or the FAA's terms.

The Court should vacate the March 12 Order and hold that the Injunctions do not apply to the Argentine Law Bonds.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT ARGENTINE LAW BONDS ISSUED IN EXCHANGE FOR DEFAULTED DEBT COULD REMAIN SUBJECT TO THE INJUNCTIONS

A. The District Court Erred In Holding That The Bonds Can Be Enjoined Whether Or Not They Are External Indebtedness

The Injunctions compel the Republic to specifically perform under the *pari passu* clause of the FAA. *See* Injunctions ¶ 2 (SPA-26-29) ("The Republic accordingly is permanently ORDERED to specifically perform its obligations to

NML under [the *pari passu* clause]"); *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012) (quoting FAA ¶ 1(c)) (the relevant portion of the *pari passu* clause provides that the Republic's "payment obligations . . . shall at all times rank at least equally with all its other present and future unsecured and unsubordinated *External Indebtedness*.") (emphasis added). In order to be subject to the *pari passu* clause – and the district court's Injunctions that enforce it – Republic debt must therefore constitute External Indebtedness. Otherwise, there is no contractual basis for subjecting such debt to the Injunctions, no finding that payment on that debt causes plaintiffs "irreparable harm" for which they have no "adequate remedy at law," and no determination that the "balance of the equities" supports the entry of equitable relief with respect to that debt. *Id.* at 255.

In refusing to modify the Injunctions such that they now apply to the Argentine Law Bonds "whether or not the exchange bonds are external indebtedness," March 12 Order at 11 (SPA-11), the district court erred in finding that the order of specific performance extends beyond the language of the relevant contract provision. *See* Restatement (Second) of Contracts § 357, 1 cmt. a (1981) ("An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced.").

To the contrary, for the district court to fashion a remedy for breach of the *pari passu* clause, it must first have found that a breach of that clause indeed took place. *See NML Capital, Ltd.*, 699 F.3d at 261 ("Once the district court *determined that Argentina had breached the FAA* and that injunctive relief was warranted, the court had considerable latitude in fashioning the relief.") (emphasis added). Here, in refusing to modify the Injunctions and finding that they apply regardless of whether the Argentine Law Bonds are External Indebtedness, the district court essentially held that it did not matter whether the FAA was breached and found that it was entitled to enjoin completely lawful activities of the Republic. That erroneous ruling should be reversed. *See, e.g., City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011) (vacating injunctions as overbroad where, in addition to restraining illegal conduct, they sought "to restrain the defendants from engaging in legal conduct"); *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994) (finding that "the scope of the district court's injunction is too broad" where it "impose[s] unnecessary burdens on lawful activity"); *Jordan v. Metro. Life Ins. Co.*, 280 F. Supp. 2d 104, 112 (S.D.N.Y. 2003) (denying injunctive relief where "[i]t is impossible for the Court to tailor an injunction that would prevent [the purported harm] while preserving" the defendant's ability to engage in lawful actions).

Until the March 12 Order, the district court recognized that the Injunctions can only reach External Indebtedness as defined in the FAA. *See, e.g.*, Sept. 26 Hr'g Tr. at 21:6-11 (A-1056) ("Now, the issue then is quite precise, and that is, do these bonds that we are talking about, the bonds issued in Argentina . . . . Are they external indebtedness calling into play the *pari passu* clause or are they not such external indebtedness."). And plaintiffs likewise conceded that peso-denominated bonds governed by Argentine law (even those issued in connection with the 2005 and 2010 exchanges) cannot be covered by the Injunctions because they do not meet the definition of External Indebtedness in the FAA. *See* July 28 Order (SPA-19-20); NML Br. at 1-2, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. July 14, 2014), ECF No. 126 (conceding that peso-denominated bonds are not External Indebtedness and therefore not within the scope of the Injunctions). For the district court to conclude that whether the Argentine Law Bonds are External Indebtedness is irrelevant, *see* March 12 Order at 9 (SPA-9), was thus manifestly erroneous: both sides identified the correct legal standard and the district court disregarded it.

B. The District Court Erred In Holding In The Alternative That Certain Of The Bonds Are Subject To The *Pari Passu* Clause Because They Are External Indebtedness

The district court further erred in refusing to vacate the July 28 Order or modify the Injunctions based on its alternative holding that the "vast majority

[of the $2.3 billion in Argentine Law Bonds issued in exchange for defaulted debt] would not qualify as DFCI" in any event. March 12 Order at 9 (SPA-9). This ruling was error. Because the Argentine Law Bonds issued in exchange for defaulted debt *are* DFCI, they therefore are not External Indebtedness subject to the *pari passu* clause, and cannot be subject to the Injunctions.

1. *Indebtedness issued in exchange for indebtedness payable in pesos.* Pursuant to subparagraph (iii)(b) of the definition of DFCI, all indebtedness "issued in payment, exchange, substitution, discharge, or replacement of indebtedness payable in the lawful currency of the Republic" constitutes DFCI. FAA at 17 (A-488). The Argentine Law Bonds issued in exchange for defaulted debt meet this definition because each of the non-performing securities that could be tendered in exchange for Argentine Law Bonds was payable in pesos pursuant to Presidential Decree No. 471/2002 (A-1795), and Resolutions 50/2002 and 55/2002. (A-1728, A-1768). Under these "pesification" decrees, all debt governed by Argentine law, including that eligible to participate in the Republic's exchanges, was payable in pesos as of 2002. Presidential Decree No. 471/2002, dated Mar. 8, 2002 (A-1795); Resolution 50/2002, dated May 30, 2002 (A-1728); Resolution 55/2002, dated Apr. 15, 2002 (A-1768).

Accordingly, the Argentine Law Bonds issued in exchange for such pesified bonds were issued in exchange for bonds "payable in the lawful currency

of the Republic of Argentina" and consequently fall under subparagraph (iii) of the definition of DFCI. FAA at 17, subparagraph (iii)(b) (A-488). This contractual language is plain, and its applicability to the present case cannot be denied. *See LaSalle Bank Nat. Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) ("In interpreting a contract under New York law, words and phrases . . . should be given their plain meaning.") (internal citation omitted).

The district court erroneously found otherwise, ruling that the Argentine Law Bonds "do not qualify as DFCI because they replaced bonds that were treated as payable in a foreign currency" rather than bonds that were payable in pesos. March 12 Order at 11 (SPA-11). The district court based this determination on the following sentence from the 2005 Prospectus Supplement: "Solely for purposes of the [exchange] Offer, Argentina will treat Eligible Securities originally denominated in a currency other than pesos and governed by Argentine law as if they were denominated in the currency in which they were originally issued." 2005 ProSupp at S-9, S-40 (A-2544, A-2577). This was error.

First, this sentence did not alter the language of the FAA and does not change the fact that the non-performing securities that could be tendered in exchange for Argentine Law Bonds were as a matter of law *payable* in pesos, and therefore that the Argentine Law Bonds issued in exchange for such pesified obligations are DFCI. *See* FAA at 17 (A-488).

Second, the sentence in the Prospectus Supplement relied on by the district court plainly states that the eligible securities would be treated as if they were denominated in their original currency "*[s]olely* for the purposes of the *[exchange] Offer*," and says nothing about those eligible securities getting such treatment for purposes of the FAA, which is the contract upon which both the Injunctions and the definition of External Indebtedness are based. The FAA plainly states that all indebtedness "issued in payment, exchange, substitution, discharge or replacement of indebtedness payable in the lawful currency of the Republic" constitutes DFCI. FAA at 17 (A-488). That the eligible securities were to be treated differently "[s]olely for the purposes of the [exchange] Offer" does nothing to change that fact. The purpose of this sentence in the Prospectus Supplement was to specify that pesified debt could be exchanged for Exchange Bonds denominated in U.S. dollars, since otherwise peso-denominated debt could only be exchanged for peso-denominated Exchange Bonds. Nothing about the exchange offer changed the terms of the FAA, including the FAA's clear and controlling definition of DFCI.

Third, the Prospectus Supplement sentence relied on by the district court states that "Eligible Securities originally denominated in a currency other than pesos and governed by Argentine law [will be treated] as if they were *denominated* in the currency in which they were originally issued." 2005 ProSupp

at S-9, S-40 (A-2544, A-2577) (emphasis added). Of course, treating the defaulted instruments as denominated in dollars for the purpose of making them eligible for the exchanges did nothing to change that these eligible securities were and remained "*payable*" in Argentine pesos, which is the operative term under the FAA and the definition of DFCI. FAA at 17 (A-488) (emphasis added). *See also EM Ltd. v. Republic of Argentina*, 382 F.3d 291, 293 (2d Cir. 2004) (finding that the currency in which the bonds were "denominated" did not foreclose "payment" in another currency). The district court's determination that the fact the Argentine Law Bonds were payable in pesos should be disregarded because owners of debt payable in pesos could elect to receive dollar-denominated Argentine Law Bonds in the exchanges – a concession offered to holders of pesified debt by the Republic as an inducement to enter into the exchanges – ignores the plain language of the FAA that defines as DFCI "indebtedness payable . . . in a currency other than the lawful currency of the Republic of Argentina which is . . . (b) issued in payment, exchange, substitution, discharge or replacement of indebtedness *payable* in the lawful currency of the Republic of Argentina . . . ." FAA at 17 (A-488) (emphasis added).

2. *Indebtedness issued in exchange for debt identified in the definition of DFCI.* Subparagraph (i)(a)-(g) of the definition of DFCI expressly lists seven categories of bonds as constituting DFCI. Subparagraph (ii) of the

definition of DFCI includes "any indebtedness issued in exchange, or as replacement, for the indebtedness referred to in [subparagraph] (i)." FAA at 17 (A-488). In the March 12 Order, the district court acknowledged that the parties agree that a portion comprising "(3%-17%) of the exchange bonds governed by Argentine law were issued as replacements for one of the seven bonds specified in the definition of DFCI," March 12 Order at 9 (SPA-9),[7] but the district court nonetheless erroneously refused to modify the Injunctions to exclude such DFCI.

II. THE DISTRICT COURT WRONGFULLY ENJOINED, WITHOUT ANALYSIS, PAYMENT ON $6.1 BILLION OF ARGENTINE LAW BONDS THAT ARE NEITHER EXCHANGE BONDS NOR EXTERNAL INDEBTEDNESS

The district court also erred because the effect of the March 12 Order – which the court claimed only dealt with "exchange bonds" that were "dollar-denominated" – was to enjoin payment on Argentine Law Bonds that are neither Exchange Bonds nor External Indebtedness and therefore cannot be subject to the Injunctions by their plain terms or for any legally cognizable reason. March 12

[7] Of the 57 eligible securities that could be tendered in exchange for Argentine Law Bonds, 21 of those securities qualify as (a)-(g), *see* Chart Listing DFCI Bonds under Subparagraph (i) (A-1016), which amounts to approximately 17% of the eligible securities tendered, see Chart Listing Eligible Amounts Tendered (A-7596). All Argentine Law Bonds issued in exchange for those 21 securities fall under DFCI subparagraph (ii). Plaintiffs conceded below that at least 3% of the bonds tendered for the Argentine Law Bonds fall under DFCI subparagraph (i), *see* NML Supp. Mem. of Law at 26, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 17, 2015), ECF No. 745.

Order at 3 (SPA-3). The district court made the explicit statement that it was dealing only with those Argentine Law Bonds issued in exchanges and did absolutely no analysis regarding the other $6.1 billion (*i.e.*, 72%) of Argentine Law Bonds at issue in this litigation. *Id.* In fact, the district court did not even mention this 72% of Argentine Law Bonds at all. This 72% of Argentine Law Bonds are not Exchange Bonds nor External Indebtedness, and there is accordingly no basis to enjoin payment on them.

A. $6.1 Billion Of The Argentine Law Bonds Are DFCI Because They Were Offered Exclusively In Argentina

The district court erred because this $6.1 billion (72%) of Argentine Law Bonds, issued through local reopenings either by public auction or direct placement, cannot be subject to the *pari passu* clause because all of these bonds constitute indebtedness offered exclusively in Argentina, and are therefore DFCI. *See* FAA at 17, subparagraph (iii)(a) (A-488); *supra* 14-17.

Contracts governed by New York law, like the FAA, are to be construed in accordance with their plain meaning. *See LaSalle Bank*, 424 F.3d at 206 (contract interpretation under New York law requires giving words and phrases their plain meaning). In plain English, and under black letter contract law, indebtedness is "offered" on the terms under which it can be accepted. *See* Restatement (Second) of Contracts § 60 (1981) ("If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in

order to create a contract."); *see also Offer*, Black's Law Online Dictionary (2015), www.thelawdictionary.org/offer (defining offer as "to present for acceptance or rejection; to make a proposal to; to exhibit something that may be taken or received or not"); *Offer*, Merriam-Webster Online Dictionary (2015), http://www.merriam-webster.com/dictionary/offer (defining offer as "to give someone the opportunity to accept or take (something) . . . to make (something) available: to provide or supply (something)").

A party making an offer can condition acceptance of that offer upon whatever terms it deems fit. *See* Restatement (Second) of Contracts § 60 (1981). And of course "[m]any offers include terms concerning the . . . method by which the offer may be accepted." *Ellefson v. Megadeath, Inc.*, No. 04 Civ. 5395 (NRB), 2005 WL 82022, at *4 (S.D.N.Y. Jan. 13, 2005). Because any acceptance of an offer "requires a manifestation of intention to consent to the terms of the offer," offers can only be accepted on the strict terms under which they are made. 1-3 Corbin on Contracts § 3.28; *see also* 2 Williston on Contracts § 6:56 (4th ed.) (same). As a result, any expression of assent that purports to change those terms is not an "acceptance," but rather is a rejection and a counteroffer. *See Commerce Funding Corp. v. Comprehensive Habilitation Servs.*, 2005 WL 447377, at *11 (S.D.N.Y. Feb. 24, 2005) ("A communication that purports to accept an offer cannot be subject to additional or different terms. Such a communication is no

acceptance at all, but is an absolute rejection of the offer and a proposed counter-offer.").

Because the Republic's offer of this $6.1 billion of Argentine Law Bonds conditioned acceptance of the offer on the requirement that persons (or their agents) be resident in the Republic, the offer was made exclusively in Argentina. Each of the reopenings of the 113 Bonds was offered under terms that could only be accepted by investors located in the Republic (or through their agents located in the Republic). *See supra* 14-17. In the local auctions, a press release was published on the Ministry of Economy's website only in Spanish, and bidders could participate only through MAE, an electronic securities and currency trading market located in Argentina, and were required to be registered members of one of two Argentine securities markets – Bolsa or MAE – and to have CRYL accounts at BCRA. Authorizing Resolution, Annex ¶¶ 1.4, 1.6 (A-1543). Other investors could participate only by using a registered member as their agent. *Id.* at Annex ¶ 1.6.c. Direct placement issuances were generally made in a procedure similar to the auctions, in which ONCP proposed a placement and, upon receiving approval, debited the BCRA account of the participant financial entity for deposit with the National Treasury and drafted the corresponding Global Certificate to be sent to CRYL. *Id.*

With regard to the $4.33 billion of 113 Bonds issued in local public auctions or direct placements, each of those resolutions references the Authorizing Resolution, thereby incorporating the inherently local issuance procedures provided for in the Authorizing Resolution. *See* Local Issuance Resolutions (A-1700, A-1540, A-1535, A-1421, A-1416, A-1396, A-1391, A-1386, A-1368). Critically, each provides that the 113 Global Certificate will be deposited with, registered in the name of, and cleared and paid through CRYL in Argentina. And the Local Issuance Resolutions emphasize that the Authorizing Resolution sets forth "the procedural rules for the placement and settlement of the public debt securities to be undertaken in the *local market*." *See id.* (emphasis added).

In the case of the $1.75 billion in principal outstanding amount of 113 Bonds issued to Repsol, the settlement documentation specifically confirms that the issuance of the 113 Bonds was negotiated entirely *in Argentina*. *See* Repsol Settlement Agreement at 4 (A-1126). The 113 Bonds issued to Repsol were offered in Argentina, *see id.* at 4, 19, 35, 51-53, 101 (A-1126, 1141, 1157, 1173-75, 1223); are situsued and payable in Argentina, *id.* at 31, 52-53 (A-1153, 1174-75); and are governed by Argentine law, *id.* at 53 (A-1175).[8] Notably, this $1.75

[8] All four series of bonds issued to Repsol pursuant to the settlement agreement share these characteristics. *See* Repsol Settlement Agreement at Annex IV, Appendix I (A-1172-77).

billion of Argentine Law Bonds issued to Repsol share all of the same characteristics – widely recognized in the financial markets as distinguishing between external and domestic indebtedness – as the $4.33 billion of Argentine Law Bonds issued under the local issuance procedures mandated by the Authorizing Resolution. *See supra* 10. For all of these reasons, these bonds – like the rest of the Argentine Law Bonds – fall squarely in the FAA's definition of DFCI.[9]

B. $6.1 Billion Of The Argentine Law Bonds Are Not Exchange Bonds Under The Plain Terms Of The Injunctions

The Injunctions conditioned the Republic's service of its Exchange Bonds – and *only* its Exchange Bonds – upon the Republic making a "Ratable Payment" to plaintiffs. *See* Injunctions ¶ 2(a) (SPA-26) (Republic must make

[9] Plaintiffs have no cogent argument as to how this $6.1 billion of Argentine Law Bonds could be anything but DFCI. Plaintiffs have not, because they cannot, contest that this $6.1 billion of Argentine Law Bonds was offered exclusively in Argentina. Rather, plaintiffs argued below that the $2.3 billion of Argentine Law Bonds are External Indebtedness because they were described in a Prospectus Supplement that was distributed internationally, and that any other bonds sharing the same ISIN as that $2.3 billion of bonds, regardless of any other characteristic or how they were issued, are automatically External Indebtedness. Those arguments are incorrect because they rest on the faulty premise that eligibility for an exchange offer determines the treatment of those bonds under the FAA. As discussed *supra*, the $2.3 billion of Argentine Law Bonds issued pursuant to the Republic's exchanges are DFCI because, *inter alia*, they were exchanged for debt payable in pesos, and the fact that they were described in a Prospectus Supplement as being eligible for the debt exchanges is irrelevant to their status as DFCI under the FAA.

"Ratable Payment" to plaintiffs whenever it pays any amount due on its "Exchange Bonds"); *see also* Nov. 21 Opinion at 5 ("[T]he obligation of Argentina under the payment formula in the Injunctions arises when Argentina 'pays any amount due' *to the exchange bondholders*.") (emphasis added). In this context, the term "Exchange Bonds," as it has been used throughout these proceedings, refers to the Exchange Bonds for which BNYM serves as the bondholders' Trustee. *See id.* at 10 (stating that the process for "making payments on the Exchange Bonds" subject to the Orders begins with a transfer of funds to BNYM); Injunctions ¶ 2 (SPA-26-29); *see also NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 239 (2d Cir. 2013) (expressly relying on district court's description of the BNYM payment process in affirming the Injunctions).

The $6.1 billion in principal amount of Argentine Law Bonds that make up 72% of bonds at issue in this litigation were issued completely outside the Republic's 2005 and 2010 exchanges of its non-performing debt. These bonds, which are all 113 Bonds, were issued by the Republic through securities reopenings effected by either public auction or direct placement, and are fungible with 113 Bonds issued pursuant to the exchanges. *See supra* 14-17. The district court thus clearly erred in its March 12 Order when, without even acknowledging this fact, and without making any finding that the bonds were otherwise External Indebtedness, it treated the Injunctions as covering them. The district court's

ruling was all the more anomalous because it actually highlighted that the "Injunction prohibits 'participants in the payment process' from assisting the Republic in making payments on *exchange bonds*," March 12 Order at 8 (SPA-8) (emphasis in original), but then inexplicably went on to issue a decision that effectively enjoins payment on *all* Argentine Law Bonds, the majority of which are *not* Exchange Bonds.

It is black letter law that the district court cannot extend an injunction to reach lawful conduct. *See Forschner Grp. 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"). Here, that lawful conduct is the legal payment on Argentine Law Bonds that were never the subject of the prior litigation (which litigation trained solely on the alleged subordination of plaintiffs' bonds vis-à-vis the Exchange Bonds), and which never remotely involved other Argentine debt – whether DFCI or even other External Indebtedness, which plaintiffs disclaimed any intention of enjoining. *See* Pls. Reconsideration Br. at 2, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. July 10, 2014), ECF No. 583 (conceding that DFCI is not External Indebtedness); NML Br. at 7, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. July 14, 2014), ECF No. 126

(conceding that bonds that are not External Indebtedness are not within the scope of the Injunctions).

Far from addressing this issue head-on – after it was brought to the district court's attention many times – the district court ignored this problem and did not engage in any of the analysis that is necessary to enter injunctive relief against the Republic's payment on those Argentine Law Bonds that are *not* Exchange Bonds, as discussed *supra*, or External Indebtedness. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393-94 (2006) (vacating judgment of Court of Appeals where neither the district court nor the appellate court "fairly applied" the "traditional equitable principles" required when injunctive relief is requested, and remanding to the district court so that it "may apply that framework in the first instance"); *see also La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F. 3d 867, 880 (9th Cir. 2014) (vacating permanent injunction where the "omission of [a] consideration from the district court's analysis" left the court "uncertain where the district court considered all relevant factors in assessing the balance of hardships").

* * *

The March 12 Order prevents innocent third-party holders of Argentine Law Bonds from receiving payments to which they are indisputably entitled. Prohibiting payments to these bondholders is unjustified and inequitable. The Injunctions have already resulted in a situation where receipt of payments by

exchange bondholders, whose legal right to such payments has never been questioned, has been blocked by court order for over a year. *See* Order at 2, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Aug. 6, 2014), ECF No. 633. As a result of the March 12 Order, the Injunctions now bar the collection on payment of Argentine Law Bonds too. This only injures additional non-parties without even an arguable legal basis, and causes more harm with no foreseeable benefit. The March 12 Order unjustifiably imposes financial hardship on an entirely new group of bondholders while not advancing (in fact, further impeding) a resolution of holdout creditor claims.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the March 12 Order.

Dated: New York, New York
August 11, 2015

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i), because it contains 9,450 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 proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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