

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NML CAPITAL, LTD.,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.
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:
: 08-cv-6978 (TPG)
: 09-cv-1707 (TPG)
: 09-cv-1708 (TPG)
: 14-cv-8601 (TPG)
: 14-cv-8988 (TPG)
:
:

AURELIUS CAPITAL MASTER, LTD., AURELIUS
OPPORTUNITIES FUND II, LLC, AURELIUS CAPITAL
PARTNERS, LP, et al.,

Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.
----- X

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:
: 09-cv-8757 (TPG)
: 09-cv-10620 (TPG)
: 10-cv-1602 (TPG)
: 10-cv-3507 (TPG)
: 10-cv-3970 (TPG)
: 10-cv-8339 (TPG)
: 14-cv-8946 (TPG)
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BLUE ANGEL CAPITAL I LLC,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.
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: 10-cv-4101 (TPG)
: 10-cv-4782 (TPG)
: 14-cv-8947 (TPG)
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**RESPONSE OF THE BANK OF NEW YORK MELLON TO MOTION OF THE
REPUBLIC OF ARGENTINA SEEKING TO VACATE INJUNCTIONS**

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OLIFANT FUND, LTD.,	:	
	:	
Plaintiff,	:	10-cv-9587 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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VARELA, et al.,	:	
	:	
Plaintiffs,	:	10-cv-5338 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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FFI FUND, LTD., et al.,	:	
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Plaintiffs,	:	14-cv-8630 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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EM LTD.,	:	
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Plaintiff,	:	14-cv-8303 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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PEREZ, et al.,	:	
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Plaintiffs,	:	14-cv-8242 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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LIGHTWATER CORP. LTD.,	:	
	:	
Plaintiff,	:	14-cv-4092 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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OLD CASTLE HOLDINGS, LTD.,	:	
	:	
Plaintiff,	:	14-cv-4091 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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CAPITAL VENTURES INTERNATIONAL,	:	
	:	
Plaintiff,	:	14-cv-7258 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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TRINITY INVESTMENTS LIMITED,	:	
	:	
Plaintiff,	:	14-cv-10016 (TPG)
	:	15-cv-1588 (TPG)
v.	:	15-cv-2611 (TPG)
	:	15-cv-5886 (TPG)
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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MCHA HOLDINGS, LLC,	:	
	:	
Plaintiff,	:	14-cv-10064 (TPG)
	:	14-cv-7637 (TPG)
v.	:	15-cv-2577 (TPG)
	:	15-cv-5190 (TPG)
THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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SETTIN,	:	
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Plaintiff,	:	14-cv-8739 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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PROCELLA HOLDINGS, L.P.,	:	
	:	
Plaintiff,	:	15-cv-3932 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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ADAMI, et al., :
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 Plaintiffs, : 14-cv-7739 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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CAPITAL MARKETS FINANCIAL SERVICES INC., et :
al., :
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 Plaintiffs, : 15-cv-0710 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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FOGLIA, et al., :
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 Plaintiffs, : 14-cv-8243 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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PONS, et al., :
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 Plaintiffs, : 13-cv-8887 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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GUIBELALDE, et al.,	:	
	:	
Plaintiffs,	:	11-cv-4908 (TPG)
	:	
v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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DORRA, et al.,	:	
	:	
Plaintiffs,	:	14-cv-10141 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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BELOQUI, et al.,	:	
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Plaintiffs,	:	14-cv-5963 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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TORTUS CAPITAL MASTER FUND, LP,	:	
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Plaintiff,	:	14-cv-1109 (TPG)
	:	14-cv-3127 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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ANDRAREX, LTD.,	:	
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Plaintiff,	:	14-cv-9093 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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CLARIDAE LTD., et al.,	:	
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Plaintiffs,	:	14-cv-10201 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
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MONTREUX PARTNERS, L.P.,	:	
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Plaintiff,	:	14-cv-7171 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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LOS ANGELES CAPITAL,	:	
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Plaintiff,	:	14-cv-7169 (TPG)
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v.	:	
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THE REPUBLIC OF ARGENTINA,	:	
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Defendant.	:	
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CORDOBA CAPITAL, :
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 Plaintiff, : 14-cv-7164 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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WILTON CAPITAL, LTD., :
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 Plaintiff, : 14-cv-7166 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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ARAG-A LIMITED, et al., :
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 Plaintiffs, : 14-cv-9855 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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ATTESTOR MASTER VALUE FUND LP, :
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 Plaintiff, : 14-cv-5849 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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ANGULO, et al., :
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 Plaintiffs, : 15-cv-1470 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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LAMBERTINI, et al., :
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 Plaintiffs, : 15-cv-1471 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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HONERO FUND I, LLC, :
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 Plaintiff, : 15-cv-6702 (TPG)
 : 15-cv-1553 (TPG)
 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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BANCA ARNER S.A., et al., :
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 Plaintiffs, : 15-cv-1508 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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WHITE HAWTHORNE, LLC, :
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 Plaintiff, : 15-cv-4767 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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ERCOLANI, et al., :
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 Plaintiffs, : 15-cv-4654 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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FAZZOLARI, et al., :
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 Plaintiffs, : 15-cv-3523 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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STONEHILL INSTITUTIONAL PARTNERS, L.P. et al., :
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 Plaintiffs, : 15-cv-4284 (TPG)
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 v. :
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 THE REPUBLIC OF ARGENTINA, :
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 Defendant. :
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Pursuant to the Court's February 25, 2016 Order (Case 1:08-cv-06967-TPG [Dkt. 889]), intervenor The Bank of New York Mellon, as indenture trustee ("BNY Mellon" or the "Trustee"), submits this Response to the Motion of the Republic of Argentina Seeking to Vacate Injunctions (the "Motion") (Case 1:08-cv-06978-TPG [Dkt. 869]). BNY Mellon respectfully requests that, in further proceedings involving the Injunctions, the Court provide direction and clarification with regard to BNY Mellon's performance of its duties and protection of its rights under the Indenture.

PRELIMINARY STATEMENT

Since the Second Circuit affirmed this Court's Injunctions in June 2014, BNY Mellon has faithfully satisfied its obligations under both the Injunctions and the Indenture. Unfortunately, as a consequence of its compliance, BNY Mellon has been sued by Exchange Holders in multiple foreign jurisdictions and has been targeted by the Republic's efforts to undermine its role as trustee and withhold payment of fees and expenses owed for its administration of the parties' Indenture. Now, however, the possible vacating of the Injunctions provides hope for some relief and a return to normalcy.

BNY Mellon files this response to the Republic's Motion in order to seek clarification and direction from the Court regarding its duties, in the event the Injunctions are lifted. By addressing these issues concurrently with the pending Motion, the Court will ensure that Exchange Bond payments are processed in an orderly fashion and that BNY Mellon's risks of further litigation are minimized. Specifically, BNY Mellon seeks clarification and direction regarding two issues:

First, BNY Mellon seeks clarification that Paragraph 4 of the this Court's August 6, 2014 Order remains in full force and effect, and that BNY Mellon shall incur no liability under the

Indenture or otherwise as a result of its compliance with any future orders of this Court.

Second, BNY Mellon seeks clarification from this Court that the Republic must perform all of its obligations under the Indenture including (i) paying all fees, expenses and other amounts owed or payable to BNY Mellon thereunder, (ii) setting record and payment dates in accordance with the Indenture, and (iii) identifying all Exchange Bond issues and amounts to be paid.

Here, this Court has the authority to set the terms on which the Injunctions will be vacated and under which performance of the Exchange Bonds will proceed. Respectfully, the Court should use its broad powers to ensure that BNY Mellon is treated equitably and fairly in the conclusion of these proceedings.

BACKGROUND

1. BNY Mellon Holds Funds Received From The Republic Subject To The Indenture And For The Exclusive Benefit Of The Trustee And The Exchange Holders

BNY Mellon serves as indenture trustee for certain bonds (the “Exchange Bonds”) issued by the Republic pursuant to the terms of a trust indenture (the “Indenture”). *See* Case 1:08-cv-06978-TPG [Dkt. 579-1], at Ex. B (November 16, 2012 Declaration of Kevin F. Binnie (“Binnie Decl.”)), ¶ 3. BNY Mellon’s rights and duties as indenture trustee for the Exchange Bonds and Argentina’s rights and duties as issuer are defined by the Indenture.¹ *See id.* [Dkt. 579-1], at Ex. A (Indenture); *id.* at Ex. B (Binnie Decl.) ¶ 3. When the Republic sends debt service payments

¹ Unlike a common law trustee, an indenture trustee has no duties beyond those set out in the trust agreement. *See, e.g., Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (It is “well established under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture”) (citations omitted); *Meckel v. Cont’l Res. Co.*, 758 F.2d 811, 815-16 (2d Cir. 1985) (“Unlike the ordinary trustee, who has historic common law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement.”) (citations omitted); *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 156 (2008) (“The trustee under a corporate indenture . . . has his rights and duties defined . . . exclusively by the terms of the agreement.”) (citations omitted).

to BNY Mellon, BNY Mellon holds such funds “in trust” for the “exclusive benefit of the Trustee and the [Exchange] Holders entitled thereto in accordance with their respective interests” *See* Indenture at § 3.5(a); *see also id.* at § 3.1.

The Indenture provides the Trustee with certain rights and protections, including a senior lien that secures payment of the Trustee’s fees and expenses and indemnifies the Trustee for any loss or liability, *id.* at § 5.6; *see also id.* at §§ 4.4, 4.5, and exculpatory provisions that protect BNY Mellon from exposure to liability. The exculpatory provisions provide, among other things, that BNY Mellon cannot be liable for any actions taken in good faith absent gross negligence, *id.* at §§ 5.1(c), 5.2(vi); that BNY Mellon cannot be held liable for any consequential or incidental losses or damages of any kind, *id.* at § 5.1(e); that BNY Mellon is not required to incur personal financial liability in the performance of its duties, *id.* at § 5.1(g); and that BNY Mellon has no duty to act without security or indemnity satisfactory to the Trustee, including potential costs, expenses, and liabilities, *id.* at § 5.1(v). Of particular importance here is section 5.2(xx), which states:

[N]o provision in this Indenture shall require the Trustee to do anything which may (i) be illegal or contrary to applicable law or regulation; or (ii) cause it to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties or in the exercise of any of its rights, powers or discretions, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not assured to it.

Id. at § 5.2(xx).

2. BNY Mellon Holds The Funds In Compliance With This Court’s Injunctions, and the Court Recognizes BNY Mellon Acted Properly In Doing So

The Injunctions compel the Republic to make a “Ratable Payment” to the NML Plaintiffs whenever it “pays any amount due under terms of” the Exchange Bonds. *See, e.g.*, Case 1:08-cv-06978-TPG [Dkt. 425]. The Injunctions bind the Exchange Bond payment process and prohibit all “participants in the payment process of the Exchange Bonds”—including BNY

Mellon—“from aiding and abetting any violations” of the Injunctions, including “any effort” by the Republic “to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment.” *Id.* [Dkt. 425]; *see also id.* [Dkt. 424].

The Injunctions became effective on June 18, 2014. *See* Case 12-105 (2d Cir.) [Dkt. 1056]. On June 26, 2014, Argentina transferred €25,852,475.66 and \$230,922,521.14, for a total aggregate amount of approximately \$539 million (the “Funds”), into BNY Mellon’s accounts at Banco Central de la Republica de Argentina. *See* Case 1:08-cv-06978-TPG [Dkt. 579-1], at Ex. E (June 27, 2014 Tr.), at 11:25-13:12. The Republic did not make a Ratable Payment in connection with this transfer. *Id.* at 3:14-19. In accordance with the Injunctions, BNY Mellon held the Funds in its accounts. *Id.* at 13:15-20, 15:11-15.

At a June 27, 2014 hearing, the Court observed that the Trustee “didn’t do anything wrong” when it “received [Argentina’s payment] and then properly held onto it” and that it was “proper[.]” and “very, very good” for BNY Mellon to have done so. *Id.* at 33:3-7. At a subsequent hearing, the Court noted that BNY Mellon acted “wisely and in accordance with the court orders in existence” in holding the Funds. *See* Case 1:02-cv-04124-TPG [Dkt. 140-2], at Ex. F (August 8, 2014 Tr.), at 7:25-8:2.

On August 6, 2014, in response to the Trustee’s motion for clarification, the Court entered an order (the “August 6, 2014 Order”) confirming that BNY Mellon should hold the Funds in its accounts in trust for itself and the Exchange Holders pending further order of the Court. *See* Case 1:08-cv-06978-TPG [Dkt. 633]. The Court further ordered that BNY Mellon would incur no liability for holding the Funds in its accounts in accordance with the Court’s orders. *Id.*

The Republic has not transferred any additional funds to BNY Mellon since June 26, 2014. In compliance with the Court's orders and the Indenture, BNY Mellon holds the Funds in its accounts in trust for itself and the Exchange Holders.

Despite the protections of the August 6, 2014 Order, BNY Mellon's adherence to the Injunctions has exposed it to litigation. Certain Exchange Bondholders brought actions against BNY Mellon in England, Belgium, and Argentina. *See, e.g.*, Case 14-4221 (2d Cir.) [Dkt. 108], at 24; *id.* [Dkt. 109-2]; Case 14-2922 (2d Cir.) [Dkt. 76-1], at 12. In this Court, certain non-Exchange Bondholders sought to compel BNY Mellon to turn over substantial portions of the Funds. *See, e.g.*, Case 1:02-cv-04124-TPG [Dkt. 130].² BNY Mellon also faced multiple administrative proceedings in Argentina. Although the Republic is obligated to indemnify BNY Mellon fully for all claims, fees, and expenses, it has not paid all amounts owed to BNY Mellon.

3. The Court Issues its Indicative Ruling

On February 19, 2016, this Court issued its Rule 62.1 Indicative Ruling, in which it indicated that, if the Court of Appeals were to remand the above-captioned actions, the Court would vacate the Injunctions subject to fulfillment of certain conditions. *See* Case 1:11-cv-04908-TPG [Dkt. 47], at 35. In doing so, the Court gave "special consideration" to the rights of "third parties affected by the injunctions," including "the financial intermediaries that the Republic engages to help it pay the exchange bondholders." *Id.* at 18.

² Similar "turnover" motions were filed in Case 1:02-cv-04124-TPG; Case 1:02-cv-01773-TPG; Case 1:03-cv-04693-TPG; Case 1:03-cv-08120-TPG; Case 1:04-cv-03314-TPG; Case 1:04-cv-06137-TPG; Case 1:04-cv-06594-TPG; Case 1:04-cv-07504-TPG; Case 1:05-cv-00177-TPG; Case 1:05-cv-02943-TPG; Case 1:05-cv-03089-TPG; Case 1:05-cv-04299-TPG; Case 1:05-cv-04466-TPG; Case 1:05-cv-06002-TPG; Case 1:05-cv-06200-TPG; Case 1:05-cv-06599-TPG; Case 1:05-cv-08195-TPG; Case 1:05-cv-08687-TPG; Case 1:05-cv-10636-TPG; Case 1:06-cv-13085-TPG; Case 1:07-cv-00098-TPG; and Case 1:07-cv-05807-TPG.

ARGUMENT

BNY Mellon, a non-party to these proceedings which has been accused of no wrongdoing and has nonetheless been targeted by both sides in domestic and foreign jurisdictions, concurs with the Court's view that "special considerations" apply to "financial intermediaries," and now seeks the Court's assistance. Any order vacating or modifying the Injunctions should: (1) direct BNY Mellon with regarding to performance of its duties under the Indenture; and (2) provide protection for BNY Mellon's rights and interests under the Indenture.

To begin with, the Indenture requires payments to be made on fixed dates (the "Payment Dates") to holders of record as of fixed dates (the "Record Dates"). *See* Indenture, at Ex. C thereto (Terms and Conditions of the Securities) ("Interest on each Security . . . will be payable to the person in whose name such Security is registered at the close of business on the Record Date . . . for the relevant Payment Date."). If the Injunctions are vacated, BNY Mellon requires direction with regard to the Record Date and Payment Date for each of the different series of Exchange Bonds. Similarly, BNY Mellon requires direction with regard to the amounts to be paid to the holders of each series of Exchange Bonds.

Accordingly, if the Court determines that the payment process on the Exchange Bonds may resume, it should (1) require the Republic to identify all bond issues to be paid, listing for each issue the gross amount, principal, and interest to be paid and the principal and interest per \$1000; (2) require the Republic to determine the Record and Payment Dates, in accordance with the Indenture and upon consultation with any appropriate clearing houses and regulatory authorities; and (3) provide that BNY Mellon will incur no liability for adhering to the Court's Order and any determinations of the Republic which implement that Order.

Additionally, as described above, BNY Mellon's adherence to the Injunctions exposed it to challenges on three continents. In all of this litigation, BNY Mellon took the position that the Injunctions were binding. *See, e.g.*, Case 1:02-cv-04124-TPG [Dkt. 139], at 4-5 (BNY Mellon Memorandum of Law opposing *Applestein* turnover motion); Case 1:06-cv-13085-TPG [Dkt. 74], at 4-5 (BNY Mellon Memorandum of Law opposing *Dussault* turnover motion); Case 14-4221 (2d Cir.) [Dkt. 109-2], at ¶ 45; *id.* [Dkt. 108], at 24.

Modifying or vacating the Injunctions may not eliminate the risk of further challenges to BNY Mellon's administration of the Indenture. Exchange Bondholders or others might use delays in payment as a basis to pursue additional litigation. Consistent then with the Court's earlier approval of BNY Mellon's course of action, the Court should reaffirm the protections set forth in paragraph 4 of the August 6, 2014 Order, provide that BNY Mellon will incur no liability for complying with any further orders of this Court, and confirm that the protections set forth in the Indenture remain valid and in full force and effect, including without limitation the Republic's obligation to indemnify the Trustee and the Trustee's senior right to and charging lien securing payment of fees and expenses. *See* Indenture, at §§ 4.4, 4.5, 5.6.

For the reasons stated above, BNY Mellon therefore requests that, if the Court modifies or vacates the Injunctions, any such order include the following clarifications:

- 1) Paragraph 4 of the August 6, 2014 Order, providing that BNY Mellon shall incur no liability under the Indenture or otherwise to any person or entity for complying with the Injunctions or the August 6, 2014 Order, remains in full force and effect;
- 2) Argentina is authorized and directed to perform all of its obligations under the Indenture including, without limitation, payment of all fees, expenses, and other amounts owed or payable to BNY Mellon thereunder;
- 3) Argentina shall identify all bond issues to be paid, listing for each issue the gross amount, principal, and interest to be paid and the principal and interest per \$1000;

- 4) Argentina shall set one or more future record and payment dates in accordance with the Indenture and in consultation with any appropriate clearing houses and regulatory authorities;
- 5) Upon compliance by Argentina with the all of the foregoing, BNY Mellon is authorized and directed to make distributions in accordance with the Indenture, including without limitations, of the Funds;
- 6) BNY Mellon shall incur no liability under the Indenture or otherwise to any person or entity for complying with the Court's Order and any determinations of the Republic which implement that Order, and shall have no obligations other than as set forth in the Indenture and the Court's Order, and no duty under the Court's Order with regard to any notes, bonds, or securities other than the Exchange Bonds; and
- 7) The Court retains jurisdiction to ensure compliance with its Order.

CONCLUSION

BNY Mellon respectfully requests that this Court enter the order it has requested for the reasons it has advanced.

Respectfully submitted,

REED SMITH LLP

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of New York Mellon, as Indenture
Trustee*

Dated: New York, New York
February 29, 2016