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14-2698(CON),14-2699(CON),14-2700(CON),14-2701(CON),14-2702(CON),
14-2703(CON),14-2704(CON),14-2705(CON),14-2709(CON),14-2711(CON),
14-2713(CON),14-2714(CON),14-2715(CON),14-2718(CON),14-2722(CON),
14-2723(CON),14-2724(CON),14-2728,14-2732(CON),14-2736(CON)

In The 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,

—against—

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 MOVANT-INTERESTED PARTY-APPELLANT CITIBANK, N.A.

Of Counsel:

Karen E. Wagner
James L. Kerr
Matthew B. Rowland
Lindsey T. Knapp

DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Movant-Interested Party-Appellant Citibank, N.A.

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SUMMARY OF REPLY

Citibank appeals from the Citibank Injunction, which enjoins Citibank Argentina from transferring to its customers funds to be paid on Argentine Law Bonds. The Republic will pay these funds each quarter through two Argentine entities not subject to jurisdiction in the United States, who will in turn transfer the payments to Argentine custodians, including Citibank Argentina. In the custodians' hands, these funds belong to customers—not to the Republic. The Citibank Injunction therefore requires that Citibank Argentina and its employees violate Argentine law by restraining funds to which neither Appellees nor the Republic has any right.

Citibank has made substantial legal and factual arguments to demonstrate that the Injunctions were never intended to prohibit payments by Citibank Argentina, in Argentina, on Argentine Law Bonds held by customers of Citibank Argentina, and that the Injunctions could not, as a matter of law, do so now. Citibank's arguments are unrefuted.

Appellees instead argue vociferously that Citibank has no right to review in this Court until after the risk it faces is realized. Appellees are wrong. The Citibank Injunction effected a sweeping modification of the Injunctions. Citibank, which is at immediate risk, is entitled to immediate *de novo* review. The Citibank Injunction must be reversed.

ARGUMENT

I. CITIBANK IS ENTITLED TO APPELLATE REVIEW

Appellees' principal argument is that Citibank has no right to appeal.[1] This unlikely proposition proceeds from the false premise that the Citibank Injunction "simply clarifies that the Injunctions, by their own terms, have *always* applied to all U.S.-dollar-denominated Exchange Bonds (whether or not they are issued under Argentine Law)." Aurelius Br. 16.

In fact, the Injunctions *never* applied to payments by Citibank Argentina on the Argentine Law Bonds until the District Court entered the Citibank Injunction. Indeed, it appears that Appellees deliberately refrained from seeking to enjoin payments on this "massive category" of bonds, NML Br. 1, until they moved for reconsideration, and the Citibank Injunction was issued to extend the Injunctions to these bonds. Citibank is therefore entitled to immediate *de novo* appellate review under 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a)(1).

[1] Capitalized terms used herein have the same meaning as defined in the principal appeal brief filed by Citibank on August 15, 2014 (the "Citibank Br."). "Aurelius Br." refers to the Response Brief filed on August 29, 2014, by plaintiffs-appellees Aurelius Capital Master, Ltd., et al. "NML Br." refers to the Response Brief filed on August 29, 2014, by plaintiffs-appellees NML Capital, Ltd., et al.

A. Appellees Never Sought an Injunction as to Payments on Argentine Law Bonds, and No Such Injunction Issued

Appellees' opposition relies on a complete misstatement of the record below. The Injunctions were issued—in a proceeding to which Citibank was not a party—upon Appellees' factual record. *See* Declaration of Robert A. Cohen, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Jan. 6, 2012) (Docket No. 362). Appellees solely targeted payments on bonds for which BNY Mellon acts as indenture trustee. *See, e.g.*, *id.* Exs. C and D (appending copies of the relevant global bonds for those issues); Mem. at 18 n.12, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Oct. 20, 2010) (Docket No. 230) (describing the payment process for the specified bonds); *see also* Mem. at 6–7 & n.2, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Jan. 6, 2012) (Docket No. 361) (same).

When the District Court identified the bonds to which the Injunctions applied, it relied upon the description provided by Appellees. *Compare* Mem. at 18 n.12, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Oct. 20, 2010) (Docket No. 230), *with* Opinion (A-1450). Consequently, as the opinion elaborated, the only enjoined payments were those made by the Republic to BNY Mellon, which were then transferred to the registered owner of the "Exchange Bonds" *in New York*. *See* Opinion (A-1450).

This Court's affirmance relied upon the same description. *See NML Capital, Ltd. v. Republic of Argentina ("NML II")*, 727 F.3d 230, 239 (2d Cir. 2013) (quoting Opinion (A-1450)), *cert. denied*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-990).

Neither Appellees' papers nor the District Court's opinion makes any mention of payments on the Argentine Law Bonds to CRYL, the registered owner of these bonds, *in Argentina,* even though Appellees were well aware of these bonds, as they are plainly identified in other papers submitted by Appellees to the District Court in support of the Injunctions. *See, e.g.*, Prospectus Supplement, Jan. 10, 2005 (A-653); Prospectus Supplement, Apr. 28, 2010 (A-893). On this record, the Injunctions apply "unambiguously" only to payments on the "Exchange Bonds" that are identified in the District Court's opinion.[2] *Cf.* NML Br. 24.

Nevertheless, given the breadth of the language of the Injunctions, Citibank sought confirmation, in May 2013, that the Injunctions were not intended to, and did not, reach Citibank Argentina's payments to its customers on Argentine Law

[2] The Citibank Clarification Order was only rescinded as to the U.S. Dollar-denominated Argentine Law Bonds. *Compare* Citibank Injunction at 4 (SPA-4), *with* Citibank Clarification Order ¶ 1 (SPA-6). Appellees conceded—after initially contesting—that the Injunctions cannot apply to Peso-denominated bonds. If the Injunctions had all along applied to the Argentine Law Bonds, then the District Court modified them to exclude the Peso-denominated bonds; if, as Citibank contends, the Injunctions never applied, then the District Court modified the Injunctions to include the U.S. Dollar-denominated Argentine Law Bonds.

Bonds. On June 27, 2014, when it ultimately heard Citibank's motion, the District Court confirmed that they did not:

> [Appellees' Counsel]: Your Honor, this is Edward Friedman on behalf of the Aurelius and Blue Angel plaintiffs. The opposition to that motion is, to begin with, that your Honor's amended February 23 orders are clear that the orders cover exchange bonds, and Citibank is now asking the Court to modify the amended February 23 orders so that --
>
> * * *
>
> With all respect, the Citibank motion addresses bonds that are clearly within the scope of exchange bonds. It is illegal under your Honor's orders that have been affirmed for Argentina to pay those bonds, and it is illegal for Citibank to facilitate those payments. This is a very serious matter as far--
>
> THE COURT: I simply disagree with everything you're now saying. I will grant [Citibank's] motion.

June 27 Hr'g Tr. at 26:12–17, 27:10–17 (A-1839–40).

Immediately following this hearing, the District Court entered an order that:

> CLARIFIED that this Court's Amended February 23, 2012 Orders *do not as a matter of law* prohibit payments by Citibank, N.A.'s Argentine branch on 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 to customers for whom it acts as custodian in Argentina.

Citibank Clarification Order (SPA-6) (emphasis added).[3] Citibank Argentina then made the June 30 payment on the Argentine Law Bonds.

[3] This order was consistent with two previous orders issued in factually similar situations. *See* Citibank Br. 29–34 (discussing *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415 (S.D.N.Y. 2012); *Aurelius Capital Partners, LP v.*

B. The Citibank Injunction Effected a Sweeping Modification

Appellees then moved for reconsideration. Appellees put forward no evidence that any of the Argentine Law Bonds had been the subject of the original proceedings relating to the Injunctions, and were therefore "Exchange Bonds," as defined, or even that the Argentine Law Bonds constituted External Indebtedness that would render them subject to the *pari passu* clause. Indeed, they introduced no evidence at all.

At oral argument, the District Court focused on information irrelevant to Citibank's arguments—the relative value of the Argentine Law Bonds versus the Exchange Bonds paid through BNY Mellon. July 22, 2014 Hr'g Tr. at 13:4–5, 14:9–11, 25:3–6 (A-2130–31, 2142). The District Court also expressed confusion that some exchange bonds were not paid through BNY Mellon. *Id.* at 17:16–20:23 (A-2134–37).

Immediately after the hearing, the District Court was advised that only a small fraction of Argentine Law Bonds were issued in connection with any exchange offer, and that it was not possible to identify whether any particular bond

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Republic of Argentina, No. 07 Civ. 2715, 2010 WL 768874 (S.D.N.Y. Mar. 5, 2010), *stay pending appeal vacated by* No. 10-837-cv, slip. op. (2d Cir. Mar. 24, 2010)).

was, or was not, because the bonds are fungible, and are traded.[4] *See* Letter from Karen E. Wagner to Hon. Thomas P. Griesa, July 23, 2014 (A-2174–76); *see also* Citibank Injunction (SPA-3–4); Letter from Edward A. Friedman [Appellees' Counsel] to Hon. Thomas P. Griesa, July 27, 2014, at 4 (A-3147) ("[I]t is now impossible for Citibank and other financial institutions who process payments to distinguish some of the 2005 Exchange Bonds from identical later issued bonds . . . .").

Nevertheless, on July 28 the District Court inexplicably issued the Citibank Injunction:

> [T]he court will only allow this one-time payment on the dollar denominated exchange bonds. After July 30, 2014, the court will rescind the Citibank order with regard to the dollar-denominated exchange bonds. To avoid future confusion, the parties are directed to devise a way to distinguish between the Repsol bonds and the exchange bonds before the next interest payment is due.

(SPA-4).

The Citibank Injunction ignores the record underlying the issuance of the Injunctions; ignores the analysis supporting the Citibank Clarification Order; ignores previous orders recognizing the jeopardy faced by Citibank Argentina in

[4] Citibank and the Republic also provided information showing that the Argentine Law Bonds issued in the local exchange offers constitute only a small proportion of the total universe of exchange bonds. *See* Boccuzzi Letter (A-2180–81); Letter from Karen E. Wagner to Hon. Thomas P. Griesa, dated July 28, 2014 (A-2187–88). These facts are confirmed in the Republic's brief on this appeal.

similar situations as a consequence of its unique status as a branch bank in Argentina; ignores the fact that there are many non-exchange bonds that are not Repsol bonds; and orders Citibank Argentina to do that which is "operationally impossible."

C. Citibank Is Entitled to Immediate *De Novo* Review

Because the Citibank Injunction effected a sweeping modification of both the Citibank Clarification Order and the Injunctions, under Appellees' own authority Citibank is entitled to immediate *de novo* review under both 28 U.S.C. § 1292(a)(1), as an appeal from an order modifying an injunction, and 28 U.S.C. § 1291, as an appeal from a final decision.

1. Review Under 28 U.S.C. § 1292(a)(1) Is Mandated

Appellees strenuously challenge this Court's appellate jurisdiction, and insist that "the Injunction's text flatly forbids" any challenge to their current contention that the Injunctions *always* applied to the Argentine Law Bonds. NML Br. 19. As Appellees' own cases demonstrate, however, *de novo* review is mandated under 28 U.S.C. §1292(a)(1) because the Citibank Injunction effected a modification of either the Injunctions, or the Citibank Clarification Order, or both.

Appellees rely heavily on *Wilder v. Bernstein*, 49 F.3d 69 (2d Cir. 1995). There, the court was required to determine whether a consent decree encompassed a particular group of children. *Id.* at 71. On appeal under Section 1292(a)(1) from

a ruling that the group was encompassed, this Court held that *de novo* review was mandated:

> In order to determine whether the ruling modifies the Decree, we must assess its merits because if the Judge correctly construed the Decree, he did not modify it, but if he erred in his construction, he did modify it. In assessing his interpretation, we apply *de novo* review.

Id. at 72 (citation omitted). Here, where the District Court issued one order that ruled unequivocally that the payments targeted by the Citibank Injunction were not encompassed by the Injunctions, and then issued another order completely reversing the first, one of the two orders must be a misinterpretation of the Injunctions, and this Court must exercise *de novo* review to determine which is right and which is wrong.[5]

Appellees also rely on *Weight Watchers International, Inc. v. Luigino's Inc.*, 423 F.3d 137 (2d Cir. 2005), Aurelius Br. 22, which held that:

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[5] Appellees cite a line of cases from other Circuits holding that the Court "'should *not* analyze the injunction and the order in detail,'" Aurelius Br. 23 (quoting *Birmingham Fire Fighters Ass'n 117 v. Jefferson Cnty.*, 280 F.3d 1289, 1293 (11th Cir. 2002)), but only determine if there has been a "'*blatant or obvious misinterpretation* of the injunction,'" *id.* (quoting *United States v. Phillip Morris USA Inc.*, 686 F.3d 839, 845 (D.C. Cir. 2012)). These cases stand in direct contradiction to *Wilder*, and are not binding here. *See also United States v. Hasan*, 586 F.3d 161, 168 (2d Cir. 2009) ("[R]eview for 'abuse of discretion' and *de novo* review are not entirely distinct concepts, but rather, review for abuse of discretion incorporates, among other things, *de novo* review of district court rulings of law."); *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 103 (2d Cir. 2009) ("[W]e review *de novo* the legal question of whether the district court issued a preliminary injunction or restraining order in satisfaction of Fed.R.Civ.P. 65.").

> Whether an order interprets or modifies an injunction is determined by its actual effect. An interpretation does not change the status of the parties, while a modification alters the legal relationship between the parties, or substantially change[s] the terms and force of the injunction.

423 F.3d at 141–42 (citations omitted and internal quotation marks). Since the "actual effect" of the Citibank Injunction is to dramatically extend the Injunctions to a "massive category" of bonds deliberately excluded from consideration on Appellees' motion for injunctive relief—which cannot therefore be "Exchange Bonds" as defined in the Injunctions—review under Section 1292(a)(1) is mandated.[6]

Nor is Citibank required to undergo contempt proceedings before seeking review. *See* Aurelius Br. 39–52.[7] This Court has never addressed the unique legal issues presented by imposing the Injunctions on Citibank Argentina and on

[6] In addition, immediate *de novo* review is required because the District Court utterly failed to explain the reasons why it reversed itself and issued the Citibank Injunction, as required by Federal Rule of Civil Procedure 65(d)(1)(A). *See, e.g.*, *In re Palermo*, 739 F.3d 99, 106 (2d Cir. 2014) (holding that district court decisions are not entitled to abuse of discretion review where the record is too "sparse" to justify such deferential treatment); *In re Mazzeo*, 167 F.3d 139, 143 (2d Cir. 1999) (noting that there must be "sufficient information to determine what facts and circumstances specific to the present case the court believed made" its decision "appropriate").

[7] Citibank has never declared that it will violate any order of a U.S. court. Citibank Argentina has acknowledged that it is subject to the laws of Argentina and that "it is required to take necessary measures to comply, at all times with its obligations arising from its contracts with its customers in Argentina." Letter from Gabriel Ribisich to Pablo Julio López, dated Aug. 11, 2014 (translation) (A-2213).

payments on the Argentine Law Bonds, as these issues were never before this Court.[8] Because the Citibank Injunction plainly expands the scope of the Injunctions, this Court may hear Citibank's appeal under Section 1292(a)(1) without requiring Citibank to be in contempt. *See Wilder*, 49 F.3d at 72–75 (order was not "final" under § 1291 due to pending contempt motion, but was appealable under § 1292(a)(1) because appellants showed that it plausibly might have modified an injunction); *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 829–32 (11th Cir. 2010) (same).

Finally, the fact that the Citibank Injunction directs that Citibank do the impossible provides a separate ground for review under Section 1292(a)(1). This Court assumed, in affirming the Injunctions, that the targeted bonds could be "identified by a unique code assigned to a particular Exchange Bond." *NML II*, 727 F.3d at 246.[9] Here, however, the District Court has *recognized* that "Citibank

[8] This Court has previously recognized in another context that Citibank Argentina is caught between two sovereigns, and in that case accepted the validity of the arguments made on this appeal. *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 10-837-cv, slip. op. (2d Cir. Mar. 24, 2010) (vacating stay pending appeal).

[9] Notably, in support of this proposition, this Court cited a November 11, 2012, letter from the DTC explaining that, when the DTC receives payment, it "will receive a transfer of funds identified with a single, particular CUSIP number." Letter from the DTC to Hon. Thomas P. Griesa (Nov. 16, 2012), No. 12-105-cv(L) (2d Cir.), Supp. App. at 1289–90, *cited by NML II*, 727 F.3d at 246. The Argentine Law Bonds do not bear CUSIP numbers because they do not trade

cannot distinguish between [Argentine Law Bonds that are not exchange bonds] and [exchange bonds]." Citibank Injunction at 3 (SPA-3).

2. Review Under 28 U.S.C. § 1291 Is Mandated

Citibank is also entitled to review under 28 U.S.C. § 1291. A proceeding that seeks to clarify or modify a permanent injunction is treated as "a free-standing litigation." *Thomas*, 594 F.3d at 829 (citation omitted). The Citibank Injunction is deemed "final" because it "dispose[s] of all issues" raised in Citibank's motion. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 745 (7th Cir. 2007) (citation omitted). Where an injunction is "immediately enforceable," this Court has found "no reason to withhold review and await the institution of contempt proceedings."[10] *McDonnell v. Birrell*, 321 F.2d 946, 947 (2d Cir. 1963); *see also, e.g.*, *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) ("[A] final

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in the U.S. or Canada. Instead, they bear International Securities Identification Numbers, or "ISINs," again demonstrating that they were never part of the proceedings leading to the Injunctions.

[10] Again contrary to Appellees' contentions, this Court has not ruled that before it is entitled to review under Section 1291, Citibank is required to go into contempt. Aurelius Br. 41. The Court's focus in its decision affirming the Injunctions was on whether lack of personal jurisdiction over unidentified payment system participants would invalidate the Injunctions. The Court concluded that it would not, as those parties could challenge personal jurisdiction in contempt proceedings. *See NML II*, 727 F.3d at 243–44. Citibank does not understand this Court to have held that review is foreclosed where a non-party, subject to jurisdiction, is directly enjoined. *See, e.g.*, *id.* at 240 (BNY Mellon could appeal the Injunctions since it was directly enjoined).

decision [within the meaning of Section 1291] does not necessarily mean the last order possible to be made in a case." (citation omitted)); *Leftridge v. Conn. State Trooper Officer No. 1283*, 640 F.3d 62, 66 (2d Cir. 2011) (finality is to be given a "'practical rather than a technical construction'" (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949))).

For Citibank, the Citibank Injunction is devastatingly final. While the District Court continues to hold hearings in these cases, those hearings do not involve continued adjudication of the Citibank Injunction. Citibank's jeopardy is concrete, and imminent. Citibank's challenge to the Citibank Injunction is ripe for review under Section 1291.

II. APPELLEES FAIL TO COUNTER CITIBANK'S ARGUMENTS THAT THE INJUNCTIONS DID NOT, AND CANNOT AS A MATTER OF LAW, EXTEND TO PAYMENTS ON THE ARGENTINE LAW BONDS

Appellees never moved to enjoin Citibank's payments on the Argentine Law Bonds until they sought the Citibank Injunction. As set forth in Citibank's opening brief, the Citibank Injunction is unlawful. Appellees do not refute Citibank's arguments; instead, they argue that any harm to Citibank as a result of the Republic's actions "does not make an otherwise lawful injunction 'inequitable.'" NML Br. 11 (quoting *NML II*, 727 F.3d at 242). But Citibank does not challenge the Injunctions entered against the Republic; Citibank challenges the equities of the

Citibank Injunction, which threatens to impose unprecedented harm on a non-party that is not liable to Appellees. It is the Citibank Injunction that is unlawful and inequitable, and which must therefore be reversed.

A. Appellees Never Moved To Enjoin Payments on the Argentine Law Bonds and the Injunctions Do Not Mention Citibank

Appellees, sophisticated hedge funds, cannot deny that their original motion for injunctive relief never targeted the "massive category" of Argentine Law Bonds, even though they plainly knew of them.[11] NML Br. 1. Consequently, the Injunctions cannot have applied to payments by Citibank Argentina on the Argentine Law Bonds, and the Argentine Law Bonds cannot be "Exchange Bonds" as defined in the Injunctions.[12] *See United States v. Spallone*, 399 F.3d 415, 424 (2d Cir. 2005) (the "determining factor" in interpreting a court order is the intent of

[11] In fact, the category is not so large, and vacating the Citibank Injunction will not therefore "eviscerate" the Injunctions, as Appellees claim. Aurelius Br. 36, 49 n.16. First, if Appellees were concerned about evisceration they would have identified the Argentine Law Bonds in their original motion seeking the Injunctions. Second, the Republic has represented that the Argentine Law Bonds issued in connection with the exchange offers constitute only 4.8% or 7.4% of the total universe of exchange bonds. Boccuzzi Letter (A-2181). Moreover, Citibank Argentina is not the custodian for all such bonds.

[12] Under Federal Rule of Civil Procedure 65(d)(1)(C), an injunction is required to "describe in reasonable detail . . . the act or acts restrained or required." To do so, it must "be specific and definite enough to apprise those within its scope of the conduct that is being proscribed." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 143 (2d Cir. 2011). The explanatory opinion accompanying the Injunctions makes no mention of Citibank or the Argentine Law Bonds, or any proxy for either, and cannot under Rule 65 be read to extend to either.

the issuing court, and "[a]s a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide, [and] . . . an order will not be construed as going beyond the motion in pursuance of which the order was made, for a court is presumed not to intend to grant relief which was not demanded." (citations and internal quotation marks omitted)); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 104–05 & n.23 (2d Cir. 2006) (construing ambiguous term in injunction narrowly, based in part on record before the district court at the time of its entry, and stating that the plaintiffs who had sought the injunction had "bor[ne] the burden of providing such a 'clarification' if indeed they desired a broader scope to the injunction" (citation omitted)).

On the contrary, it was the Citibank Injunction that on July 28 for the first time extended the Injunctions to enjoin Citibank Argentina from making payment on all Argentine Law Bonds. Appellees sought that extension, but introduced no evidence whatsoever that any of the Argentine Law Bonds were originally intended to be covered by the Injunctions, or constituted External Indebtedness subject to the *pari passu* clause.

The Citibank Injunction therefore has no basis in fact, and must be vacated. *See Forschner Grp., Inc. v. Arrow Trading Co.*, 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

mould each decree to the necessities of the particular case." (citations and internal quotation marks omitted)); *Brooks v. Giuliani*, 84 F.3d 1454, 1467 (2d Cir. 1996) ("Injunctive relief should be narrowly tailored to address specific harms and not impose unnecessary burdens on lawful activity." (citations and internal quotation marks omitted)).

B. The Republic's Payment to the Registered Owner of the Argentine Law Bonds Takes Place Wholly Within Argentina

The Republic effects payments on the Argentine Law Bonds by transferring payments to the CRYL, the registered owner of the global bonds, which transfers payments to the Caja, which then credits the accounts of many local custodians, including Citibank Argentina. Under Argentine law, these payments are customer property when deposited by the Caja into the accounts of Citibank Argentina and other local custodians at the BCRA. *See* Citibank Br. 11–12.

Appellees do not dispute that the Republic's payments to CRYL as the registered owner of the Argentine Law Bonds are completed within Argentina, before the funds reach Citibank Argentina.[13] Upon receipt of the funds, Citibank

[13] Appellees attempt to confuse the record by asserting that "certain entities involved in payment" on Argentine Law Bonds "use bank accounts located in New York." Aurelius Br. 7 n.1; *see also* NML Br. 15. Once payment is completed in Argentina, bondholders may of course transfer funds outside the country, but that is irrelevant to Citibank's argument. Citibank's point is that the registered owners for the exchange bonds for which BNY Mellon acts as indenture trustee are located outside Argentina, so payment is completed outside of Argentina. The registered

Argentina, as custodian, acts solely for its customers.[14] Thus, the "actual effect" of the Citibank Injunction cannot be distinguished from the restraint found unlawful in *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 423–24 (S.D.N.Y. 2012), based on arguments similar to those advanced by Citibank here. *See also* Citibank Br. 22–24.

Further, Appellees agree that the Injunctions do not enjoin acceptance of payments by bondholders. *See* Feb. 27, 2013 Hr'g Tr., No. 12-105-cv(L) (Doc. No. 950), at 50:23–24 ([Appellees' Counsel]: "No one is asking [for] an injunction preventing [the exchange bondholders] from accepting money."); *id.* at 92:20–22 (Judge Raggi: "I don't think there's any question about once the money lands in

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owner for Argentine Law Bonds is the CRYL, in Argentina, so payment is completed in Argentina. *See* D'Auro Decl. ¶¶ 6, 10 (A-1486–88); Elewaut Decl. ¶ 6 (A-1477); *see also* Prospectus Supplement, Jan. 10, 2005, at S-20, S-67 (A-680, A-728). After such payment is made, where or how the funds reach the ultimate beneficial owners is irrelevant.

[14] Citibank Argentina is acting independently, not in concert with the Republic, when it pays its customers on the Argentine Law Bonds. Citibank Br. 25–26. None of the cases cited by Appellees is to the contrary. *See* NML Br. 39 (citing *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 193 (2d Cir. 2010) (holding that the contemnor was *not* acting independently of the enjoined party); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) (holding that bank fell within the scope of Rule 65(d) where it assisted *its customer*, who was enjoined from transferring assets, to transfer assets in violation of an injunction)); *cf. N.Y. State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2d Cir. 1992) (claimed independent motivation of respondents-appellants was irrelevant where they acted in concert with the defendants to violate an injunction), *cited in Eli Lilly*, 617 F.3d at 193, *and vacated on other grounds sub nom. Pearson v. Planned Parenthood Margaret Sanger Clinic (Manhattan)*, 507 U.S. 901 (1993).

[the exchange bondholders'] hands, that not being contempt."). Because there is no dispute either that payment is completed in Argentina, or that Citibank Argentina's customers are not enjoined from receiving payment, there is no basis for contending that Citibank Argentina's payments, or those being made by any other Argentine custodian, to customers holding Argentine Law Bonds could be subject to the Injunctions.

C. The Citibank Injunction Unlawfully Contravenes Key Protective Doctrines

Appellees make little effort to contest Citibank's arguments on the merits. They argue only that, since the order placing Citibank Argentina in jeopardy is an injunction, not an attachment or an execution, and since Citibank does business in and with Argentina, Citibank is not entitled to review or relief. NML Br. 53–54.

This argument ignores fundamental due process considerations, and elevates formalities to achieve an unjust result. The "actual effect" upon Citibank Argentina of the unprecedented Injunctions, which mandate or prohibit the payment of money, is the same, only broader, than the "actual effect" of an enforcement mechanism for a damages judgment.

Under the Citibank Injunction, after the Republic makes a payment, and it reaches Citibank Argentina, Citibank Argentina must restrain assets, as it would be required to do under a conventional restraint—except the assets to be restrained are

not those of a judgment debtor, they are *customer funds* to which neither Appellees nor the Republic has any right, and they are to be held for an indeterminate time. The scope of the remedy is therefore novel, but the protective doctrines of comity, separate entity, act of state, and foreign sovereign compulsion nevertheless must apply just as they would to any other restraint.

1. The District Court's Failure To Perform a Comity Analysis Was Error

As an initial matter, given the conflicting obligations imposed on Citibank, the District Court's failure to address comity issues is alone sufficient grounds for vacating the Citibank Injunction. *See United States v. Davis*, 767 F.2d 1025, 1036–37 (2d Cir. 1985) (engaging in comity analysis by applying factors set forth in Section 403 of the Restatement (Third) of Foreign Relations Law (Tentative Draft No. 2, 1981) when reviewing district court order directing litigant to terminate litigation in the Cayman Islands); *see also In re Grand Jury Proceedings*, 40 F.3d 959, 964–66 (9th Cir. 1994) (conducting Section 403 analysis to affirm a court order that would potentially require an Austrian citizen to violate Austrian law).

2. The Citibank Injunction Violates the Separate Entity Doctrine

This is a classic case for applying the separate entity doctrine. Contrary to Appellees' arguments, Citibank does not dispute that the District Court has the

power to enjoin its foreign branches—i.e., to compel Citibank Argentina not to pay. But the Republic can at the same time compel Citibank Argentina to pay, if necessary by taking control of the branch. Consequently, the issue is whether the District Court abused its discretion by exercising its power to compel Citibank Argentina's compliance with the Injunctions where such compliance would violate the laws of Argentina.

The separate entity doctrine compels the conclusion that the Citibank Injunction is indeed an abuse of discretion. That doctrine protects foreign branches by "*treat[ing]* branches *like* independent banks in discrete, narrow contexts unrelated to the branches' juridical status and often involving transactions between the bank and its branch." *United States v. BCCI Holdings (Luxembourg), S.A.*, 48 F.3d 551, 553 n.6 (D.C. Cir. 1995) (emphasis in original) (citation omitted). That the "branch bank's affairs are, therefore, as much within the reach of the in personam order entered by the District Court as are those of the home office . . . is not to say that a federal court in this country should treat all the affairs of a branch bank the same as it would those of the home office." *United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965).

Treating a branch as a separate entity is appropriate when compliance with an injunction "would violate foreign law." *First Nat'l City Bank*, 379 U.S. at 384. For example, in *Societe Internationale Pour Participations Industrielles et*

Commerciales, S.A. v. Rogers, 357 U.S. 197, 211 (1958), the Supreme Court held that where compliance with a U.S. court's order will itself constitute a violation of foreign law, "fear of criminal prosecution constitutes a weighty excuse for [non-compliance], and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."

Similarly, in *Samsun Logix Corp. v. Bank of China*, No. 105262/10, 2011 WL 1844061, at *5–6 (N.Y. Sup. Ct. May 12, 2011), the court held that, despite having personal jurisdiction over certain national banks, the separate entity doctrine precluded ordering their foreign branches to turn over assets where compliance "could expose the bank's officers and employees to civil and criminal liability." As set forth in Citibank's principal brief, that is exactly the risk faced by Citibank Argentina's officers and employees here. Citibank Br. 10.

3. The Citibank Injunction Contravenes the Act of State Doctrine

Appellees' analysis of the act of state doctrine is similarly erroneous. A U.S. court cannot enjoin Citibank Argentina from transferring payments to its customers without ruling that the Republic's payments or enforcement of its banking laws—within its sovereign territory—are legally ineffective acts. Any such ruling would traduce the act of state doctrine.

Appellees agree. They state affirmatively that the act of state doctrine bars "U.S. courts from enjoining or imposing liability for a sovereign's acts in its own territory, [if it] treat[s] those acts as legally ineffective." NML Br. 48; *see also Allied Bank Int'l v. Banco Credito Agricola de Cartago,* 757 F.2d 516, 521 (2d Cir. 1985) ("[O]bviously, where the taking is wholly accomplished within the foreign sovereign's territory, it would be an affront to such foreign government for courts of the United States to hold that such act was a nullity. Furthermore, under such circumstances, the court's decision would almost surely be disregarded within the borders of the foreign state." (citation and internal quotation marks omitted)).

Appellees attempt to alter the inevitable conclusion that the act of state doctrine prevents extending the Injunctions to the payments at issue by asserting that the Republic has consented to jurisdiction in the United States in the FAA. NML Br. 50. But the Republic has *not* consented to U.S. jurisdiction as to the Argentine Law Bonds. *See* Prospectus Supplement for 2005 exchange, submitted to the District Court by Appellees (A-732–33) (Republic has consented to U.S. jurisdiction only with respect to disputes relating to exchange bonds governed by New York law).

Also incorrect is Appellees' argument that the "commercial activity" exception eliminates the protection afforded Citibank by the act of state doctrine. NML Br. 50 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S.

682, 695 (1976) (plurality opinion)). The "commercial activity" exception embodied in the restrictive theory of sovereign immunity has never been extended to the act of state doctrine.[15] Following the Supreme Court's lead, this Court has repeatedly declined to recognize the commercial activity exception propounded by the *Dunhill* plurality. *See, e.g.*, *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) ("Plaintiffs insist that we have adopted this so-called [*Dunhill* commercial activity] exception [to the act-of-state doctrine], citing [dicta in various cases]. We do not read the dicta in those cases as an adoption of the suggested exception."); *First Nat'l Bank of Boston (Int'l) v. Banco Nacional de Cuba*, 658 F.2d 895, 902 n.9 (2d Cir. 1981) ("[W]e declined to hold that the act of state doctrine does not apply to a foreign sovereign's commercial activities.").

[15] Although a plurality of Supreme Court Justices in *Dunhill* did believe that the restrictive theory should also apply to the act of state doctrine, *Dunhill*, 425 U.S. at 698–99 (plurality opinion), an equal number of Justices also opposed such an extension, *see id.* at 725–26 (Marshall, J., dissenting). Both groups of Justices, however, recognized that sovereign immunity and the act of state doctrine were discrete, independent doctrines. *See id.* at 705 n.18 (plurality opinion); *id.* at 725–26 (Marshall, J., dissenting). And since *Dunhill*, the Supreme Court has never again suggested that the FSIA or the underpinnings of sovereign immunity inform the act of state doctrine. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) ("Because the FSIA in no way affects application of the act of state doctrine, our determination that the [FSIA] applies in this case in no way affects any argument petitioners may have that the doctrine shields their alleged wrongdoing.").

4. The Citibank Injunction Violates the Defense of Foreign Sovereign Compulsion

Appellees have no coherent response to Citibank's foreign sovereign compulsion argument. As Appellees recognize, the foreign sovereign compulsion defense "protects a party from liability where the U.S. court order would require action that violates another sovereign's laws." NML Brief 52. This Court has acknowledged the doctrine's applicability where "the conduct of the [defendant] has been compelled by the foreign government." *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 453 (2d Cir. 1987). Exactly these circumstances are presented here.[16]

The Citibank Injunction would compel Citibank Argentina and its employees to violate the laws of the Republic, as the only way Citibank Argentina could comply with the Citibank Injunction would be to mandate action by individuals in Argentina in violation of local criminal laws. Citibank Br. 10. The Republic, which granted Citibank Argentina its banking license, has made clear

[16] Appellees' arguments to the contrary are not helped by their citation to comment b to Section 441 of the Restatement (Third) of Foreign Relations Law. *See* NML Br. 54. That comment directs that "prohibitions by the state in whose territory the act is to be carried out ordinarily prevail over orders of other states." Restatement (Third) of Foreign Relations Law § 441 cmt. b. While the comment also notes that "where conduct abroad is so egregious," a home court might prohibit it, *id.*, the conduct required here of Citibank Argentina is *not* egregious—the obligations of Argentine banking law are consistent with those imposed by U.S. law. Citibank Br. 22.

that it will enforce those laws. While Appellees contend that the resulting jeopardy to Citibank Argentina is caused by the Republic's payments, NML Br. 52, that only makes more obvious that sovereign compulsion will be brought to bear on Citibank Argentina and its employees.

Finally, Appellees argue that because Citibank voluntarily chooses to do business in Argentina it is not entitled to protection from the severe consequences it faces as a result of the conflict between the Citibank Injunction and Argentine law. Aurelius Br. 46. But Citibank, a non-party with no liability to Appellees, is subject to conflicting obligations not because the United States has imposed sanctions on doing business in Argentina[17]—but because the Republic, a sovereign having power over Citibank Argentina, has been enjoined by the United States, another sovereign having power over Citibank, and neither will give way. In this circumstance, foreign sovereign compulsion is manifest.

D. The Citibank Injunction Is Grossly Inequitable

The undisputed record demonstrates that the Injunctions could expose Citibank Argentina to serious risk, the most dire being loss of license and criminal sanctions for its employees. *See* Citibank Br. 9–10. Appellees do not offer any

[17] The executive branch prohibits U.S. companies from doing business in or with certain countries. Argentina is not one of them. *See* U.S. Dept. of State, Bureau of Western Hemisphere Affairs, *Fact Sheet: U.S. Relations with Argentina* (Nov. 21, 2013), *available at* http://www.state.gov/r/pa/ei/bgn/26516.htm.

contrary evidence, but simply belittle the risk of *civil* damages. Aurelius Br. 45–46; NML Br. 52 n.9. That risk is serious enough, but it is far overshadowed by the threat of sovereign action and criminal prosecution, to which Appellees have no response.

Mandating that Citibank Argentina comply with the Citibank Injunction will not punish the Republic. It will punish, and severely, only Citibank—a non-party that is not liable to Appellees—and its employees. Whatever the merits of the Injunctions as to the Republic, the collateral consequences to Citibank are inequitable in the extreme.

CONCLUSION

For the reasons set forth, the Citibank Injunction should be reversed and the Citibank Clarification Order reinstated.

Dated: New York, New York
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DAVIS POLK & WARDWELL LLP

By: /s/ Karen E. Wagner

Karen E. Wagner
James L. Kerr
Matthew Rowland
Lindsey T. Knapp

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 701-5800

Attorneys for Movant-Interested Party-Appellant Citibank, N.A.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,592 words (based on the Microsoft Word word count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: New York, New York
September 5, 2014

By: /s/ Karen E. Wagner
Karen E. Wagner

450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 701-5800