UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	No. 08 Civ. 6978 (TPG) No. 09 Civ. 1707 (TPG) No. 09 Civ. 1708 (TPG)
AURELIUS CAPITAL MASTER, LTD. and ACP MASTER, LTD., Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	No. 09 Civ. 8757 (TPG) No. 09 Civ. 10620 (TPG)
AURELIUS OPPORTUNITIES FUND II, LLC and AURELIUS CAPITAL MASTER, LTD., Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	No. 10 Civ. 1602 (TPG) No. 10 Civ. 3507 (TPG) No. 10 Civ. 3970 (TPG) No. 10 Civ. 8339 (TPG)
BLUE ANGEL CAPITAL I LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	No. 10 Civ. 4101 (TPG) No. 10 Civ. 4782 (TPG)

(captions continue on following page)

MEMORANDUM OF LAW IN SUPPORT OF CITIBANK, N.A.'S MOTION BY ORDER TO SHOW CAUSE TO VACATE THE CITIBANK INJUNCTION, CLARIFY OR MODIFY THE INJUNCTION, AND FOR A STAY

OLIFANT FUND, LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	No. 10 Civ. 9587 (TPG)
PABLO ALBERTO VARELA, et al., Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	No. 10 Civ. 5338 (TPG)

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Non-party Citibank, N.A. ("Citibank") respectfully submits this memorandum of law in support of its motion by order to show cause, pursuant to Federal Rule of Civil Procedure 54, to vacate this Court's July 28, 2014 order (the "Citibank Injunction"), to clarify or modify its November 21, 2012 order (the "Injunction"), and for a stay of the application of either order to the payments to be made by Citibank's Argentine branch ("Citibank Argentina") on September 30, 2014 (the "September 30 Payments").

PRELIMINARY STATEMENT

Citibank needs immediate relief from this Court to prevent a grave injustice.

Citibank Argentina is caught in the middle of the dispute between Plaintiffs in these cases, who are holders of defaulted Argentine sovereign debt, and the Republic of Argentina ("the Republic"). The Citibank Injunction *prohibits* Citibank Argentina from making payments on certain bonds (the "Argentine Law Bonds"), even though Plaintiffs have made no showing that the Argentine Law Bonds are subject to any *pari passu* obligation or should otherwise fall within the scope of the Injunction. Argentina, the sovereign country in which Citibank Argentina is licensed, has directed that Citibank Argentina *must* make the payments. Citibank Argentina is threatened with contempt in this Court if it makes the September 30 Payments, and with criminal sanctions and the revocation of its banking license in Argentina if it does not. [1]

Citibank Argentina holds the Argentine Law Bonds as a passive custodian. Citibank Argentina is paid by customers, not by the Republic. Citibank Argentina has no control over its customers' investment decisions. Citibank Argentina is neither an indenture trustee, nor a party to any indenture or other contract with the Republic regarding the Argentine Law Bonds, nor in

[1] During argument in the Court of Appeals, counsel for the Republic was unable to represent that these penalties would not be imposed on Citibank Argentina.

any way liable to Plaintiffs. Citibank Argentina will violate Argentine banking law if it does not make the September 30 Payments.

This Court's Injunction enjoins the Republic, and those assisting the Republic, from making payments on certain bonds, for which Bank of New York Mellon ("BNY") is indenture trustee, issued by the Republic in exchange offers in 2005 and 2010 (the "BNY Exchange Bonds"). The Argentine Law Bonds are very different from the BNY Exchange Bonds, so Citibank sought an order confirming that the Injunction did not apply to payments by Citibank Argentina on the Argentine law Bonds. This Court confirmed in an order issued on June 27, 2014 (the "Clarification Order") that payments by Citibank Argentina were not subject to the Injunction. Plaintiffs then asked for reconsideration, and on July 28, 2014 the Court rescinded the Clarification Order, ruling in the Citibank Injunction that Citibank Argentina could make only the June 30, 2014 payment. Citibank took an expedited appeal to the Court of Appeals, which declined jurisdiction, concluding that the Citibank Injunction was it was a clarification, not a modification, of the Injunction.

However, the Court of Appeals specified that nothing in its order is intended to preclude Citibank from seeking further relief from this Court. Citibank therefore asks that the Court vacate the Citibank Injunction and reinstate the Clarification Order. Pending such a ruling, or any necessary appeal, Citibank seeks an order staying the application of the Injunction and the Citibank Injunction to the September 30 Payments. The potential harm to Citibank Argentina if it is enjoined from making the payments is massive. Plaintiffs, on the other hand, will suffer no harm if Citibank Argentina makes the September 30 Payments, as the Republic will not change its plans based on what Citibank Argentina does. Under these circumstances, justice requires that Citibank be granted an immediate stay unless the Citibank Injunction is vacated.

BACKGROUND

A. The Injunction

Plaintiffs hold certain defaulted bonds issued by the Republic pursuant to a 1994 Fiscal Agency Agreement (the "FAA"). In 2010, Plaintiffs commenced proceedings in which they sought specific performance of the Republic's obligations under the *pari passu* provision found in paragraph 1(c) of the FAA with respect to the BNY Exchange Bonds for which BNY is indenture trustee.

The FAA imposes the *pari passu* obligation upon the Republic's "External Indebtedness," as defined in the FAA, and Plaintiffs demonstrated that the BNY Exchange Bonds were indeed External Indebtedness. *See* Declaration of Robert A. Cohen, Jan. 6, 2012 ("Cohen Decl.") (Dkt. No. 362); *see also id.* Exs. B and C (Dkt. Nos. 362-2 & 362-3) (copies of the relevant global bonds for those issues); Pls.' Mem. in Supp. of Mot. for Partial Summ. J. & Injunctive Relief at 18 n.12, Oct. 20, 2010 (Dkt. No. 230) (describing payment process for the BNY bonds); Pls.' Mem. in Supp. of Renewed Mot. for Specific Enforcement at 6–7 & n.2, Jan. 6, 2012 (Dkt. No. 361) (same).[2] Plaintiffs therefore sought injunctive relief against the Republic, and against BNY, the indenture trustee for the BNY Exchange Bonds, and other parties involved in payments on the BNY Exchange Bonds. *See* Pls.' Mem. in Supp. of Renewed Mot. for Specific Enforcement at 3-4, 6-7 & n.2, Jan. 6, 2012.

Plaintiffs sought no relief as to any other bonds, offered no proof that any other bonds were External Indebtedness, and did not seek to enjoin any custodian, including Citibank Argentina.

[2] Unless otherwise indicated, "Dkt. No." refers to the assigned docket number in *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG).

On November 21, 2012, this Court issued the Injunction, clarifying an earlier order of February 23, 2012. The foundation for the Injunction was the Court's finding that:

> [U]nder paragraph 1(c) of the [FAA], the Republic is 'required . . . at all times to rank its payment obligations pursuant to NML's Bonds at least equally with all the Republic's other present and future unsecured and unsubordinated *External Indebtedness*.

Amended Feb. 23, 2012 Order at 5, Nov. 21, 2012 (Dkt. No. 425) (emphasis added).

The Injunction was thus a contractual remedy, as described by the Court. "[W]hat is being done here is not literally to carry out the *Pari Passu* Clause, as would be done in a normal commercial situation, but to provide a remedy for Argentina's violation of the Clause. Yet, the remedy must bear some reasonable relation to the *Pari Passu* Clause in order to be a sensible remedy." Nov. 21, 2012 Opinion at 6 (Dkt. No. 424) (citation omitted).

Finally, relying upon a description provided by Plaintiffs, the Court identified the prohibited payments. *Compare* Pls.' Mem. in Supp. of Mot. for Partial Summ. J. & Injunctive Relief at 18 n.12, Oct. 20, 2012 (Dkt. No. 230), *with* Nov. 21, 2012 Opinion at 10 (Dkt. No. 424). These included only payments by the Republic to BNY, by BNY, and by parties downstream from BNY:

> The process and the parties involved in making payments on the Exchange Bonds are as follows. Argentina transfers funds to the Bank of New York Mellon ("BNY"), which is the indenture trustee in a Trust Indenture of 2005. Presumably there is a similar indenture for the 2010 exchange offer. BNY then forwards the funds to the "registered owner" of the Exchange Bonds. There are two registered owners for the 2005 and 2010 Exchange Bonds. One is Cede & Co. and the other is the Bank of New York Depositary ("BNY Depositary"). Cede and BNY Depositary transfer the funds to a "clearing system" such as the Depository Trust Company ("DTC"). The funds are then deposited into financial institutions, apparently banks, which then transfer the funds to their customers who are the beneficial interest holders of the bonds.

Nov. 21, 2012 Opinion at 10 (Dkt. No. 424).

The Second Circuit affirmed the Injunction based on the same description. *See NML Capital, Ltd. v. Republic of Argentina ("NML II")*, 727 F.3d 230, 239 (2d Cir. 2013) (quoting Nov. 21, 2012 Opinion at 10), *cert. denied*, 134 S. Ct. 2819 (June 16, 2014) (No. 13-990).

B. Citibank Argentina and the Argentine Law Bonds

Citibank Argentina and the Argentine Law Bonds are completely different from BNY and the BNY Exchange Bonds described in the November 21, 2012 opinion.

First, Citibank Argentina is not an indenture trustee. It has no relation to the Argentine Law Bonds except as custodian for customers. Instead, Citibank Argentina has been for about 100 years a branch bank, licensed to engage in banking activities in Argentina, that acts as a custodian, holding local law securities for customers. *See* Declaration of Maximiliano D'Auro, dated May 21, 2013 ("D'Auro Decl.") ¶¶ 13–15 (Dkt. No. 463); Declaration of Federico Elewaut, dated May 22, 2013 ("Elewaut Decl.") ¶ 4 (Dkt. No. 461).[3]

Second, the payment procedure for the Argentine Law Bonds is completely different from the payments described in this Court's November 21, 2012 opinion. Payment to the registered holder of the Argentine Law Bonds takes place entirely in Argentina, first through the Central de Registro y Liquidación de Instrumentos de Endeudamiento Publico (the "CRYL"), then through the Caja de Valores S.A. (the "Caja"), and ultimately to Citibank Argentina in Argentina as custodian for its customers. Elewaut Decl. ¶¶ 6-11; D'Auro Decl. ¶¶ 6-11. As a matter of Argentine law, the Republic's payment is complete when funds reach the CRYL in Argentina. *See* D'Auro Decl. ¶ 10.

[3] Citibank has previously described the differences between Citibank Argentina and BNY, and between the Argentine Law Bonds and the Exchange Bonds subject to the Injunction, and incorporates its prior papers herein. *See* Mem. L. of Citibank, N.A. in Supp. of Mot. for Clarification, dated May 22, 2013 (Dkt. No. 460); D'Auro Decl.; Elewaut Decl.; Declaration of Manuel Beccar-Varela, dated May 21, 2013 (Dkt. No. 462); Mem. L. in Supp. of Citibank, N.A.'s Renewed Mot. by Order to Show Cause for Clarification or Modification, dated June 19, 2014 (Dkt. No. 550); Declaration of Federico Elewaut, dated July 28, 2014 (Dkt. No. 612).

Third, the terms of the Argentine Law Bonds are completely different from those of the BNY Exchange Bonds. The Argentine Law Bonds are issued under Presidential decrees, not the Indenture, and the Republic has not submitted to the jurisdiction of this Court with respect to the Argentine Law Bonds. The Argentine Law Bonds are governed by Argentine law, not New York or English law. The Argentine Law Bonds are payable in Argentina, not New York. *See infra*, pp. 11-12. In addition, as discussed below, the Argentine Law Bonds constitute Domestic Foreign Currency Indebtedness, not External Indebtedness, as defined in the FAA, as are thus outside the reach of the *pari passu* provision. These reasons confirm what this Court has said repeatedly—that the Argentine Law Bonds for which Citibank Argentina is custodian are "completely different" from the Exchange Bonds:

> [W]hat I was dealing with, and the proceedings this summer was bonds issued in Argentina expressly subject to Argentine law, something completely different from what was covered in the injunction, the major injunction of February 23, I guess, of 2012.

Sept. 10, 2014 Hr'g Tr at 12:10-14 (Dkt. No. 665); *see also id.* at 11:12-12:14, 18:8-19:11.

C. The Clarification Order

On June 16, 2014, after the Supreme Court denied the Republic's petition for *certiorari* with respect to the Injunction, the Injunction went into force. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (mem.). Citibank then renewed a motion, originally made in May 2013, for confirmation that the Injunction did not apply to payments made by Citibank Argentina on the completely different Argentine Law Bonds.

At the hearing on Citibank's motion, this Court stated that the Argentine Law Bonds had "been treated differently [from the bonds covered by the Injunction] . . . all along." June 27, 2014 Hr'g Tr. at 26:23–27:1 (Dkt. No. 622). The Court then entered the Citibank Clarification Decision (Dkt. No. 547), which:

> 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.

D. The Citibank Injunction

Plaintiffs moved for reconsideration, arguing, misleadingly, that "the Court may have overlooked the undisputed facts that [the Argentine Law Bonds] are External Indebtedness within the meaning of the FAA, that they are covered by the *pari passu* provision in the FAA, and that they are Exchange Bonds covered by the Amended February 23 Orders." Pls.' Mem. in Supp. of Mot. for Partial Reconsideration at 2, filed July 10, 2014 (Dkt. No. 418). Plaintiffs provided no proof that the Argentine Law Bonds constitute "External Indebtedness," or are subject to the *pari passu* provision, and they are not.

On July 28, 2014, the Court issued the Citibank Injunction (Dkt. No 613), rescinding the Clarification Order and permitting only the June 30, 2014 payment by Citibank Argentina on the Argentine Law Bonds.

E. The Appeal

Citibank immediately appealed to the Second Circuit Court of Appeals. On the appeal, misstating their own record before this Court, Plaintiffs argued that payments by Citibank Argentina on Argentine Law Bonds were *always* subject to the Injunction. *See, e.g.*, Response Br. of Plaintiffs-Appellees Aurelius Capital Master, Ltd., et al., *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 14-2689(L), filed Aug. 29, 2014, at 16 (Dkt. No. 129) ("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).").

On September 18, 2014, the Second Circuit heard argument, and the next day it dismissed the appeal for lack of appellate jurisdiction. The Second Circuit stated that "nothing in this Court's order is intended to preclude Citibank from seeking further relief from the district court," and immediately returned the mandate to this Court. *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 14-2689(L), slip op. at 2 (2d Cir. Sept. 19, 2014) (summary order).

F. This Application

Citibank now asks this Court to vacate the Citibank Injunction and to reinstate the Citibank Clarification Order. Plaintiffs never offered any evidence that the Argentine Law Bonds are "External Indebtedness" subject to the *pari passu* provision of the FAA—which was the basis for enjoining payments on the BNY Exchange Bonds that violated the *pari passu* provision—and indeed they are not. Consequently, the Citibank Injunction has no basis in law or fact.

If the Citibank injunction is not immediately vacated, Citibank also requires a stay of the application of the Injunction and the Citibank Injunction to the September 30 Payments to protect it from imminent and irreparable harm—including civil and criminal liability in Argentina and the prospect that the Republic will revoke Citibank Argentina's banking license. No party will be harmed by a stay, and Citibank Argentina will be protected from grave, and completely unjustified, consequences.

ARGUMENT

THE CITIBANK INJUNCTION SHOULD BE VACATED

A. This Court May Change or Vacate Its Interlocutory Orders

Citibank's appeal from the Citibank Injunction was dismissed by the Second Circuit on the ground that the Citibank Injunction was an interlocutory order. Consequently, this Court has plenary jurisdiction to take any appropriate action with regard to its existing orders, especially in

the interests of justice. "[A] district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment . . . ." *Peterson v. Syracuse Police Dep't*, 467 F. App'x 31, 34 n.1 (2d Cir. 2012) (summary order) (internal quotation marks omitted) (quoting *United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir. 1982)). No judgment has been entered in these cases.

B. Payments By Citibank Argentina on Argentine Law Bonds Are Completely Different from Payments By BNY on the BNY Exchange Bonds

The Citibank Injunction, which extended the Injunction to payments by Citibank Argentina on Argentine Law Bonds, must be vacated. The Injunction was never intended to apply to payments by Citibank Argentina on Argentine Law Bonds, and Plaintiffs failed to make any record that the Argentine Law Bonds constitute External Indebtedness.

The Injunction was issued to provide a remedy for the Republic's breach of the *pari passu* obligation of paragraph 1(c) of the FAA, which requires equal treatment for "External Indebtedness." *See* Declaration of Carmine D. Boccuzzi, dated Dec. 10, 2010, Ex. P at ¶ 1(c) ("FAA") (Dkt. No. 271-6). External Indebtedness is defined as "obligations . . . denominated or payable . . . in a currency other than the lawful currency of the Republic *provided that no Domestic Foreign Currency Indebtedness, as defined [in the FAA] shall constitute External Indebtedness.*" *Id.* ¶ 11 (emphasis added). Domestic Foreign Currency Indebtedness includes debt denominated, for example, in U.S. Dollars, and is defined to include a list of seven kinds of foreign currency bonds, as well as "any indebtedness issued in exchange, or as replacement," for the listed bonds, and "any other indebtedness payable by its terms, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic of Argentina which is . . . offered exclusively within the Republic of Argentina." *Id.*

Because Plaintiffs never sought to restrain payments on any debt other than the BNY Exchange Bonds, which plainly constitute External Indebtedness subject to paragraph 1(c) of the FAA, Plaintiffs never made a showing that any other bonds, including any Argentine Law Bonds, were subject to paragraph 1(c) of the FAA. And indeed, they are not, as they do not constitute External Indebtedness:

- In connection with the 2005 and 2010 exchanges, holders of defaulted bonds governed by Argentine law, including those denominated in U.S. Dollars that constituted Domestic Foreign Currency Indebtedness, could exchange those bonds for Argentine Law Bonds that would either constitute domestic indebtedness or Domestic Foreign Currency Indebtedness (because was issued in exchange for Domestic Foreign Currency Indebtedness). Declaration of Robert A. Cohen, filed Oct. 10, 2010, Ex. I ("Prospectus Supplement 2005") at S-9, S-16, S-39 (Dkt. 231-11); Prospectus Supplement 2010 at S-15, S-26, S-37, https://www.sec.gov/Archives/edgar/data/914021/000090342310000252/roa-424b5_0428.html; *see also* FAA ¶ 11.

- Because the Argentine Law Bonds do not constitute External Indebtedness, they are not subject to the *pari passu* provision in the FAA or the Injunction. *Compare* FAA ¶ 11 (Dkt. No. 271-6), *with* Prospectus Supplement 2005 at Annex A, A-1-A-11 (Dkt. No. 231-13) (listing Domestic Foreign Currency Indebtedness bonds eligible for exchange); Prospectus Supplement 2010 Annex A, A-1-A-17. https://www.sec.gov/Archives/edgar/data/914021/000090342310000252/roa-424b5_0428.htm (listing Domestic Foreign Currency Indebtedness bonds eligible for exchange).

- Global Bonds representing the Argentine Law Bonds were registered in the name of, and are cleared and paid through, CRYL, an Argentine clearing system that clears "transactions involving *Bonos del Tesoro de Argentina* and other debt securities of Argentina governed by Argentine law." Prospectus Supplement 2005 at S-75 (Dkt. No. 231-12).

- The Argentine Law Bonds are governed not by the Trust Indenture, but by the Presidential decrees and Spanish language instruments issued pursuant to those decrees. *See* Prospectus Supplement 2005 at S-61; Prospectus Supplement 2010 at S-103. The Argentine Law Bonds do not contain *pari passu* clauses, negative pledge covenants, events of default, acceleration provisions, or provisions for amendments or otherwise for bondholder meetings. *See* Prospectus Supplement 2005 at S-21, S-33, S-70-71 (Dkt. Nos. 231-11 & 231-12); Prospectus Supplement 2010 at S-42, S-61, S-113, https://www.sec.gov/Archives/edgar/data/914021/000090342310000252/roa-424b5_0428.html.

- The Argentine Law Bonds include no submission to the jurisdiction of foreign courts, either in the United States or elsewhere. Prospectus Supplement 2005 at S-71-72; Prospectus Supplement 2010 at S-114. The Argentine Law Bonds were issued with the identifying letters "ARARGE" in the prefix of their International Securities Identification Number. Prospectus Supplement 2005 at S-104-105; Prospectus Supplement 2010 at S-44, S-47, S-52.

Plaintiffs misled this Court when they sought reconsideration of the Clarification Order. They told this Court that the definition of External Indebtedness "makes clear that what matters is the currency in which a bond is paid, not the governing law." Pls.' Mem. in Supp. of Mot. for Partial Reconsideration at 2, filed July 10, 2014 (Dkt. No. 418). By doing so they simply read out of the definition of External indebtedness the exclusion of Domestic Foreign Currency Indebtedness, which obviously relates to currency other than Argentine Pesos yet still does not constitute External Indebtedness.

Plaintiffs therefore argued for an interpretation of the Injunction that was never intended by this Court, and improperly secured the extension of the Injunction to the Argentine Law Bonds even though they offered no proof—nor could they—that Argentine Law Bonds are External Indebtedness and subject to the *pari passu* provision.

C. Citibank Argentina's Payments Are Not Subject To the Injunction

The Injunction bars payments only by those who "assist the Republic in fulfilling *its payment obligations* under the Exchange Bonds." Amended Feb. 23, 2012 Order ¶ (2)(f) (Dkt. No. 425) (emphasis added.) Under Argentine law, the Republic fulfills its obligations to pay the holders of Argentine Law Bonds when CRYL, as the registered holder of the Argentine Law Bonds, receives the payment. *See supra*, p. 7. Citibank Argentina cannot therefore "assist" the Republic in making enjoined payments—when funds reach Citibank Argentina, the Republic has already met its obligation.

D. The Court Cannot as a Matter of Law Enjoin Payments by Citibank Argentina

In the Clarification Order, this Court ruled that payments by Citibank Argentina should not as a matter of law be subject to the Injunction.[4] The Clarification Order is consistent with the recent directive of the Second Circuit in *Gucci America, Inc. v. Weixing Li*, Nos. 11-3934-cv, 12-4557-cv, 2014 WL 4629049 (2d Cir. Sept. 17, 2014). There, the district court issued a preliminary injunction freezing assets held overseas at the Bank of China. *Id.* at *2. The Bank of China objected to the application of the injunction to it, "specifically citing an apparent conflict with the requirements of Chinese banking law." *Id.* at *13. The Court held that "[i]n such circumstances . . . comity principles required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with the Asset Freeze Injunction." *Id.*

The Second Circuit specifically instructed district courts to "us[e] the framework provided by § 403 of the Restatement (Third) of Foreign Relations Law," which "instructs that when a state has jurisdiction, it should not exercise it 'to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'" *Id.* at *13 & n.20 (quoting Restatement (Third) of Foreign Relations Law § 403(1) (1987)). Section 403 identifies the factors to consider when evaluating whether the exercise of jurisdiction would be unreasonable, all of which would be consistent with recognizing the Republic's interest in enforcing banking laws consistent with international banking regulation.

[4] Citibank had argued that the Injunction could not be extended to Citibank Argentina because it is a separate entity and because it is protected by principles of comity and the doctrines of act of state and sovereign compulsion. Citibank's prior arguments are incorporated by reference herein. *See* Citibank Mem. in Supp. of Renewed Mot. for Clarification or Modification, dated June 19, 2014 (Dkt. No. 550).

Here, the Clarification Order properly reflects the principles of the Restatement, and the Citibank Injunction does not. Citibank Argentina must obey Argentine banking law, which requires Citibank Argentina to transfer the September 30 Payments to its customers. An order requiring Citibank Argentina to act in violation of Argentine banking law would not be consistent with the comity directives set out in the *Gucci* case.

E. The Reach of Equity Jurisdiction is Limited

The comity analysis is consistent with well recognized "fundamental limitations on the remedial powers of the federal courts," which permit their exercise "only on the basis of a violation of the law." *Gen. Bldg. Contractors Ass'n, Inc. v. Penn.*, 458 U.S. 375, 399 (1982) (internal quotation marks omitted). A non-party's lawful conduct that is "independent" of a party's wrongful conduct falls outside the scope of a federal court's injunctive power. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (injunctive power is not "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Shakhnes v. Berlin*, 689 F.3d 244, 257 (2d Cir. 2012) ("An injunction is overbroad when it restrains . . . legal conduct."), *cert. denied sub nom. Proud v. Shaknes*, 133 S. Ct. 1805 (2013). As Judge Learned Hand stated over eighty years ago:

> [N]o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930).

In *General Building Contractors*, the Supreme Court held that a remedy that treated "petitioners as if they had been properly found liable . . . is beyond the traditional equitable limitations upon the authority of a federal court to formulate such decrees." 458 U.S. at 400-01. "[W]e hold that such obligations can be imposed neither under traditional equitable authority of

the District Court nor under the All Writs Act." *Id*. at 402; *see also EEOC v. Local 638*, 81 F.3d 1162, 1180 (2d Cir. 1996) ("If the plaintiffs wish to have sanctions imposed on the Contractors or to fashion remedies as to them that are more than minor and ancillary, they may do so only upon establishing the Contractors' liability after adhering to the appropriate rules of civil procedure."); *New York ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996); *Heyman v. Kline*, 444 F.2d 65, 65–66 (2d Cir. 1971)); *cf. Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.").

Equitable jurisdiction therefore prohibits the imposition of extreme burdens on non-parties. In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308 (1999), holders of defaulted bonds obtained a provisional injunction restraining a defendant at risk of insolvency from dissipating its assets. *Id.* at 310-13. The Supreme Court rejected the argument that "'the grand aims of equity'" created "a general power to grant relief whenever legal remedies are not 'practical and efficient.'" *Id*. at 321 (quoting *id.* at 342 (Ginsburg, J., dissenting)); *see also Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993); *Cook Inc. v. Boston Sci. Corp*., 333 F.3d 737, 743–44 (7th Cir. 2003); *see also United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) (cautioning that a U.S. court should refrain from entering an order or judgment which "would violate foreign law or place respondent under any risk of double liability" (citations omitted)).

F. Most of the Argentina Law Bonds Were Not Issued in Either Exchange

Finally, the Injunction may not be extended to the Argentine Law Bonds pursuant to the Court's equitable powers because, even were those bonds determined to be External Indebtedness, most of them are not "Exchange Bonds" as defined by the Injunction. Only a small fraction of Argentine Law Bonds were issued in connection with any exchange offer, and it

is not possible to identify whether any particular bond was, or was not, because the bonds are fungible, and are traded.[5] *See* Letter from Karen E. Wagner to Hon. Thomas P. Griesa, dated July 23, 2014, at 2-3 (Dkt. No. 605); *see also* Letter from Carmine D. Boccuzzi, Jr. to Hon. Thomas P. Griesa, dated July 27, 2014 ("Boccuzzi Letter"), at 1-2 & n.2 (Dkt. No. 609).

Thus, determining which Argentine Law Bonds might be exchange bonds is "operationally impossible." *See* Declaration of Federico Elewaut, dated July 28, 2014 ("Suppl. Elewaut Decl.") ¶ 4 (Dkt. No. 612); *see also* Letter from Edward A. Friedman to Hon. Thomas P. Griesa, July 27, 2014, at 4 (Dkt. No. 610) ("[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 . . . ."); Citibank Injunction at 3 ("Citibank cannot distinguish between [Argentine Law Bonds that are not Exchange Bonds] and [ones that are Exchange Bonds].").

For that reason as well, the Citibank Injunction exceeds the equitable powers of this Court. *See Forschner Grp., Inc. v. Arrow Trading Co., Inc.*, 124 F.3d 402, 406 (2d Cir. 1997) ("[T]he essence of equity jurisdiction has been the power to grant relief no broader than necessary to cure the effects of the harm caused by the violation and 'to mould each decree to the necessities of the particular case.'" (citations 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.'").

[5] 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 bonds offered in the 2005 and 2010 exchanges offers. *See* Letter from Carmine D. Boccuzzi, Jr. to Hon. Thomas P. Griesa, dated July 27, 2014 ("Boccuzzi Letter"), at 2 (Dkt. No. 609); Letter from Karen E. Wagner to Hon. Thomas P. Griesa, dated July 23, 2014, at 2 (Dkt. No. 605).

CONCLUSION

For the reasons set forth, Citibank respectfully requests that, before September 30, 2014, this Court vacate the Citibank Injunction, and reinstate the Clarification Order, to allow Citibank Argentina to make payments on the Argentine Law Bonds to customers for whom it acts as custodian in Argentina, or issue a stay of the application of the Injunction and the Citibank injunction to the September 30 Payments.

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September 22, 2014

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

Counsel to Non-Party Citibank, N.A.