UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD., Plaintiff, v. THE REPUBLIC OF ARGENTINA, Defendant.	08 Civ. 6978 (TPG) 09 Civ. 1707 (TPG) 09 Civ. 1708 (TPG)
AURELIUS CAPITAL MASTER, LTD. and ACP MASTER, LTD., Plaintiffs, v. THE REPUBLIC OF ARGENTINA, Defendant.	09 Civ. 8757 (TPG) 09 Civ. 10620 (TPG)
AURELIUS OPPORTUNITIES FUND II, LLC and AURELIUS CAPITAL MASTER, LTD., Plaintiffs, v. THE REPUBLIC OF ARGENTINA, Defendant.	10 Civ. 1602 (TPG) 10 Civ. 3507 (TPG)

(captions continued on next page)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO CITIBANK, N.A.'S MOTION TO MODIFY THE INJUNCTION

AURELIUS CAPITAL MASTER, LTD. and AURELIUS OPPORTUNITIES FUND II, LLC, Plaintiffs, v. THE REPUBLIC OF ARGENTINA, Defendant.	:	10 Civ. 3970 (TPG) 10 Civ. 8339 (TPG)
BLUE ANGEL CAPITAL I LLC, Plaintiff, v. THE REPUBLIC OF ARGENTINA, Defendant.	:	10 Civ. 4101 (TPG) 10 Civ. 4782 (TPG)
OLIFANT FUND, LTD., Plaintiff, v. THE REPUBLIC OF ARGENTINA, Defendant.	:	10 Civ. 9587 (TPG)
PABLO ALBERTO VARELA, et al., Plaintiff, v. THE REPUBLIC OF ARGENTINA, Defendant.	:	10 Civ. 5338 (TPG)

TABLE OF CONTENTS

Page

Table of Authorities ii

PRELIMINARY STATEMENT 1

BACKGROUND 4

A. The Republic Violates the Pari Passu Clause of the FAA 4

B. The Court Enters the Injunction as a Remedy for the Republic's Violations 5

C. The Injunction Covers All Obligations Issued Pursuant to the Exchange Offers 6

D. Citibank Asks the Court To Modify the Injunction To Exclude the U.S. Dollar Argentine Law Exchange Bonds 7

1. The Court Initially Permits Citibank To Make Payments Even Though Citibank Admitted that the U.S. Dollar Argentine Law Exchange Bonds Were Exchange Bonds 7

2. The Court Agrees that the U.S. Dollar Argentine Law Exchange Bonds Are Covered by the Injunction 8

3. The Republic and Citibank Concede on Appeal that the U.S. Dollar Argentine Law Exchange Bonds Were Issued Pursuant to the 2005 and 2010 Exchange Offers 10

4. Citibank Once Again Moves To Modify the Injunction 10

ARGUMENT 12

I. DISCOVERY HAS ESTABLISHED THAT THE U.S. DOLLAR ARGENTINE LAW EXCHANGE BONDS WERE NOT OFFERED EXCLUSIVELY IN ARGENTINA, AND THAT THEY ARE EXTERNAL INDEBTEDNESS 12

A. The U.S. Dollar Argentine Law Exchange Bonds Were Not "Offered Exclusively" in Argentina 13

B. The U.S. Dollar Argentine Law Exchange Bonds Were Not Issued in Exchange, or as Replacement, for Specifically Enumerated Indebtedness 25

II. CITIBANK LACKS STANDING TO SEEK A MODIFICATION OF THE INJUNCTION 28

III. THE REPUBLIC'S POST-2005 RE-USE OF THE 113 ISIN DOES NOT JUSTIFY EXCLUDING FROM THE INJUNCTION BONDS THAT UNQUESTIONABLY MEET THE INJUNCTION'S DEFINITION OF "EXCHANGE BONDS" 30

IV. THE COURT SHOULD NOT PERMIT CITIBANK TO AID THE REPUBLIC IN VIOLATING THE INJUNCTION....34

A. Citibank's Activities Are Covered by the Injunction 35

B. The Republic's Purported Threats Are Not a Basis for Permitting Citibank To Aid and Abet the Republic's Violation of the Injunction....36

C. The "Separate Entity" Rule Has No Application to Citibank's Request to Modify the Injunction....38

D. Denying Citibank's Motion Will Not Weaken New York's Standing as a Financial Center....39

CONCLUSION....42

TABLE OF AUTHORITIES

Page(s)

Cases

Advance Pharm., Inc. v. United States,
391 F.3d 377 (2d Cir. 2004)....................28

Allied Maritime, Inc. v. Descatrade SA,
620 F.3d 70 (2d Cir. 2010)....................38

Armstrong v. Guccione,
470 F.3d 89 (2d Cir. 2006)....................38

Aurelius Capital Master, Ltd. v. The Republic of Argentina,
No. 14-2689, slip op. (2d Cir. Sept. 19, 2014)....................10

Baum v. Blue Moon Ventures, LLC,
513 F.3d 181 (5th Cir. 2008)....................28

CE Int'l Res. Hodlings, LLC v. S.A. Minerals Ltd. P'ship,
No. 12-cv-08087, 2013 WL 2661037 (S.D.N.Y. June 12, 2013)....................38

Dunlop v. Pan American World Airways,
672 F.2d 1044 (2d Cir. 1982)....................28

EM Ltd. v. Republic of Argentina,
695 F.3d 201 (2d Cir. 2012)....................38

EM Ltd. v. Republic of Argentina,
No. 13-3819 (2d Cir. Nov. 6, 2014)....................39

Grace v. Bank Leumi Tr. Co. of N.Y.,
443 F.3d 180 (2d Cir. 2006)....................28

Gucci America, Inc. v. Weixing Li,
768 F.3d 122 (2d Cir. 2014)....................36, 37

Johnson v. Holder,
564 F.3d 95 (2d Cir. 2009)....................29

Mobay Chem. Co. v. Hudson Foam Plastics Corp.,
277 F. Supp. 413 (S.D.N.Y. 1967)....................29

Motorola Credit Corp v. Standard Chartered Bank,
24 N.Y.3d 149 (2014)....................39

Motorola Credit Corp. v. Uzan,
561 F.3d 123 (2d Cir. 2009)....29

Nat'l Acceptance Co. of Am. v. Frigidmeats, Inc.,
627 F.2d 764 (7th Cir. 1980) 29

NML Capital, Ltd. v. Republic of Argentina (NML I),
699 F.3d 246 (2d Cir. 2012).... *passim*

NML Capital, Ltd. v. The Republic of Argentina ("NML II"),
727 F.3d 230 (2d Cir. 2013).... *passim*

Sierra Club v. U.S. Army Corps of Eng'rs,
732 F.2d 253 (2d Cir. 1984)....29

Statutes

15 U.S.C. § 77b(10) 14

Plaintiffs NML Capital, Ltd., Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC, Olifant Fund, Ltd., and Pablo Alberto Varela, et al. (collectively, "Plaintiffs"), through their undersigned counsel, respectfully submit this Supplemental Memorandum of Law in opposition to the motion brought by Citibank, N.A. ("Citibank") seeking modification of this Court's Amended February 23, 2012 Orders (the "Injunction").

PRELIMINARY STATEMENT

At the hearing on September 26, 2014 – when the Court deferred ruling to allow discovery and further briefing – the Court made clear that the principal issue to be addressed was the factual issue of whether U.S. Dollar-denominated, Argentine-law governed bonds issued pursuant to the Republic's 2005 and 2010 Exchange Offers (the "U.S. Dollar Argentine Law Exchange Bonds") had been "offered exclusively" within Argentina. Citibank and the Republic had argued that these Bonds should be excluded from the coverage of the Injunction because they are Domestic Foreign Currency Indebtedness ("DFCI"), and not External Indebtedness, as defined by the 1994 Fiscal Agency Agreement ("FAA"). There was no dispute that the U.S. Dollar Argentine Law Exchange Bonds would be considered External Indebtedness – because they were issued in a currency other than Argentine Pesos – unless they fell into one of the specific exceptions listed in the FAA's definition of DFCI, in particular Category (iii)(a) of the definition, which covers indebtedness "offered exclusively within the Republic of Argentina." As the Court stated on September 26, 2014: "I would think it's a matter of fact where these bonds were offered. And, obviously, the factual issue has to be dealt with." (Sept. 26, 2014 Tr. (Ex. 10) at 25:13-15.)

In order to effectuate the discovery contemplated by the Court, Plaintiffs served discovery requests on the Republic, Citibank, and other third parties involved in the issuance and

payment of the U.S. Dollar Argentine Law Exchange Bonds, such as the Dealer Managers, Exchange Agent, and Information Agent retained by the Republic in connection with the 2005 and 2010 Exchange Offers. The discovery process has established that the U.S. Dollar Argentine Law Exchange Bonds were *not* offered exclusively in Argentina. Documents produced by the Bank of New York Mellon, Barclays Capital Inc., Euroclear, Citibank, and the Republic itself show that the U.S. Dollar Argentine Law Exchange Bonds were offered in jurisdictions around the world, that these bonds were marketed in road shows across Europe and North America, that persons outside of Argentina accepted the Republic's offer and received these bonds outside of Argentina, and that payments on these bonds flow outside of Argentina.

The results of discovery are described in more detail in Point I below. Point II below shows that even if – contrary to fact – discovery suggested that the U.S. Dollar Argentine Law Exchange Bonds *were* DFCI rather than External Indebtedness, as contended by Citibank, Citibank's motion would still have to be denied because it is seeking a *modification* of the Injunction. The plain language of the Injunction covers the U.S. Dollar Argentine Law Exchange Bonds. These Bonds are within the category of "bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers," and thus, they are "Exchange Bonds" within the meaning of the Injunction. As a non-party, however, Citibank cannot seek a modification of a permanent injunction. Nor can Citibank raise arguments that the Republic itself forfeited years ago, when it failed to raise them at the time the Injunction was issued and affirmed. And if Citibank wants to argue that it should be excused from complying with the Injunction, it can make those arguments only as a defense to a charge of contempt.

Point III below addresses an argument that concerns only a subset of the U.S. Dollar Argentine Law Exchange Bonds, those with the identifying number ARARGE03E113

(the "113 ISIN"). Citibank notes that the Republic used the 113 ISIN not only when it issued U.S. Dollar Argentine Law Exchange Bonds pursuant to the 2005 Exchange Offer, but also when it issued *identical* bonds bearing the same ISIN at other times, including bonds issued to Argentine governmental entities, and in 2014 to the Spanish energy company Repsol S.A. in connection with the settlement of claims brought by Repsol. Citibank argues that it and the Republic cannot distinguish between the 113 ISIN bonds issued in 2005 and the increased amount of 113 ISIN bonds issued later when making payment, and that all 113 ISIN bonds should therefore be excluded from the Injunction.

This situation, however, does not call out for any relief. While the Court earlier expressed concern about upsetting the Repsol settlement, Repsol had sold all of the relevant bonds before the Republic and Citibank even raised the issue here, and Repsol will not be affected in any way by enforcement of the Injunction. And any problem that the Republic faces in distinguishing identical bonds with the same ISIN is a situation that the Republic has intentionally created. The Republic purposefully used the same ISIN precisely so that the later-issued bonds would be fungible with, and treated identically to, previously-issued 113 ISIN bonds. And it issued the bonds to Repsol long after the Injunction had already been issued and affirmed. Carving out the 113 ISIN bonds simply because some of the bonds using this ISIN were issued after 2005 might lay the ground work for the Republic to further eviscerate the Injunction by issuing more bonds with the same ISINs used by other Exchange Bonds and then arguing that those other Exchange Bonds should no longer be included in the Injunction.

Point IV below addresses Citibank's argument that it should be exempted from the Injunction – in effect allowed to help the Republic violate the Injunction – because the Republic has threatened to punish it if it does not participate in the payment process on the U.S.

Dollar Argentine Law Exchange Bonds. But this argument is not properly raised, is legally unsound, and is factually unsupported. Plaintiffs have repeatedly asked Citibank and the Republic to produce any evidence that Citibank will actually be punished by the Republic if it complies with the Injunction, and have received nothing. And even if there were such evidence, sanctions threatened by the *enjoined party* would not be grounds for relief.

For all these reasons, the Court should deny Citibank's motion to modify the Injunction.

BACKGROUND

A. The Republic Violates the Pari Passu Clause of the FAA

Plaintiffs are holders of bonds issued by the Republic under the FAA. Section 1(c) of the FAA provides that:

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

(FAA (Ex. 1) at 2.)[1] This "Pari Passu Clause" consists of two sentences, which impose two separate sets of obligations on the Republic. The first sentence "prohibits Argentina, as bond *issuer*, from formally subordinating the bonds by issuing superior debt." *NML Capital, Ltd. v. Republic of Argentina (NML I)*, 699 F.3d 246, 259 (2d Cir. 2012). The second sentence – the "Equal Treatment Provision" – "prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA Bonds." *Id.*

[1] Unless otherwise specified, all exhibits are annexed to the accompanying Declaration of Charles E. Enloe, and all references to docket numbers are made with respect to No. 08-cv-6978.

In 2001, the Republic defaulted on more than $80 billion of its debt, including the bonds held by Plaintiffs. *See id.* at 251. In 2005 and 2010, the Republic offered holders of defaulted bonds the opportunity to exchange their bonds for new bonds. These offers – the 2005 Exchange Offer and the 2010 Exchange Offer – were made to holders of defaulted bonds located around the world pursuant to filings with securities regulators in the United States and elsewhere. Some holders of defaulted bonds accepted the Offers, while others (including Plaintiffs) did not. *See id.* at 252-53. In the ensuing years, the Republic has honored its obligations on the new bonds, while refusing to pay what it owes on Plaintiffs' bonds. *See id.* at 253.

In December 2011, this Court held that the Republic had violated the Pari Passu Clause. (*See* Dkt. 353.)[2] The Second Circuit affirmed, making clear that the Republic had violated the Equal Treatment Provision when it "effectively . . . ranked its payment obligations to the plaintiffs below those of the [holders of Exchange Bonds]." *NML I*, 699 F.3d at 259.

B. The Court Enters the Injunction as a Remedy for the Republic's Violations

As a remedy for the Republic's violations of the Pari Passu Clause, this Court issued a permanent injunction on February 23, 2012 (as amended in November 2012, the "Injunction"). The Injunction provides, among other things, that

> Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers, or any subsequent exchange of or substitution for the 2005 and 2010 Exchange Offers that may occur in the future (collectively, the "Exchange Bonds"), the Republic shall concurrently or in advance make a "Ratable Payment" to [Plaintiffs].
>
> [. . .]

[2] While the Court's initial Order pertained only to certain of Plaintiffs' cases, substantively identical orders were entered in the remaining cases. (*See* No. 09-cv-8757, Dkt. 164; No. 10-cv-5338, Dkt. 44; No. 10-cv-9587, Dkt. 26.)

> The Republic is ENJOINED from violating Paragraph 1(c) of the FAA, including by making any payment under the terms of the Exchange Bonds without complying with its obligation pursuant to Paragraph 1(c) of the FAA by concurrently or in advance making a Ratable Payment to [Plaintiffs].

(Injunction, Dkt. 425 (Ex. 2) ¶ 2(a), (d).)[3] Thus, if the Republic makes payment on any Exchange Bonds, it must also pay Plaintiffs.

Under Fed. R. Civ. P. 65(d)(2), the Injunction automatically forbids third parties from acting "in active concert or participation" with the Republic to violate its terms. *See NML Capital, Ltd. v. The Republic of Argentina ("NML II")*, 727 F.3d 230, 243 (2d Cir. 2013). In addition, the Injunction specifically provides that "Participants" – defined as those "who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds" – are "prohibited from aiding and abetting any violation" by the Republic. (Injunction ¶¶ 2(e)-(f).)

The Second Circuit has twice upheld the Injunction, and the Supreme Court has twice denied the Republic's petitions for *certiorari*. *See NML I*, 699 F.3d at 261-64, *cert. denied*, 134 S.Ct. 201 (2013); *NML II*, 727 F.3d at 240-48, *cert. denied*, 134 S.Ct. 2819 (2014).

C. <u>The Injunction Covers All Obligations Issued Pursuant to the Exchange Offers</u>

By its plain terms, the Injunction covers all "Exchange Bonds," which it defines as all "obligations issued pursuant to the Republic's 2005 and 2010 Exchange Offers," as well as instruments substituted for those obligations. The Injunction requires the Republic to make a Ratable Payment to Plaintiffs whenever it makes payment on *any* such Exchange Bonds. (Injunction ¶ 2(a).) This includes the U.S. Dollar Argentine Law Exchange Bonds.

The Injunction does not distinguish among Exchange Bonds on the basis of what law governs, the identity of the trustee, how payment is made, what type of defaulted bond was

[3] *See also* No. 09-cv-8757, Dkt. 312; No. 10-cv-5338, Dkt. 64; No. 10-cv-9587, Dkt. 40.

tendered, or any other characteristic. To the contrary, the terms of the Injunction specifically anticipate that the characteristics of the Exchange Bonds will vary. Thus, for example, in defining Participants, the Injunction acknowledges that there may be trustees or clearing systems beyond those expressly enumerated in the Injunction who play a role in the payment on the Exchange Bonds covered by the Injunction. All that matters for purposes of the Injunction is whether obligations were issued pursuant to the 2005 or 2010 Exchange Offer, because the Injunction covers *all* Exchange Bonds, plain and simple.

D. Citibank Asks the Court To Modify the Injunction To Exclude the U.S. Dollar Argentine Law Exchange Bonds

Citibank is a Participant in the process by which the Republic makes payment on the U.S. Dollar Argentine Law Exchange Bonds. It passes funds to, and acts as the depositary for, two non-Argentine clearing systems – Euroclear and Clearstream – that the Injunction specifically identifies (along with their depositaries) as "Participants" that act in active concert or participation with the Republic to assist the Republic in fulfilling its payment obligations under the Exchange Bonds.[4] (Injunction ¶ 2(f).) Because Citibank would otherwise be prohibited by the Injunction from assisting the Republic in making payment on the U.S. Dollar Argentine Law Exchange Bonds, it has brought a series of motions asking the Court to modify the Injunction to exclude the Bonds, or at least Citibank, from its scope.

1. The Court Initially Permits Citibank To Make Payments Even Though Citibank Admitted that the U.S. Dollar Argentine Law Exchange Bonds Were Exchange Bonds

Before this Court issued the Injunction that is the subject of these proceedings, it heard from a slew of parties who claimed they would be affected. Citibank, however, said

[4] *See* [redacted] (Ex. 3); Euroclear Market Directory (Ex. 4) at 1 (listing Citibank as Euroclear's depositary in Argentina for government debt securities); Clearstream Banking Luxembourg Directory (Ex. 5) at 3 (listing Citibank as Clearstream's depositary in Argentina).

nothing and waited until after the Injunction had been issued and the matter was on appeal to the Second Circuit. Accordingly, when Citibank first moved in May 2013, the Court declined to entertain the motion due to the pendency of appellate proceedings. (Dkt. 464.) During these proceedings, the Republic itself never suggested to this Court, the Second Circuit or the Supreme Court that the Injunction did not reach the U.S. Dollar Argentine Law Exchange Bonds.

After the Supreme Court denied the Republic's petition for *certiorari* for the second time and the Injunction went into effect, Citibank re-filed its motion. Citibank admitted in its papers that the U.S. Dollar Argentine Law Exchange Bonds are Exchange Bonds (Dkt. 550 at 1, 4), and did not dispute that they are External Indebtedness. The Court nonetheless initially granted that motion, signing Citibank's proposed order, "clarifying" that the Injunction does not "prohibit payment by Citibank, N.A.'s Argentine branch on Peso- and U.S. Dollar-denominated" Argentine law bonds issued pursuant to the 2005 and 2010 Exchange Offers. (June 27, 2014 Order, Dkt. 547; *see also* June 27, 2014 Tr. (Ex. 6) at 25:25-27:24.)

2. The Court Agrees that the U.S. Dollar Argentine Law Exchange Bonds Are Covered by the Injunction

Plaintiffs moved for reconsideration with respect to the U.S. Dollar Argentine Law Exchange Bonds. In opposition briefs, neither the Republic nor Citibank disputed that the bonds were Exchange Bonds or External Indebtedness. At the hearing on July 22, 2014, Citibank conceded that the U.S. Dollar Argentine Law Exchange Bonds were Exchange Bonds covered by the Injunction. (July 22, 2014 Tr. (Ex. 7) at 20:22-23 ("The order covers exchange bonds. Our bonds are indeed exchange bonds, and that is why we sought clarification.").)

In post-hearing letters, however, Citibank and the Republic argued for the first time that because the Republic had increased the amount outstanding of a particular series of bond issued pursuant to the 2005 Exchange Offer – the bonds bearing the 113 ISIN – that series

of bond should no longer be subject to the Injunction. Citibank and the Republic noted that some of the increased amounts had been given to Spanish energy company Repsol S.A. in connection with the settlement of an expropriation claim against the Republic. (Dkts. 605, 609, 611.)

The Republic and Citibank failed to mention at the time that: (i) the Republic had purposefully used the same ISIN, so that the increased amount of 113 ISIN bonds would benefit from the market and liquidity that had been created by the bonds with that ISIN previously issued pursuant to the 2005 Exchange Offer – in other words, the 113 ISIN bonds issued to Repsol were intended to be identical in every way to the 113 ISIN bonds issued in 2005; (ii) the Republic and Repsol were aware that the bonds issued to Repsol in early 2014 might be affected by the Injunction, which had been issued and affirmed long before; (iii) the Republic-Repsol settlement agreement specifically contemplated that possibility; and (iv) Repsol had already sold the bonds – meaning the settlement was fully consummated. The Republic and Citibank also failed to make clear that this issue affects only one subset of the U.S. Dollar Argentine Law Exchange Bonds – those with the "113" ISIN – and that the remainder of the U.S. Dollar Argentine Law Exchange Bonds have different ISINs and are fully distinguishable from the 113 ISIN bonds later issued to Repsol and others. (*See infra* Point III.)

On July 28, 2014, the Court issued a further Order noting that it did "not wish to upset the settlement with Repsol." (July 28, 2014 Order, Dkt. 613, at 4.) "For this reason only," the Court allowed Citibank to make a one-time payment on the U.S. Dollar Argentine Law Exchange Bonds. With respect to all *future* payments on the U.S. Dollar Argentine Law Exchange Bonds, however, the Court rescinded its earlier order that had allowed Citibank to make payment, and directed the parties to devise a way to distinguish between the 113 ISIN bonds issued to Repsol and previously-issued iterations of the 113 ISIN bonds. (*Id.*)

3. The Republic and Citibank Concede on Appeal that the U.S. Dollar Argentine Law Exchange Bonds Were Issued Pursuant to the 2005 and 2010 Exchange Offers

Both Citibank and the Republic appealed from the July 28 Order. The Second Circuit panel judges repeatedly expressed their view that the Injunction clearly covers the U.S. Dollar Argentine Law Exchange Bonds. (*See, e.g.,* Sept. 18, 2014 Tr. (Ex. 8) at 10:10-11 ("[T]he injunction is pellucid that it covers all exchange bonds."), 13:8-10 ("I don't know how you could seriously argue that the Argentine bonds aren't covered by the definition [of Exchange Bonds]."). And both the Republic and Citibank conceded that this indebtedness had arisen in connection with the 2005 and 2010 Exchange Offers (id. at 13:12-13, 51:7-13), meaning that the bonds satisfy the Injunction's definition of "Exchange Bond." The Second Circuit dismissed the appeals for lack of jurisdiction because the July 28 Order of this Court was "a clarification, not a modification" of the Injunction. *See Aurelius Capital Master, Ltd. v. The Republic of Argentina*, No. 14-2689, slip op. at 2 (2d Cir. Sept. 19, 2014) (Ex. 9). This means, necessarily, that granting Citibank's motion – which Citibank has alternatively referred to as a motion for clarification and a motion for a modification – would entail a modification of the Injunction.

4. Citibank Once Again Moves To Modify the Injunction

After losing before the Second Circuit, Citibank renewed its motion in this Court for a third time. The Court heard argument on September 26, 2014. (*See* Sept. 26, 2014 Tr. (Ex. 10.) Citibank and the Republic may note that the Court suggested at the hearing that it had not intended the Injunction to cover the U.S. Dollar Argentine Law Exchange Bonds – either because those Bonds were not issued solely in exchange for debt issued under the FAA (as opposed to other defaulted debt), or because the Bonds are not governed by New York law. (*Id.* at 18:18-19:2, 26:21-27:6, 30:2-12.) The Court's concerns, however, are belied by the plain language of the Injunction. The Injunction applies to *all* "Exchange Bonds," a term defined to

include *all* bonds and other obligations issued pursuant to the 2005 and 2010 Exchange Offers. Since there is no question that the U.S. Dollar Argentine Law Exchange Bonds were issued pursuant to the Exchange Offers, there is no question those Bonds are covered by the Injunction.

In any event, the Court made clear that it had "not made a ruling" (*id.* at 54:11-15), and ultimately agreed with Plaintiffs' suggestion to defer a decision to allow for discovery and for further briefing (*id.* at 51:19-52:21). It issued an order providing that:

> in order to allow the parties and non-party Citibank, N.A. the time necessary to present a sufficient record and legal argument to resolve the issues presented by [Citibank's motion], the Court will defer the hearing on the Motion scheduled for September 26, 2014, and enlarge the briefing schedule, to dates to be set . . .

(Dkt. 683.) On November 10, 2014, the Court issued a further order adjourning the briefing and hearing schedule a second time, and directing that "the parties and non-parties served with discovery related to the Motion cooperate in the production of relevant documents and information, so that the Court will have the benefit of a complete and accurate record in resolving the Motion." (Dkt. 714.) In connection with these adjournments, Plaintiffs agreed that Citibank could process the September 30, 2014 and December 31, 2014 interest payments due on the U.S. Dollar Argentine Law Exchange Bonds.

ARGUMENT

I.

DISCOVERY HAS ESTABLISHED THAT THE U.S. DOLLAR ARGENTINE LAW EXCHANGE BONDS WERE NOT OFFERED EXCLUSIVELY IN ARGENTINA, AND THAT THEY ARE EXTERNAL INDEBTEDNESS

The U.S. Dollar Argentine Law Exchange Bonds were not offered exclusively in Argentina – they were offered in jurisdictions all over the world – and they are External Indebtedness (and not DFCI).[5] The FAA defines External Indebtedness as debt payable in a currency other than Argentine pesos (FAA at 16); the *U.S. Dollar* Argentine Law Exchange Bonds fit this description. The only exception is for Domestic Foreign Currency Indebtedness ("DFCI"), which consists of three categories:

> Category (i): "the following indebtedness (a) Bonos del Tesoro issued under Decree No. 1527/91 and Decree No. 1730/91, (b) Bonos de Consolidacion issued under Law No. 23,982 and Decree No. 2140/91, (c) Bonos de Consolidacion de Deudas Previsionales issued under Law No. 23,982 and Decree No. 2140/91, (d) Bonos de la Tesoreria a 10 Afios de Plaza issued under Decree No. 211/92 and Decree No. 526/92, (e) Bonos de la Tesoreria a 5 Afios Plazo issued under Decree No. 211/92 and Decree No. 526/92, (f) Ferrobonos issued under Decree No. 52/92 and Decree No. 526/92 and (g) Bonos de Consolidacion de Regalias Hidrocarburiferas a 16 Afios de Plaxo issued under Decree No. 2284/92 and Decree No. 54/93."
>
> Category (ii): "Any indebtedness issued in exchange, or as replacement, for the indebtedness referred to in (i) above."
>
> Category (iii): "Any other indebtedness payable by its terms, or which at the option of the holder thereof may be payable, in a

[5] Citibank's contention to the contrary is not only factually incorrect – as explained below – but also legally irrelevant. The Injunction, by its terms, applies to all Exchange Bonds, and is not limited to those that are also "External Indebtedness." As the Second Circuit made clear in *NML I*:

> Once the district court determined that Argentina had breached the FAA and that injunctive relief was warranted, the court had considerable latitude in fashioning the relief. The performance required by a decree need not, for example, be identical with that promised in the contract.

699 F.3d at 261.

> currency other than the lawful currency of the Republic of Argentina which is: (a) **offered exclusively within the Republic of Argentin[a]** or (b) issued in payment, exchange, substitution, discharge or replacement of indebtedness payable in the lawful currency of the Republic of Argentin[a]."

(*Id.* at 17 (emphasis added).)

The Republic and Citibank argue that the U.S. Dollar Argentine Law Exchange Bonds are DFCI because they were: (1) issued in exchange for Category (i) debt (so as to fall within Category (ii)); and (2) "offered exclusively" in Argentina (so as to fall within Category (iii)(a)). (*See* Republic's September 23, 2014 Memorandum of Law, Dkt. 673 ("Rep. Mem.") at 4-7; Citibank's Sept. 22, 2014 Memorandum of Law, Dkt. 668 ("Citi Mem.") at 9-11.) Neither contention is correct.[6]

A. The U.S. Dollar Argentine Law Exchange Bonds Were Not "Offered Exclusively" in Argentina

The U.S. Dollar Argentine Law Exchange Bonds were *not* "offered exclusively" in Argentina, and therefore are not DFCI under Category (iii)(a). The evidence, including evidence gathered in discovery, overwhelmingly shows that the U.S. Dollar Argentine Law Exchange Bonds were offered around the world, and that persons around the world accepted the offer and received those bonds.

When issuers offer securities to the public – whether directly or through an exchange offer – they do so using standard procedures that eventually result in investors owning beneficial interests in the newly-issued securities. These steps include:

- Registering the securities with regulators.
- Publishing and filing offering documents with regulators, including a "Prospectus" that explains to investors the terms of the securities and makes any required disclosures. According to the U.S. securities laws, a

[6] Neither the Republic nor Citibank invokes the other categories of DFCI, which are inapplicable.

"prospectus" is the document that "offers any security for sale or confirms the sale of any security." 15 U.S.C. § 77b(10).

- Advertising the securities issuance directly to investors through "road shows" and media.
- Listing the securities in securities markets to ensure that investors who receive securities through the issuance can easily resell them on the secondary market.
- Hiring financial and legal advisors to assist with the offer.
- Establishing the rules to govern acceptance of the offer and the distribution of new securities (including the governing law).
- Distributing securities to the beneficial owners who accept the offer.
- Establishing a mechanism to make payment on the securities.

At each step in the Republic's offering of the U.S. Dollar Argentine Law Exchange Bonds, it operated outside of its borders, soliciting non-Argentinians outside of Argentina, using non-Argentine agents and facilities whose activities were governed by non-Argentine law. The Republic and Citibank nevertheless attempt to contort the evidence, realty, and common sense to suggest that bonds offered in countries around the world were somehow "offered exclusively" in Argentina. Their contentions are completely belied by the facts.

The Republic's Prospectuses and Other Offering Documents Filed with Regulators Around the World Make Clear It Was Offering the U.S. Dollar Argentine Law Exchange Bonds Outside of Argentina. In connection with the 2005 and 2010 Exchange Offers, the Republic filed prospectuses and other offering documents with securities regulators around the world, including in the United States, Luxembourg, Germany, and Italy. Those filings indicated that if a person held beneficial interests in certain defaulted governmental debt securities (the "Eligible Securities"), that person could tender those interests in exchange for

certain newly-issued "New Securities" or "Exchange Bonds."[7] Among the New Securities or Exchange Bonds included in each of these Exchange Offers were the U.S. Dollar Argentine Law Exchange Bonds.[8] The Republic also offered Exchange Bonds that were denominated in other currencies (such as Euros or Argentine Pesos), and governed by other law (such as New York or English law). Which Exchange Bonds a person was offered and could receive depended on which debt that person tendered.[9] In the United States, the Republic registered all the Exchange Bonds – including the U.S. Dollar Argentine Law Exchange Bonds – with the Securities and Exchange Commission, meaning those Bonds were offered in the United States according to U.S. regulations.[10]

It is crystal clear that the U.S. Dollar Argentine Law Exchange Bonds, as well as the other Exchange Bonds, were offered around the world, not just in Argentina. The Republic's regulatory filings expressly stated that the "Offer" it made in 2005 was made to residents of the United States, Austria, Denmark, Germany, Italy, Luxembourg, Spain, and the Netherlands.[11]

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[7] *See, e.g.*, 2005 U.S. Prospectus Supplement (Ex. 11) ("2005 PS") at S-3 ("Argentina is offering holders of Eligible Securities the opportunity to tender their Eligible Securities in exchange for newly issued New Securities . . ."), S-10 to S-13 (describing tender procedures); 2010 U.S. Prospectus Supplement (Ex. 12) ("2010 PS") at S-5, S-17 to S-23 (same).

[8] *See* 2005 PS (Ex. 11) at S-17, 2010 PS (Ex. 12) at S-38, and 2010 Luxembourg Prospectus (Ex. 13) at 106 (all listing "U.S. dollar-denominated Pars (governed by Argentine law)" and "U.S. dollar-denominated Discounts (governed by Argentine law)" among the "New Securities" being "Offered," and noting that the Republic would also be issuing "GDP-linked" Securities with the same currencies and governing law as the Pars and Discounts); *see also* 2005 German Prospectus (Ex. 14) at 1, 74, 2005 Italian Prospectus (Ex. 15) at 244, 270, 2005 Spanish Disclosure (Ex. 16) at 7, and 2010 Italian Prospectus (Ex. 17) at 33 (all providing that holders of certain defaulted debt could receive Exchange Bonds denominated in U.S. Dollars and governed by Argentine law).

[9] *See, e.g.*, 2005 PS (Ex. 11) at S-16; 2010 PS (Ex. 12) at S-26; 2010 Luxembourg Prospectus (Ex. 13) at 25.

[10] *See infra* notes 20-22 and accompanying text.

[11] *See* 2005 PS (Ex. 11) at (iii) ("The Offer is being extended to holders of Eligible Securities in the United States, Luxembourg and Denmark on the basis of this prospectus supplement and the accompanying prospectus . . . . The Offer is also being extended to holders of Eligible Securities in . . . Germany and Italy on the basis of separate prospectuses approved by the relevant regulatory authorities in these jurisdictions, and in the Netherlands and Spain on the basis of . . . this prospectus supplement and the accompanying prospectus, together with such additional disclosure required by the regulatory authorities."), S-95 ("The Offer will be made in Austria by means of a public

Similarly, the Republic stated that the "Invitation" it made in 2010 was made to residents of the United States, Austria, Germany, Italy, Luxembourg, the Netherlands, Spain, Switzerland, and the United Kingdom.[12] There is also evidence that the offers were made in several additional jurisdictions outside of Argentina, including Bahrain, Belgium, Canada, the Cayman Islands, the Channel Islands, France, Hong Kong, Ireland, Monaco, the Netherlands Antilles, Portugal, Russia, Singapore, and Uruguay.[13] To be clear, the Republic distributed these prospectuses and related offering documents to investors and individuals while they were in their resident foreign locations; investors were not required to come to Argentina or contact the Republic in Argentina in order to receive an offer.

And there is no question that the Republic's "Offer" and "Invitation" to residents of each of these countries included the U.S. Dollar Argentine Law Exchange Bonds. The terms "Offer" and "Invitation" were defined to include all transactions contemplated by the filings, including the exchange of certain defaulted bonds for U.S. Dollar Argentine Law Exchange Bonds.[14] The filings, moreover, were replete with references to the U.S. Dollar Argentine Law Exchange Bonds: they specifically listed the identifying numbers (ISINs) of the U.S. Dollar

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offer . . ."); *see also id.*at S-97 to S-100; 2005 German Prospectus (Ex. 14); 2005 German Notice (Ex. 18); 2005 Italian Prospectus (Ex. 15); 2005 Italian Prospectus Supplement (Ex. 19); 2005 Italian Regulatory Document (Ex. 20); 2005 Luxembourg Addendum (Ex. 21); 2005 Spanish Prospectus Supplement (Ex. 22); 2005 Spanish Disclosure (Ex. 16); 2005 Spanish Registration (Ex. 23).

[12] *See* 2010 PS (Ex. 12) at (v) ("This invitation is being extended to holders of Eligible Securities in the United States on the basis of this document and the accompanying Prospectus."); 2010 Luxembourg Prospectus (Ex. 13) at Cover ("The Invitation is being made to holders of Eligible Securities in Austria, Germany, Italy, Luxembourg, the Netherlands, Spain, and the United Kingdom . . . and in the United States . . . and Switzerland"); *see also* 2010 PS (Ex. 12) at S-23; 2010 Luxembourg Prospectus (Ex. 13) at xi, 162, 165-69; 2010 Luxembourg Prospectus Supplement (Ex. 24); 2010 Approval by Luxembourg Regulator (Ex. 25); [REDACTED] (Exs. 26-29); 2010 Italian Prospectus (Ex. 17); 2010 Swiss Gazette Notice (Ex. 30).

[13] *See* 2005 PS (Ex. 11) at S-95 to S-100; 2005 Spanish Registration (Ex. 23) at 2; 2010 PS (Ex. 12) at S-23, S-151 to S-159; 2010 Luxembourg Prospectus (Ex. 13) at 162-70*; see also* [REDACTED], BNYM00000061 (Ex. 31) [REDACTED]

[14] *See* 2005 PS (Ex. 11) at Cover; 2010 PS (Ex. 12) at Cover; 2010 Luxembourg Prospectus (Ex. 13) at (ii).

Argentine Law Exchange Bonds, described the form and settlement of the U.S. Dollar Argentine Law Exchange Bonds, discussed terms and risks associated only with those Exchange Bonds governed by Argentine Law (including the U.S. Dollar Argentine Law Exchange Bonds), and included sample calculations applicable to the U.S. Dollar Argentine Law Exchange Bonds.[15]

U.S. Dollar Argentine Law Exchange Bonds Were Offered Outside Argentina in the Same Exchange Offers as the Other Exchange Bonds. Contrary to the evidence, the Republic argues that there were two separate Exchange Offers: a domestic offering of Exchange Bonds governed by Argentine law, and an international offering of Exchange Bonds governed by foreign law. (*See* Rep. Mem. at 5, 6.) This is simply not true. Although the decrees relied on by the Republic did specify the procedures for an exchange inside Argentina ("Operating Procedures applicable in the Republic of Argentina"), and the procedures for an exchange outside Argentina ("applicable to the international offer"),[16] it is *not* the case that the U.S. Dollar Argentine Law Exchange Bonds were offered only pursuant to the internal Argentine procedures. On the contrary, the full set of Exchange Bonds, including the U.S. Dollar Argentine Law Exchange Bonds, was offered outside of Argentina pursuant to the international procedures.[17] And the full set of Exchange Bonds was also offered inside Argentina pursuant to

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[15] *See, e.g.*, 2005 PS (Ex. 11) at S-20, S-21, S-33, S-70 to S-71, S-104 to S-105; 2010 PS (Ex. 12) at S-39, S-42, S-44, S-47, S-52, S-113, F-1, F-3; 2010 Luxembourg Prospectus (Ex. 13) at 42, 46, 63, 123, 126, 173, F-1, F-3.

[16] Decree 1735/04 (Ex. 32) at Art. 1 ("It is hereby provided that the debt of the NATIONAL STATE . . . be restructured by means of a national and international exchange to be carried out to the extent and under the terms and conditions provided hereunder, as set for in the form of Prospectus Supplement, applicable to the international offer, a copy of which . . . is included as Exhibit I hereto, [and] in the Operating Procedures applicable in the REPUBLIC of ARGENTINA, included as Exhibit II hereto . . . "; Decree 536/10 (Ex. 33) at § 1 ("NATIONAL STATE debt restructuring is ordered . . . as described in the applicable Procedure model in the REPUBLIC of ARGENTINA, which [is attached] as Exhibit I of this decree . . . and in the model of the Prospectus Supplement, applicable to the international offer, [which is attached] as Exhibit II of this decree . . ."); *see also* Rep. Mem. at 6.

[17] *See* Exhibit I to Decree 1735/04 (Ex. 34) at 17; Exhibit II to Decree 536/10 (Ex. 35) at S-38.

the domestic procedures.[18] Indeed, one of the decrees relied on by the Republic had a separate exhibit with terms relevant only to Exchange Bonds governed by Argentine law – including the U.S. Dollar Argentine Law Exchange Bonds – and that document expressly stated that both the international Prospectus Supplement (governing the offer outside Argentina) and the domestic Operating Procedures (governing the offer inside Argentina) applied to those Argentine Law Exchange Bonds.[19] So, while the U.S. Dollar Argentine Law Exchange Bonds may have been offered within Argentina, they certainly were not "offered exclusively" within Argentina.

The Republic's Offering of the U.S. Dollar Argentine Law Exchange Bonds Was Not Treated as an "Offshore Securities Offering" Under U.S. Securities Law. The Republic asserts – without citation to any evidence – that its offerings of the U.S. Dollar Argentine Law Exchange Bonds "were treated as offshore securities offerings for [U.S.] Securities Act purposes, and were *not* registered with the SEC under the Securities Act." (Rep. Mem. at 6.) This assertion is belied by the Republic's own securities filings. Before each Exchange Offer, the Republic filed Registration Statements for new bonds that would be offered under "New York law, English law, or *Argentine law*."[20] Its subsequent Prospectus Supplement made clear that it

[18] *See* Exhibit II to Decree 1735/04 (Ex. 36) at 1132 (Tabla 3); Exhibit I to Decree 536/10 (Ex. 37) at 40 (Tabla 1).

[19] Decree 1735/04 (Ex. 32) at Ex. III ("This document complements what is set forth in the Prospectus Supplement and the Applicable Operating Procedures in the Republic of Argentina as it relates to the applicable conditions of bonds issued under the laws of the Republic of Argentina, and should be analyzed in conjunction with the aforementioned documents.").

[20] Post Effective Amendment No. 1 to Registration Statement (Dec. 23, 2004) (Ex. 76) at 176; Registration Statement (Dec. 16, 2009) (Ex. 77) at 11.

had registered *all* of the "New Securities,"[21] a term defined to include the U.S. Dollar Argentine Law Exchange Bonds.[22]

The Republic Actively Marketed the Exchange Offers Outside of Argentina. The Republic, moreover, actively marketed the Exchange Offers – including the U.S. Dollar Argentine Law Exchange Bonds – around the world. In both 2005 and 2010, for example, the Republic took out large advertisements in the Wall Street Journal and the Financial Times notifying investors of the Exchange Offers, and referring them to the prospectuses discussed above.[23] The Republic also agreed that announcements regarding the Exchange Offers would be published in the Wall Street Journal, the Financial Times, and a Luxembourg newspaper.[24]

The Republic's officials, along with its investment bankers – Merrill Lynch, Citibank, Barclays Capital Inc., UBS Securities LLC, and Deutsche Bank Securities Inc. – also conducted a series of "road shows" and meetings with the owners of Eligible Securities and their representatives in countries around the world, including [REDACTED] [REDACTED].[25] "Road shows" are commonplace in global securities offerings. The purpose is to allow the issuer and its financial advisors to communicate the terms of the offer, in person, to eligible participants. In these meetings, [REDACTED]

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[21] 2005 PS (Ex. 11) at S-103 ("Argentina has filed with the SEC a registration statement under the Securities Act covering the New Securities."), (ii) ("The New Securities that Argentina issues to tendering holders of Eligible Securities in the United States are being offered under Argentina's registration statement . . . filed with the United States Securities and Exchange Commission."); 2010 PS (Ex. 12) at (iv) (same).

[22] 2005 PS (Ex. 11) at S-17; 2010 PS (Ex. 12) at S-38.

[23] Exs. 38-41; *see also* 4/30/10 advertisement in Luxemberger Wort (Ex. 42).

[24] *See* 2005 PS (Ex. 11) at S-57; 2010 PS (Ex. 12) at S-92; *see also* 2005 PS (Ex. 11) at S-71 (requiring certain notices to be published in "London's *Financial Times* and New York City's *The Wall Street Journal*").

[25] *See* [REDACTED], BCI_0006409 (Ex. 43); [REDACTED], BCI_0013044 (Ex. 44).

[REDACTED] .[26] [REDACTED] .[27] And the Republic provided information about tax consequences in multiple jurisdictions, without distinguishing between U.S. Dollar Argentine Law Exchange Bonds and other Exchange Bonds.[28]

Persons Who Were Offered the U.S. Dollar Argentine Law Exchange Bonds Outside Argentina Accepted the Republic's Offer and Received U.S. Dollar Argentine Law Exchange Bonds Outside of Argentina. The Republic, through its counsel, has *admitted* that beneficial owners of the securities eligible to be tendered for U.S. Dollar Argentine Law Exchange Bonds "were located outside of Argentina at the time of the Exchanges," and that those owners "were not prohibited from tendering their beneficial interests in the Exchanges."[29]

And in addition to receiving the offers outside Argentina – through offering documents, advertisements, "road shows," and meetings – these beneficial owners located outside of Argentina actually received U.S. Dollar Argentine Law Exchange Bonds. The Republic flatly refused to provide any information about the locations of participating beneficial owners[30] – suggesting the information it has is helpful to Plaintiffs. And, indeed, information

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[26] *See* [REDACTED], BCI_0006409 (Ex. 43) at 65, 68, 70.

[27] *See* [REDACTED], BCI_0006385 (Ex. 45) at 6; [REDACTED], BCI_0011121 (Ex. 46) at 9, 11, 13.

[28] *See* 2005 PS (Ex. 11) at S-79 to S-91; 2010 PS (Ex. 12) at S-120 to S-147.

[29] *See* 11/26/14 Email from D. Northrop to C. Enloe (Ex. 47).

[30] *See* The Republic of Argentina's Supplemental Responses and Objections to Plaintiffs' Interrogatories and Document Requests (Oct. 31, 2014) (Ex. 48) ("Rep. Resp. & Obj.") at 7, 13.

produced by Citibank shows that roughly [redacted] of the securities tendered for U.S. Dollar Argentine Law Exchange Bonds were tendered by beneficial owners outside Argentina (including in [redacted]).[31]

Similarly, documents produced by the Bank of New York Mellon and Citibank show that roughly [redacted] of the relevant defaulted bonds were tendered by, and [redacted] of the U.S. Dollar Argentine Law Exchange Bonds were issued to, beneficial owners holding through clearing systems outside of Argentina – *i.e.*, Euroclear and Clearstream.[32] These clearing systems are used exclusively or nearly exclusively by investors and individuals outside of Argentina; documents produced by Euroclear show, for example, that [redacted].[33] The involvement of non-Argentine clearing systems is also significant because the way beneficial owners accepted the Republic's Offers was by submitting "electronic acceptance" notices to a "principal clearing system," such as Euroclear or Clearstream.[34] Thus, beneficial owners could accept the Republic's Offers by submitting notices to clearing systems outside of Argentina, and the evidence shows that many did so. In the 2010 Exchange Offer, moreover, *every* bondholder who wished to accept the Republic's Offer also had to submit a letter of transmittal to the Information Agent, which was an entity in Italy.[35]

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[31] *See* CITI00003820 (Ex. 49).

[32] *See id.*; BNYM00001592 (Ex. 50).

[33] *See* EUR0001369 (Ex. 51).

[34] *See* 2005 PS (Ex. 11) at S-10 to S-11; 2010 PS (Ex. 12) at S-17 to S-18.

[35] *See* 2010 PS (Ex. 12) at S-21.

The Republic Listed the U.S. Dollar Argentine Law Exchange Bonds, and Their Predecessors, on Exchanges Outside of Argentina. The Republic registered each series of U.S. Dollar Argentine Law Exchange Bonds for trading on the Luxembourg stock exchange, and at least some on the Frankfurt, Stuttgart, or Berlin exchanges.[36] Similarly, many of the securities tendered for U.S. Dollar Argentine Law Exchange Bonds were listed in Luxembourg.[37]

Entities Outside Argentina Managed the Exchange Offers. The Republic also reached outside of its borders when it hired financial institutions to assist the Republic in offering the Exchange Bonds – including the U.S. Dollar Argentine Law Exchange Bonds – to the broadest audience possible. The Republic retained five U.S. financial institutions (Merrill Lynch, Citibank, Barclays Capital Inc., UBS Securities LLC, and Deutsche Bank Securities Inc.) as Dealer Managers to solicit bondholders to participate in the Exchange Offers. It retained the Bank of New York Mellon to serve as Exchange Agent and its Luxembourg affiliate to serve as the Luxembourg Listing Agent or Luxembourg Exchange Agent, and Georgeson Shareholder Communications Inc. (a U.S. entity) and Georgeson s.r.l. (its Italian affiliate) to serve as the Information Agent. New York-based Cleary Gottlieb served as Legal Advisor to the Republic.[38] That the Republic elected so many advisors with a global presence to help manage the public, international offerings of the U.S. Dollar Argentine Law Exchange Bonds further belies its contention that those Bonds were somehow offered "exclusively" within Argentina.

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[36] *See* 2005 Luxembourg Listing Supplement (Ex. 52); Bourse de Luxembourg Website (Exs. 53-57); 2005 PS (Ex. 11) at S-94; 2010 PS (Ex. 12) at S-150; Websites of Borse Frankfurt, Boerse Stuttgart, and Frankfurter Algemeine (Exs. 58-60).

[37] *See* 10/19/14 Email from Luxembourg Stock Exchange (Ex. 61); 11/24/98 Listing Memorandum (Ex. 62) at 4; 5/25/00 Listing Memorandum (Ex. 63) at 4.

[38] 2005 PS (Ex. 11) at S-13, Back Cover; 2010 PS (Ex. 12) at S-24, S-161, Back Cover; *see also* 2005 German Prospectus (Ex. 14) at 298; 2005 Italian Prospectus (Ex. 15) at 5, 6; 2005 Spanish Prospectus Supplement (Ex. 22) at 193; 2010 Luxembourg Prospectus (Ex. 13) at Back Cover; 2010 Italian Prospectus (Ex. 17) at 9.

The Republic Chose New York Law and Courts to Govern the Exchange Offers. In the offering documents, the Republic agreed that any disputes arising out of the Exchange Offers as made in the United States (or other jurisdictions governed by the U.S. filings), including the offers of the U.S. Dollar Argentine Law Exchange Bonds, were to be heard in *New York* courts, and that the acceptance notices submitted by bondholders would be governed by *New York* law.[39] Similarly, the Republic agreed that disputes arising out of the 2010 Exchange Offer as made in Luxembourg and other European jurisdictions would also be heard in New York courts, and that acceptance notices submitted in those jurisdictions would be governed by English law.[40] If the offers of the U.S. Dollar Argentine Law Exchange Bonds were truly made "exclusively" within Argentina, there would have been no reason for disputes about those offers to be heard in New York, and the Republic presumably would have chosen Argentine law to govern the terms of those offers. The implication of the Republic's choice of law and forum is clear – the Republic elected not to have Argentine law govern the Exchange Offers because those Exchange Offers did not occur "exclusively" within Argentina.

Payments on the U.S. Dollar Argentine Law Exchange Bonds Flow Outside of Argentina. When the Republic makes payment on the U.S. Dollar Argentine Law Exchange Bonds, the payments flow around the world. [redacted]

.[41] Non-Argentine entities JPMorgan Chase, Euroclear, and Clearstream have all made filings with this Court indicating that they have been among the recipients of these

[39] *See* 2005 PS (Ex. 11) at S-58; 2010 PS (Ex. 12) at S-93.

[40] *See* 2010 Luxembourg Prospectus (Ex. 13) at 96.

funds.[42] And Euroclear's documents show that [redacted]
[redacted].[43]

Eligible Securities Could Be Tendered Through Non-Argentine Clearing Systems. The Republic states that "[t]he bonds tendered to receive these Argentine Law Bonds could only be tendered (directly or indirectly) through Caja de Valores S.A., an entity located in Argentina." (Rep. Mem. at 6.) Even if, as a procedural matter, the bonds tendered in exchange for the U.S. Dollar Argentine Law Exchange Bonds had to flow through Caja, that would not change the fact that the Republic presented its offers to exchange in numerous countries outside of Argentina, to residents of those countries.

In all events, bondholders were permitted to tender through clearing systems outside of Argentina,[44] and many did so. The Republic concedes as much with respect to the 2010 Exchange Offer – its interrogatory responses state that some of the "amounts tendered" in exchange for U.S. Dollar Argentine Law Exchange Bonds were "submitted through Euroclear and Clearstream."[45] As mentioned above, documents produced by the Bank of New York Mellon and Citibank show that approximately [redacted] of the relevant defaulted bonds were tendered, and [redacted] of the U.S. Dollar Argentine Law Exchange Bonds were issued, through Euroclear and Clearstream.[46] And documents produced by Euroclear show that [redacted]

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[41] *See* [redacted] (Ex. 64). [redacted] *See id.*

[42] *See* Dkt. 556, 566, 606.

[43] *See* EUR0000002 to EUR0000012 (Exs. 65-75).

[44] 2005 PS (Ex. 11) at S-10 to S-11; 2010 PS (Ex. 12) at S-17 to S-18.

[45] Rep. Resp. & Obj. (Ex. 48) at 14.

[46] *See supra* notes 32 and 34and accompanying text.

[redacted].[47] The fact that bonds were tendered through clearing systems outside of Argentina is particularly significant given that beneficial owners accepted the Republic's offer by submitting electronic acceptance notices to those clearing systems.

The Other Factors Relied On by the Republic Are Irrelevant. Finally, the Republic focuses on various attributes of the U.S. Dollar Argentine Law Exchange Bonds that have nothing to do with where those Bonds were *offered*. (*See* Rep. Mem. at 6-7.) While it is true, for example, that The Bank of New York Mellon was not the trustee for the Bonds, that says nothing about where they were *offered*. Similarly, it is irrelevant what law governs the Bonds, what prefix their identifying numbers begin with, whether they include *pari passu* or acceleration clauses, or how bond payments will be made. There is no dispute that the various Exchange Bonds, including the U.S. Dollar Argentine Law Exchange Bonds, differ from each other in certain ways. But they were all *offered* outside of Argentina.

For all of these reasons, the U.S. Dollar Argentine Law Exchange Bonds were not "offered exclusively" in Argentina, and therefore do not fall within Category (iii)(a) of the FAA's definition of DFCI.

B. The U.S. Dollar Argentine Law Exchange Bonds Were Not Issued in Exchange, or as Replacement, for Specifically Enumerated Indebtedness

Under Category (ii), indebtedness qualifies as DFCI if it was "issued in exchange, or as replacement, for the indebtedness referred to in" Category (i). (FAA at 17.) The Republic contends that because *some* of the bonds tendered in exchange for U.S. Dollar Argentine Law Exchange Bonds fell within Category (i), *all* of the U.S. Dollar Argentine Law Exchange Bonds are DFCI under Category (ii). (*See* Rep. Mem. at 5.) At the September 26, 2014 oral argument,

[47] *See supra* note 33 and accompanying text.

the Court observed that it "would think that [Category] (ii) doesn't apply." (Ex. 10 at 24:9-10.) The Court was correct, because the Republic has misread the plain language of the FAA.

The parties agree that only a small fraction of the bonds tendered for the U.S. Dollar Argentine Law Exchange Bonds fell within Category (i). Plaintiffs believe that only approximately 3% of the bonds tendered for the U.S. Dollar Argentine Law Exchange Bonds were from Category (i).[48] Even the Republic's list of purported Category (i) bonds only includes bonds making up 17% of those tendered for U.S. Dollar Argentine Law Exchange Bonds,[49] and Plaintiffs believe that list is overinclusive.[50] Details aside, the parties agree that the vast majority of the bonds tendered for U.S. Dollar Argentine Law Exchange Bonds were not in Category (i).

The Republic seems to suggest that this is of no moment – that even if only a tiny portion of tendered bonds were within Category (i), the entirety of the U.S. Dollar Argentine Law Exchange Bonds are DFCI under Category (ii). But Category (ii) only covers indebtedness

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[48] *See* Republic's Updated Securities Amount Tendered Chart (Dec. 23, 2014) (Ex. 78) (listing amounts of each Eligible Security tendered in exchange for U.S. Dollar Argentine Law Exchange Bonds in the 2010 Exchange Offer); BNYM00001554 (Ex. 79) ([redacted]). Plaintiffs contend the only Eligible Securities that might possibly fit in Category (i) are those with ISINs ARARGE044081, ARARGE043992, ARARGE044156, ARARGE030114, ARP04981BA66, ARARGE043927, ARARGE044008, ARARGE044164, and ARARGE030056.

[49] *See* Republic's Response to Interrogatory No. 4 (Dec. 23, 2014) (Ex. 80).

[50] The Republic claims that certain Eligible Securities were issued under Law 23,982 (Ex. 81) and Decree 2140/91 (Ex. 82) – *i.e.*, they fell within Category (i)(b) or (c) of the DFCI definition. However, many of the Eligible Securities the Republic identifies were *not* issued under that decree or law, or were *also* issued under other decrees or laws not listed in Category (i). For example, the Debt Consolidation Bonds, U.S. Dollar 2nd Series (Pro 4) were issued under Law 24,411 (Ex. 83), Decree 726/97 (Ex. 84), and Resolution 389/97 (Ex. 85). Similarly, the Debt Consolidation Bonds, U.S. Dollar 3rd Series (Pro 6) were issued under Decree 1318/98 (Ex. 86) and Resolution 562/98 (Ex. 87). The Debt Consolidation Bonds, U.S. Dollar 5th Series (Pro 10) were issued under Law 25,401 (Ex. 88) and Resolution 111/01 (Ex. 89). And the Debt Consolidation Bonds, U.S. Dollar 2nd Series (Pre 4) were issued under Law 24,130 (Ex. 90) and Decree 684/93 (Ex. 91).

Indeed, the definition of DFCI in the Exchange Bond documentation prepared in 2005 and 2010 added bonds which that the Republic now claims were part of the FAA's Category (i) in 1994. *See* 2005 PS (Ex. 11) at 204 (adding "Bonos de Consolidacion issued under Law No. 24,411 and Decree No. 726/971" – such as the Debt Consolidation Bonds, U.S. Dollar 2nd Series (Pro 4) – to DFCI definition); 2010 PS (Ex. 12) at 18 (same). If these bonds had already been covered by the DFCI definition in place at the time of the FAA in 1994, there would have been no need to supplement the definition of DFCI in this way in 2005 and 2010.

issued in exchange for Category (i) indebtedness – not debts issued *partially* in exchange for Category (i) indebtedness, and *partially* in exchange for other debts. Notably, the FAA does not say that an indebtedness constitutes DFCI if it is issued "in whole or in part" for Category (i) indebtedness. Even though the FAA frequently uses the "in whole or in part" formulation elsewhere (FAA §§ 1(a), 5, 11), the FAA does not use that formulation in Category (ii). Thus, only debt issued *solely* in exchange for Category (i) debt falls within Category (ii).

The alternative reading of Category (ii) suggested by the Republic – that any drop of Category (i) debt taints the entire new indebtedness and makes it DFCI – would ignore the purpose behind Category (ii) and lead to absurd results. The FAA gives the Republic a narrow exemption from its Equal Treatment obligations for the bonds specifically enumerated in Category (i). Category (ii) recognizes that the exemption will survive if the Republic somehow reconfigures the particular debts listed in Category (i) by replacing or exchanging those debts. If the Republic had wanted to preserve the DFCI status of its Category (i) debts, it could have issued separate bonds in exchange *solely* for those debts. But it consciously chose not to do so, and therefore has forfeited its ability to invoke Category (ii) of the definition of DFCI.

Category (ii) was *not* intended to give the Republic a path to vastly expand the amount of debt exempted from the Equal Treatment Provision. Under the Republic's reading, it could issue massive amounts of new foreign-currency debt that would otherwise be External Indebtedness, but avoid its Equal Treatment obligations merely by mixing in a tiny piece of a Category (i) debt. In order to avoid such absurd results, and to give full meaning to the language and purpose of the FAA, new debt only falls within Category (ii) if it is issued in exchange or replacement for Category (i) debt, and not for any other debt outside of Category (i). Because

the U.S. Dollar Argentine Law Exchange Bonds do not meet this requirement – the bulk of these bonds were issued in exchange for debt outside Category (i) – they are not DFCI.

II.

CITIBANK LACKS STANDING TO SEEK A MODIFICATION OF THE INJUNCTION

Because the U.S. Dollar Argentine Law Exchange Bonds are unambiguously covered by the Injunction, Citibank is necessarily seeking a *modification* of the Injunction. Citibank, however, is not permitted to seek such relief, for three reasons.

First, the Federal Rules of Civil Procedure do not allow a non-party like Citibank to seek a modification of a permanent injunction. "[T]he appropriate vehicle for modifying a permanent injunction that has prospective effect" is a motion for relief from judgment under Federal Rule of Civil Procedure 60(b).[51] *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008); *see also Advance Pharm., Inc. v. United States*, 391 F.3d 377, 400-01 (2d Cir. 2004). And under the plain terms of Rule 60(b), only "a party or its legal representative" may seek relief. The Second Circuit has allowed non-parties to bring Rule 60(b) motions only in highly unusual situations in which the defendant *agreed* to a judgment that hurt a third party *not* involved in the litigation. *See Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 188 (2d Cir. 2006) (after plaintiffs settled with judgment-proof *pro se* defendant with intent to use settlement to collect from third party, third party could seek to vacate judgment); *Dunlop v. Pan American World Airways*, 672 F.2d 1044, 1051-52 (2d Cir. 1982) (employees could seek amendment of stipulation dismissing Secretary of Labor's claims against employer, when discrimination claims

[51] In its *amicus* brief, The Clearing House Association suggests that Citibank is merely asking the Court to reconsider its July 28, 2014 Order under Rule 54(b). (Dkt. 738 at 4.) But such a reconsideration motion would be untimely. *See* Local Civil Rule 6.3 (requiring reconsideration motions to be brought within 14 days after decision). And it is plain that Citibank is seeking modification of the *Injunction*, relief that can only be sought pursuant to Rule 60(b).

were precluded by stipulation despite Secretary's assurances they would not be). Citibank's situation, however, is completely different because the Republic did not agree to the Injunction.

Citibank thus "lacks standing to make a [Rule 60(b)] motion." *Nat'l Acceptance Co. of Am. v. Frigidmeats, Inc.*, 627 F.2d 764, 766 (7th Cir. 1980); *see also* 11 C. Wright et al., Fed. Prac. & Procedure § 2865 (3d ed. 2014). Of course, Citibank is prohibited by Rule 65(d)(2) from assisting the Republic in evading or violating the injunction, but that fact does not give it standing: "[n]either Rule 60(b) nor Rule 65(d) indicates that the two rules are to be read together or that because one is bound under Rule 65(d) he has a right to bring a motion under Rule 60(b)." *Mobay Chem. Co. v. Hudson Foam Plastics Corp.*, 277 F. Supp. 413, 417 (S.D.N.Y. 1967).

Second, Citibank should not be allowed to seek a modification when even the Republic would be barred from doing so. The Republic plainly could have argued on its initial appeals that the Injunction should have excluded the U.S. Dollar Argentine Law Exchange Bonds for any of the reasons it and Citibank now assert. The Republic did not do so then, and therefore it has forfeited its ability to raise those arguments now. *See Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) ("Where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived . . . "); Sept. 18, 2014 2d Cir. Tr. (Ex. 8) at 26:12-14 ("[E]xplain to me [why] this is not an issue which you should have brought to us in connection with your first appeal.") (Parker, J.).) In any event, "a court may modify a final or permanent injunction only where conditions have so changed as to make such relief equitable, *i.e.*, a significant change in the law or facts." *Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984); *see also Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) ("Rule 60(b) provides a mechanism for extraordinary judicial relief available only if

the moving party demonstrates exceptional circumstances.") Citibank and the Republic do not demonstrate anything newly arisen, let alone extraordinary.

Third, any arguments that Citibank might make as to why it should be exempted from complying with the Injunction are not a basis for modifying the Injunction. At most, they are defenses to be raised in contempt proceedings. As the Second Circuit has already held in this case, the proper time for non-parties to raise such arguments is "if and when they are summoned to [the district court] for having assisted Argentina in violating United States law." *NML II*, 727 F.3d at 244 (holding that non-parties' challenges to extraterritorial application of the Injunction were "premature"). If Citibank believes that despite the plain language of the Injunction, it should be allowed to assist the Republic in making illegal payments on the U.S. Dollar Argentine Law Exchange Bonds, it can raise those defenses in a contempt hearing. These arguments provide no basis for modifying the Injunction, which enjoins only the Republic. *See id.*

Accordingly, Citibank's motion is not properly brought, and should be denied without regard to the merits of any of the arguments it asserts. In any event, as explained below, those arguments lack any merit.

III.

THE REPUBLIC'S POST-2005 RE-USE OF THE 113 ISIN DOES NOT JUSTIFY EXCLUDING FROM THE INJUNCTION BONDS THAT UNQUESTIONABLY MEET THE INJUNCTION'S DEFINITION OF "EXCHANGE BONDS"

Citibank and the Republic raise an additional issue that pertains only to a subset of the U.S. Dollar Argentine Law Exchange Bonds – those bearing the ISIN ARARGE03E113 (the "113 ISIN") – and *not* to the other U.S. Dollar Argentine Law Exchange Bonds bearing other ISINs (ARARGE03E097, ARARGE03E154, ARARGE03G688, and ARARGE03G704). The Republic issued obligations bearing the 113 ISIN pursuant to the 2005 Exchange Offer. Afterwards, the Republic gave more of these exact same bonds – bonds with identical terms and

the exact same ISIN – to recipients including the Argentine social security agency ("ANSES," a part of the Republic), and Repsol S.A. (as part of a settlement of an expropriation claim against the Republic).[52] Citibank and the Republic suggest that the Court should modify the Injunction to exclude *all* 113 ISIN bonds because, they contend, (1) the bonds issued after 2005 are not "Exchange Bonds" under the Injunction; and (2) neither Citibank nor the Republic can distinguish among these 113 ISIN bonds when making payments. (*See* Rep. Mem. at 7-9; *see also* Citi Mem. at 14-15.)

The issue raised by Citibank and the Republic concerning the 113 ISIN does not call for any relief, let alone a modification of the Injunction. The Injunction's definition of "Exchange Bonds" includes all "bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers." The fact that the Republic increased the amount of 113 ISIN bonds outstanding by giving some to ANSES and Repsol does not change the fundamental fact that 113 ISIN bonds are obligations issued pursuant to the Exchange Offers, and therefore are "Exchange Bonds." This is entirely consistent with the purpose of the Injunction – to prevent the Republic from making payment on Exchange Bonds without meeting its obligations to Plaintiffs. This purpose would be frustrated if, despite the Republic's refusal to meet its obligations to Plaintiffs, it were allowed to make payments on bonds issued pursuant to the Exchange Offers merely by issuing additional (and completely fungible) amounts of those same bonds.

In any event, any inability to distinguish among the various sets of 113 ISIN bonds is a problem wholly of the Republic's own making. When the Republic issued more

[52] *See, e.g.*, Rep. Mem. at 8; Republic Form 18-K for 2010 (Ex. 92) at 158 (showing "intra-public issuances" of 113 ISIN bonds); Boccuzzi 9/23/14 Decl. Ex. N (Dkt. 672-3) (decree authorizing issuance of additional amounts of the 113 ISIN bonds to ANSES); Agreement for the Amicable Settlement and Compromise of Expropriation ("Respol Settlement Agreement") (Ex. 93) at 8, 42, 52-53 (providing that the Republic would transfer $1.25 billion face value of 113 ISIN bonds to Repsol); Resolution 26/2014 (Ex. 94) at ¶ 2 (authorizing issuance of these bonds); Repsol May 8, 2014 Official Notice (Ex. 95) (noting that the Republic had delivered the bonds).

bonds, it could have simply used a different ISIN. Instead, it purposefully chose to use the 113 ISIN so that the recipients of the additional bonds would have "an easily transferrable, liquid asset." (Rep. Mem. at 8 n.7.) In other words, it was more attractive to the bond recipients, and correspondingly benefitted the Republic, if the additional 113 ISIN bonds were indistinguishable from the 113 ISIN bonds initially issued pursuant to the 2005 Exchange Offer, because the recipients could take advantage of the liquid market for 113 ISIN bonds. Having reaped that benefit, the Republic cannot complain that it failed to take steps to maintain a separate identity for the additional 113 ISIN bonds, and there is nothing inherently inequitable about continuing to treat all 113 ISIN bonds the same. It is what the Republic and bondholders bargained for.

This is particularly true with respect to the 113 ISIN bonds issued to Repsol in early 2014. At that point, this Court had already issued the Injunction, and the Second Circuit had twice affirmed. While the Republic has refused to produce its communications with Repsol concerning the 113 ISIN bonds,[53] there is no question that both the Republic and Repsol were well aware of the Injunction in February 2014 and knew that any 113 ISIN bonds issued to Repsol might be affected by the Injunction. As proof of this knowledge, the Settlement Agreement between Repsol and the Republic specifically contemplated that judicial orders obtained by the Republic's creditors – such as the Injunction – might prevent Repsol from collecting on the bonds it was receiving.[54] Nor should the Court be concerned that enforcing the Injunction might "upset the settlement with Repsol" (7/28/14 Order at 4), because (as the Republic admits) Repsol sold all of the 113 ISIN bonds it received from the Republic in May

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[53] *See* Rep. Resp. & Obj.(Ex. 48) at 11. Plaintiffs also served a subpoena on Repsol's U.S. subsidiary, but that entity took the position that it could not produce documents in the possession of its Spanish parent company. *See* Notice of Repsol Energy North America Corporation's Objections to Subpoena (Ex. 97).

[54] Respol Settlement Agreement (Ex. 93) at 31-32, 122-23.

2014, before the Injunction even went into effect (Rep. Mem. at 8).[55] Thus, Repsol has already obtained the compensation it expected to receive, and it will not be affected in any way by the enforcement of the Injunction as written with respect to the 113 ISIN bonds.[56]

Moreover, a significant portion of the 113 ISIN bonds issued after 2005 were sold to the Argentine government itself. While the Republic has refused to provide any information about its holdings,[57] public filings show that just one governmental agency – ANSES – has consistently held the majority of all outstanding principal amount of 113 ISIN bonds.[58] Since the main party supposedly affected by the Republic's alleged inability to distinguish among 113 ISIN bonds would be the Republic itself, that is a further reason why no relief is necessary and the Injunction should not be modified.

Lastly, the Republic contends that the 113 ISIN bonds issued after the 2005 Exchange Offer are not External Indebtedness (Rep. Mem. at 8-9); again, that argument is neither accurate nor relevant. 113 ISIN bonds were issued pursuant to the 2005 Exchange Offer, and as explained above they were offered around the world. Regardless of where 113 ISIN

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[55] *See also* Repsol May 13, 2014 Official Notice (Ex. 96) ("Repsol has agreed today with JP Morgan several sale operations of the bonds delivered by the Republic of Argentina . . . . [including] the sale of the whole portfolio of the . . . DISCOUNT 33 bonds.").

[56] *See* Repsol Settlement Agreement (Ex. 93) at 8 (providing that compensation would be considered paid if "REPSOL for any reason TRANSFERS such GOVERNMENT BONDS to third parties").

[57] *See* Rep. Resp. & Obj. (Ex. 48) at 10.

[58] As of June 30, 2014, there were approximately $6.872 billion (capitalized) of 113 ISIN bonds outstanding. *See* Deuda Publica 2do. Trimestre de 2014 ("Debt Report") at Tab A.1.11 (Ex. 98). ANSES reported in October 2014 that it held approximately $5.39 billion in the Republic's U.S. Dollar-denominated discount bonds, paying 8.28% interest, due in 2033, and governed by Argentine law. *See* ANSES Report (Oct. 2014) (Ex. 99) at 6. Although this category conceivably includes both the 113 ISIN bonds and a series of bonds pursuant to the 2010 Exchange Offer (the "688 Bonds"), only $184 million (*i.e.*, $0.184 billion) in 688 Bonds are outstanding. *See* Debt Report (Ex. 98). Thus, ANSES holds in excess of $5.2 billion in 113 ISIN bonds, more than 75% of the total amount outstanding.

bonds may have been later offered, the 113 ISIN bonds were not offered "exclusively in Argentina," and thus, they are External Indebtedness.[59]

It should also be noted that if the Court were to carve out the 113 ISIN bonds because the Republic issued other obligations with the same ISIN after the Exchange Offers, then the Republic might view that decision as a license to further eviscerate the Injunction. The Republic might issue more bonds with the same ISIN as other Exchange Bonds, and then argue that those other Exchange Bonds should also be carved out of the Injunction. The fact is that the Republic made the unilateral decision to issue more bonds with the same ISIN *after* the Injunction was issued and affirmed. To condone that behavior will incentivize the Republic to engage in similar mischief aimed at undermining the Injunction.

IV.

THE COURT SHOULD NOT PERMIT CITIBANK TO AID THE REPUBLIC IN VIOLATING THE INJUNCTION

Citibank brought this motion because it understood that given the crucial role it plays in processing payments on the U.S. Dollar Argentine Law Exchange Bonds – *e.g.*, Citibank acts as the depositary for Euroclear and Clearstream – it would risk contempt if it continued to carry out that role unless the bonds were carved out of the Injunction. Citibank nonetheless contends that even if the U.S. Dollar Argentine Law Exchange Bonds remain subject to the Injunction, its activities with respect to those bonds should be carved out, both because those activities are purportedly not covered by the terms of the Injunction (Citi Mem. at 11), and because the Republic has threatened to punish it if it does not assist in the Republic's evasion (*id.*

[59] Even the later offerings of 113 ISIN bonds were not exclusive to Argentina. Many of the bonds, for example, were issued to Repsol, which is a *Spanish* company. ANSES, moreover, frequently trades 113 ISIN bonds. *See* ANSES Reports (Exs. 100-110) (showing that ANSES's holdings ranged from $3.5 billion to $5.43 billion between 2012 and 2014). This suggests the Republic may have used ANSES to offer the bonds in foreign jurisdictions.

at 12-13). As discussed *supra* Point II, these arguments are premature since they can only be raised as defenses in a contempt hearing. In any event, the arguments are meritless.

A. Citibank's Activities Are Covered by the Injunction

The Injunction clearly encompasses Citibank's role in processing payments on Exchange Bonds. The Injunction bars all "participants in the payment process of the Exchange Bonds" from "aiding and abetting any violation of" the Injunction, including "any effort to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a Ratable Payment to [Plaintiffs]." (Injunction ¶ 2(e).) And it defines "Participants" as "persons or entities who act in active concert or participation with the Republic, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds." (*Id.* ¶ 2(f).) That aptly describes Citibank's role. Citibank serves as depositary for Euroclear and Clearstream – in effect, Euroclear and Clearstream hold these bonds through Citibank[60] – and the Injunction explicitly names Euroclear, Clearstream, and their depositaries as "Participants" under Paragraph 2(f). By enabling the Republic's payments to reach the Exchange Bondholders, Citibank "assist[s] the Republic in fulfilling its payment obligations." (*Id.*)

Citibank rejoins that it does not "assist the Republic in fulfilling its payment obligations under the Exchange Bonds" because, by the time funds for such payments are received by Citibank, the Republic has already "met its obligations." (Citi Mem. at 11.) This argument is irrelevant. By processing payments on the U.S. Dollar Argentine Law Exchange Bonds as depositary for Euroclear and Clearstream, even if the Republic has as a technical matter satisfied its contractual obligations, Citibank is still as a practical matter helping the Republic make payment. Citibank's argument is also wrong on the merits. Citing its own attorney's declaration, Citibank asserts that, "[a]s a matter of Argentine law, the Republic's payment is

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[60] *See supra* note 4.

complete when funds reach the CRYL in Argentina." (*Id.* at 5 (citing D'Auro Decl. (Dkt. 343) ¶ 10).) But the declaration in fact says something very different: payment is not considered complete until "the Caja receives any amount from the CRYL . . . and deposits such amount with the account of Citibank," which "receives such payments on behalf of its Custody Account Customers." (D'Auro Decl. ¶ 10.) Thus, even according to Citibank's own lawyers, by accepting payment on the U.S. Dollar Argentine Law Exchange Bonds, Citibank plays a critical role in fulfilling the Republic's payment obligations.

B. The Republic's Purported Threats Are Not a Basis for Permitting Citibank To Aid and Abet the Republic's Violation of the Injunction

Citibank's contention that it "must obey Argentine banking law," because the Republic has threatened to impose sanctions it if it refuses to facilitate payments, does not justify modifying the Injunction. The Second Circuit has held that "harm threatened to third parties by a party subject to an injunction who avows not to obey it . . . does not make an otherwise lawful injunction 'inequitable,'" and that it is "unwilling to permit Argentina's threats to punish third parties to dictate the availability or terms of relief under Rule 65." *NML II*, 727 F.3d at 242.

For just this reason, Citibank cannot rely on the Second Circuit's recent decision in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014). There, the Second Circuit held in relevant part that before compelling a non-party bank to take action that might violate Chinese banking law, the district court should "consider legal principles of comity." *Id.* at 138-39. Such consideration was necessary, the Court held, to protect the "sovereign interests of a foreign state." *Id.* at 139. But the relevant foreign sovereign in *Gucci* had no involvement at all with the case, whereas here the relevant sovereign is the *defendant* whose actions have been enjoined. The Second Circuit has already rejected the argument that the Injunction impermissibly "violate[s] comity." *NML II*, 724 F.3d at 243. And for good reason: It is

undisputed that, in the FAA, the Republic waived its sovereign-immunity defense and consented to jurisdiction in the courts of New York. *Id.* at 237. Thus, whatever resonance such principles of "comity" and "sovereignty" might have in another case, they are irrelevant here, where the sovereign in question deliberately ceded such portion of its sovereignty as would allow it to enlist the aid of others in breaking its contractual promises or violating U.S. court orders.[61]

In any event, Citibank has not demonstrated that the Republic will actually impose any sanctions on it if it is decides to comply with this Court's orders. Other than one brief letter, Citibank has not provided any evidence of "threats" from the Republic. Plaintiffs sought documents from both Citibank and the Republic that would clarify whether or not there have in fact been such threats, and that would give a fuller illustration of the actual nature of the relationship between the Republic and Citibank. The Republic refused to provide *any* responsive documents,[62] and Citibank refused to produce responsive, non-privileged documents located in the files of its in-house or outside counsel – the most likely location of communications showing the extent to which Citibank and the Republic have in fact been *allies* in this litigation.[63] [redacted]

[redacted].[64] The Republic and Citibank are working together closely to try to

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[61] Even if the Court were to apply a comity analysis, the factors discussed in *Gucci* would counsel *against* modifying the Injunction. *See* 768 F.3d at 139 n.20. For example, "the link of the activity to the territory of the regulating state" is weak, since the vast majority of the payments Citibank receives are transferred outside of Argentina. No "justified expectations" are "protected . . . by the regulation," since Citibank's contracts allow it to comply with court orders. (*See, e.g.*, Ex. 90 at 19.) And this Court certainly has "an interest in regulating" any attempts by U.S. institutions like Citibank to aid and abet the Republic's violations of its Inunction.

[62] *See* Rep. Resp. & Obj. (Ex. 48) at 12; Cleary Gottlieb Steen & Hamilton LLP's Responses and Objections to Plaintiffs' October 3, 2014 Subpoena (Ex. 111) at 5.

[63] *See* Responses and Objections to Plaintiffs' Subpoena Served on Non-Party Citibank, N.A. (Ex. 112) at 14-16.

[64] *See* CITI0000396 (Ex. 113) [redacted]; CITI00003969 (Ex. 114) ([redacted]).

exclude the U.S. Dollar Argentine Law Exchange Bonds from the Injunction. There is no evidence that the Republic will impose sanctions on its partner if those efforts are unsuccessful.[65]

C. The "Separate Entity" Rule Has No Application to Citibank's Request to Modify the Injunction

In its September briefing, Citibank asserted in a footnote that the so-called "separate entity" rule prohibited this Court from applying the Injunction to prevent payments by Citibank's Argentine branch. (Citi Mem. at 12 n.4.) Citibank's ally, the Clearing House, raises this point in its *amicus* submission. (Dkt. 738 at 9, 13.)

As Plaintiffs have previously explained, the "separate entity" rule does not apply here. (*See* Plaintiffs' June 26, 2014 Memo. of Law (Dkt. 396 in No. 09-cv-8757) at 12-16.) First, the rule is a creature of state law, *see Allied Maritime, Inc. v. Descatrade SA*, 620 F.3d 70, 74 (2d Cir. 2010), and therefore has no bearing on whether a federal court, exercising the federal court's inherent authority to enforce its own orders, can hold an entity in contempt. *See Armstrong v. Guccione*, 470 F.3d 89, 103-104 (2d Cir. 2006). Second, the "separate entity" rule applies only to orders attaching or executing on assets, not to injunctions. *See CE Int'l Res. Hodlings, LLC v. S.A. Minerals Ltd. P'ship*, No. 12-cv-08087, 2013 WL 2661037, at *16-17 (S.D.N.Y. June 12, 2013); *cf. EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 208 (2d Cir. 2012) ("[W]e have no doubt that the district court would have been within its discretion to order the discovery from third-party banks [in the United States] about the judgment debtor's assets located outside the United States."). The Injunction here is not an attachment, and thus does not

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[65] Citibank cited the "foreign sovereign compulsion" and "act of state" doctrines in connection with its June 2014 motion, and it attempts to incorporate those arguments by reference in a footnote in its September 2014 brief. (*See* Citi Mem. at 12 n.4.) The Clearing House also points to these doctrines in its *amicus* brief. (Dkt. 738.) Plaintiffs have already explained why these doctrines are inapplicable. The "act of state" doctrine does not apply because the Republic – in refusing to make Ratable Payments to Plaintiffs – would neither be acting within its own borders nor acting in its sovereign capacity. And the "foreign sovereign compulsion" doctrine has no bearing when the foreign sovereign is the defendant that is allegedly compelling others to help it violate a court order, and Citibank provides no evidence that it would actually face sanctions in Argentina. (*See* Plaintiffs' June 26, 2014 Memo. of Law (Dkt. 396 in No. 09-cv-8757).)

implicate the "separate entity" rule. *See NML I*, 699 F.3d at 262-63. The recent decision in *Motorola Credit Corp v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014), does not suggest otherwise, as the *Motorola Credit* court merely held that the "separate entity" rule prohibits courts from "ordering a garnishee bank operating branches in New York to retrain [i.e., attach] a judgment debtor's assets held in a foreign branches of the bank." *Id.* at 156. *Motorola Credit* and the "separate entity" rule are thus irrelevant here.

D. Denying Citibank's Motion Will Not Weaken New York's Standing as a Financial Center

In its *amicus* brief, The Clearing House Association suggests that the Court "risks undermining New York's standing as a financial center" unless it modifies the Injunction, because enforcement of the Injunction against Citibank could cause foreign persons to avoid U.S. banks for fear of getting caught up in similar situations. (Dkt. 738 at 10-16.) The Clearing House's concerns are unfounded, and do not justify the drastic modification of the Injunction that Citibank and the Republic propose.[66]

As an initial matter, the Second Circuit has already rejected the Clearing House's principal argument that enforcing the Injunction as written will harm New York's standing as a financial center. To the contrary, the Court made clear that the Injunction "affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms," and that "New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts." *NML II*, 727 F.3d at 248. In

[66] Although the Clearing House presents itself as a disinterested observer, both it and its counsel are deep partisans in the Republic's corner. Citibank is a member of the Clearing House. (Dkt. 738 at 1 n.1.) And the Clearing House's counsel of record also represented Argentina's central bank before the Second Circuit in December 2014. *See* Notice of Hearing Date Acknowledgment by Banco Central de la Republica Argentina, *EM Ltd. v. Republic of Argentina*, No. 13-3819 (2d Cir. Nov. 6, 2014) (Dkt. 145) (identifying Joseph E. Neuhaus of Sullivan & Cromwell LLP as the attorney presenting argument)

other words, allowing the Republic to avoid its legal obligations – as the Clearing House advocates – is the action that would harm New York's status as a financial center.

In a similar vein, the Clearing House attempts to draw parallels between New York and Argentine law. It argues that "if an Argentine bank owed money to a customer at its New York branch, a foreign court order purporting to bar payment in New York" would have no effect "unless the foreign order is backed up by an order of a United States court" – an argument intended to legitimize the Republic's insistence that the Injunction has no effect unless Argentine courts confirm the Injunction's propriety. (Dkt. 739 at 8 n.7.) This argument is disingenuous and utterly without merit. Argentina's judiciary selectively refuses to recognize the validity of this Court's judgments simply because the Argentine government has established a policy never to honor its obligations under Plaintiffs' bonds. *NML I*, 699 F.3d at 260. So, even if Argentina's laws resemble New York's laws on paper, that resemblance ceases in practice.

The Clearing House argues that enforcing the Injunction will harm "the reputation of both Citi Argentina, and New York-headquartered banks in general, for reliability in serving their emerging market customers." (Dkt. 738 at 10.) This concern is fanciful, as it is highly unlikely that any other sovereign debtor's conduct would warrant such an Injunction. This Court issued the Injunction in light of the specific terms of the Equal Treatment Provision, the Republic's "uniquely recalcitrant" behavior, and the Republic's unquestioned ability to pay what it owes Plaintiffs. *NML II,* 727 F.3d at 247. Other nations that wish to avoid the Republic's fate need only amend the terms of their sovereign debt, or otherwise negotiate with their creditors in good faith. As long as those sovereign debtors do not follow the Republic's path, Citibank and other New York banks' operations in emerging markets will be unaffected.

The Clearing House also hyperbolically asserts that "Citibank could not have structured its business operations in a way to avoid the conflict it now faces unless it ceased all custodial business outside the United States." (Dkt. 738 at 10.) The Clearing House errs. The Republic warned prospective Exchange Bondholders – and, in turn, those institutions that would process the Republic's payments on those Exchange Bonds – "that there could be 'no assurance' that litigation over the FAA Bonds would not 'interfere with payments' under the Exchange Bonds." *NML II*, 727 F.3d at 242. Citibank thus was not caught unawares. If it wanted to avoid any possibility that it might have obligations under an Injunction, it could simply have elected not to act as custodian for these particular securities.

To the extent that the Clearing House prophesizes that enforcing the Injunction will cause sovereign issuers to flee New York in favor of other jurisdictions, history has already proven the Clearing House wrong. Even Brazil and Mexico – two sovereigns that supported the Republic's appeal to the Supreme Court – have issued bonds under New York law since the Supreme Court denied the Republic's petition for *certiorari* in June 2014.[67] The Clearing House offers nothing in response but rank speculation, which cannot justify modifying the Injunction.

It should also not be forgotten that the Republic is fully responsible for any negative effects that the Injunction might have on third parties. If the Republic complied with the Injunction by making a Ratable Payment to Plaintiffs, Citibank would be fully free to play its usual role, and Exchange Bondholders would receive payment. And if the Republic chose to comply with the Injunction by paying neither Plaintiffs nor the Exchange Bondholders, Citibank

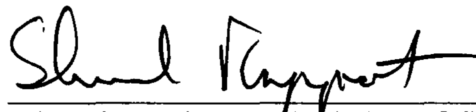
[67] *See* Federative Republic of Brazil, Prospectus Supplement at S-6 (Sept. 3, 2014), http://www.sec.gov/Archives/edgar/data/205317/000119312514333922/d784893d424b5.htm; United Mexican States, Prospectus Supplement at PS-9 (Jan. 12, 2015), http://www.sec.gov/Archives/edgar/data/101368/000119312515007314/d850652d424b2.htm.

would simply be out of the picture. The only reason this motion is even before the Court is because the Republic plans to once again *violate* the Injunction. That is no basis for relief.

CONCLUSION

The U.S. Dollar Argentine Law Exchange Bonds were not offered exclusively in Argentina, and they are External Indebtedness (not DFCI). These bonds were issued pursuant to the 2005 and 2010 Exchange Offers, and are therefore "Exchange Bonds" covered by the Injunction. And the circumstances concerning the 113 ISIN bonds do not provide any basis for granting relief to Citibank. None of Citibank's arguments provide a basis for modifying the Injunction, and in any event Citibank does not have standing to seek such a modification. Accordingly, for all of the reasons discussed above and in Plaintiffs' prior submissions, Plaintiffs respectfully request that the Court deny Citibank's motion.

Dated: New York, New York
February 17, 2015



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