UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM OF LAW OF CITIBANK, N.A. IN FURTHER OPPOSITION TO ANY INJUNCTION AGAINST PAYMENT ON ARGENTINE LAW BONDS

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

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Non-party Citibank, N.A. ("Citibank") respectfully submits this memorandum of law in further opposition to the imposition of injunctive relief barring its branch in Argentina ("Citibank Argentina") from making payments on certain U.S. dollar-denominated bonds issued by the Republic of Argentina (the "Republic") that are governed by Argentine law and payable in Argentina (the "Argentine Law Bonds").

PRELIMINARY STATEMENT

This Court's Amended February 23, 2012 Order (the "Injunction") did not enjoin Citibank Argentina or the processing of payments on the Argentine Law Bonds. While Plaintiffs have argued to the contrary, the Court was clear the last time the parties and Citibank appeared before the Court on September 26, 2014 (the "September 26 Hearing") that the Injunction was limited to payments on bonds issued in 2005 and 2010 under the Trust Indenture with Bank of New York Mellon in exchange for bonds issued under the Republic's 1994 Fiscal Agency Agreement (the "FAA"), remarking that "I was the author of the injunction. I have a pretty good idea of what it meant. And that is, *we were dealing with the 1994 bonds issued by the Republic, subject to New York law, payable in New York. That's what we were dealing with*."

> The February 23, 2012 order, as it's called, or it was amended, was dealing with the 1994 bonds and the exchanges of 2005 and 2010 dealing with those bonds. . . . [*T*]*he record should be crystal clear that the Court was dealing with the 1994 bonds and bonds issued in exchange for the majority of those 1994 bonds.* . . . I am the judge on it and that is what I intended and the record supports that. And what is called the injunction was the injunction saying that there could be no payment on those bonds unless there was a recognition of the pari passu for the people who didn't exchange, who had their judgments.[1]

Nevertheless, at Plaintiffs' request for additional time to develop the record and present legal argument, the Court deferred making a final determination regarding whether Citibank

[1] Sept. 26, 2014 Hr'g Tr. (Dkt. No. 694) at 26:12-27:5, 30:2-32:1 (emphasis added). Unless otherwise indicated, "Dkt. No." refers to the assigned docket number in *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y.).

Argentina could or should be enjoined from processing future payments with respect to the Argentine Law Bonds.[2] That is the issue now set to be heard on March 3, 2015.

The consequences to Citibank Argentina of any ruling enjoining it from remitting payments to customers could be catastrophic. Argentina, the sovereign country in which Citibank Argentina is licensed to conduct a banking business, has directed that Citibank Argentina *must* make the payments. Citibank Argentina faces revocation of its banking license if it does not act in accordance with Argentine law, and its employees may be subject to criminal sanctions, including imprisonment, if they violate the Republic's banking laws and directives.

Citibank respectfully requests that the Court now issue a final determination that Citibank Argentina's processing of payments owed to its customers with respect to Argentine Law Bonds is not and should not be enjoined. There are multiple reasons why the Court should so rule.

First, the necessary underpinning of any injunction enforcing the *Pari Passu* Clause contained in the FAA is that the payments to be enjoined must be on debt that falls within the scope of that clause. Under the FAA, only "External Indebtedness" is subject to the *Pari Passu* Clause. "Domestic Foreign Currency Indebtedness" is explicitly carved out of the definition of "External Indebtedness." All Argentine Law Bonds fall within one or more categories of Domestic Foreign Currency Indebtedness as defined in the FAA. The Argentine Law Bonds are therefore excluded from the definition of External Indebtedness, are not subject to the *Pari Passu* Clause, and payment on them may not be enjoined.

[2] With Plaintiffs' consent, the Court ruled that Citibank Argentina was permitted to process the September 30, 2014 interest payment on the Argentine Law Bonds, as it had done previously with respect to the interest payment due on June 30, 2014. Another hearing was then scheduled for December 2014 in advance of the interest payment due on December 31, 2014. The December hearing was subsequently deferred and the Court again ruled, with plaintiffs' consent, that Citibank Argentina was permitted to process the December 31st interest payment. The Court then scheduled the current hearing on March 3, 2015 in advance of the interest payment due on March 31, 2015.

Second, Plaintiffs have never sought to assert or prove any contractual right to an injunction against payment on Argentine Law Bonds, nor could they. The overwhelming majority of Argentine Law Bonds were issued outside the Republic's 2005 and 2010 exchanges, and, in Plaintiffs' words, "[b]oth the Injunction itself and the July 28 Order clarifying it pertain only to bonds that *are* 'Exchange Bonds.'"[3] Further, the Injunction does not cover and was deliberately intended to exclude entities that are downstream from the indenture trustee and the relevant clearing systems, and that act only for customers, not for the Republic. Citibank Argentina, which is downstream from the Argentine clearing system, must also be excluded.

Third, independent of whether Plaintiffs have carried their burden of demonstrating that the Argentine Law Bonds are subject to the *Pari Passu* Clause, Citibank Argentina simply cannot be required to violate the laws of the jurisdiction under which it is licensed. The principles protecting branch banks have been powerfully reaffirmed recently by the Second Circuit and the New York Court of Appeals. *See Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 139 (2d Cir. 2014) (confirming that comity must be addressed before requiring an entity to violate foreign law); *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 162 (2014) (confirming vitality of separate entity rule).

BACKGROUND

A. Citibank Argentina Is Merely a Custodian Acting for Its Own Customers

Citibank Argentina is the branch bank of Citibank in Buenos Aires. For a fee, Citibank Argentina offers custody services to its customers.[4] Some of its customers hold interests in Argentine Law Bonds indirectly through Citibank Argentina's account with *Caja de Valores,*

[3] Pls.' Mem. in Opp'n to Citibank's Mot. by Order to Show Cause, filed Sept. 26, 2014 (Dkt. No. 680) ("Opp'n Br.") at 21.

[4] *See* Declaration of Federico Elewaut, dated Feb. 13, 2015 ("Elewaut Decl.") ¶¶ 4-7, 10-13.

S.A. ("*Caja*"), the clearing system for the Argentine Law Bonds, and *Caja*'s account with *Central de Registro y Liquidación de Pasivos Públicos y Fedeicomisos Financieros* ("*CRYL*"), the depository for the Argentine Law Bonds.[5] As these Bonds trade, the number of Argentine Law Bonds owned by Citibank Argentina's customers fluctuates over time.[6] Citibank Argentina has no contractual relationship with the Republic with respect to Argentine Law Bonds, and is paid no fee by the Republic for its custody operations.[7]

When payments are made by the Republic on Argentine Law Bonds, through *CRYL* and *Caja*, Citibank Argentina remits such funds to its customers, as required by law.[8] As a bank licensed by the Central Bank of Argentina ("BCRA"), Citibank Argentina and its employees are obligated to obey the banking laws of Argentina, or risk criminal and regulatory sanctions, as well as civil liability.[9] These laws prohibit Citibank Argentina from restraining funds belonging to its customers pursuant to a foreign court order that has not been recognized in Argentina.[10] The Republic has stated that it will enforce these laws if Citibank Argentina complies with an injunction from this Court and restrains payments on Argentine Law Bonds.[11]

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[5] *See* Elewaut Decl. ¶¶ 8-9, 14-19; Declaration of Juan Duggan, dated Feb. 16, 2015 ("Duggan Decl.") ¶¶ 39-44; *see also* Republic of Argentina, Prospectus Supplement, dated Jan. 10, 2005 (Registration No. 333-117111) (excerpts attached, as Ex. C to the Declaration of Carmine D. Boccuzzi, filed Sept. 23, 2014 (Dkt. No. 672) ("Boccuzzi Decl.")) ("2005 Pro. Supp.") at S-77; Republic of Argentina, Prospectus Supplement, dated Apr. 13, 2010 (Registration No. 333-163784) (excerpts attached, as Ex. B to the Boccuzzi Decl.) ("2010 Pro. Supp.") at S-118.

[6] Elewaut Decl. ¶ 21.

[7] Elewaut Decl. ¶¶ 12-13.

[8] Elewaut Decl. ¶ 11.

[9] *See* Declaration of Maximiliano D'Auro, dated May 22, 2013 (Dkt. No. 463) ("D'Auro Decl.") ¶¶ 13-15; *see also* Elewaut Decl. ¶ 3.

[10] *See* D'Auro Decl. ¶¶ 21-22; Declaration of Manuel Beccar Varela, dated May 22, 2013 (Dkt. No. 462) ("Beccar Varela Decl.") ¶¶ 5-7.

[11] President Cristina Fernandez de Kirchner, Speech on Nat'l Radio from the Presidential Office in the Casa Rosada (Aug. 19, 2014) (translation attached as Ex. A to Letter from Matthew D. McGill to Hon. Thomas P. Griesa, dated Aug. 21, 2014, *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 09 Civ. 8757 (Doc. No. 483)) ("[I]n Argentina, [Citibank Argentina] is an Argentinian bank that has to comply with Argentine law."); *see also* Letter from Ministry of Econ. & Pub. Fin. to Citibank Argentina, dated Aug. 6, 2014 (attached, with translation, as Exs. A-B to Letter from Robert A. Cohen to Hon. Thomas P. Griesa, dated Aug. 8, 2014 (Dkt. No. 635)).

B. The Argentine Economy, Its Default, the Redenomination of U.S. Dollar Bonds into Argentine Peso Bonds, and the Exchanges

In December 2001, at the height of "the worst economic crisis in its history,"[12] the Republic defaulted on its debt. Prior to its default, the Republic had a dual Argentine peso/U.S. dollar economy, in which by law the Argentine peso was pegged to the U.S. dollar, and the Republic issued debt that was denominated in both currencies.[13] The Republic's inability to obtain sufficient U.S. dollars to repay its U.S. dollar debt became a direct cause of the default.[14]

To address that crisis, the Republic authorized the *Pesificación* of the Argentine economy. In 2002, the Government announced decrees converting all foreign-currency denominated debt issued under Argentine law into pesos.[15] As a result of the *Pesificación*, *all* foreign currency bonds issued by the Republic and *governed by Argentine law* were converted into pesos.[16] Foreign currency debt *governed by foreign law*, by contrast, remained payable in foreign currencies.[17] The Argentine Supreme Court upheld the validity of the *Pesificación*[18] and thus all bonds converted into pesos in 2002 remain payable only in pesos.[19]

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[12] *Lightwater Corp. v. Republic of Argentina*, No. 02 Civ. 3804, 2003 WL 1878420, at *2 (S.D.N.Y. Apr. 14, 2003).

[13] *See* Kevin Cowan et al., *Sovereign Debt in the Americas: New Data and Stylized Facts* at 16 (Inter-Am. Dev. Bank Working Paper No. 577, Oct. 2006); Bernardo Lischinsky, *The Puzzle of Argentina's Debt Problem: Virtual Dollar Creation?*, *in* THE CRISIS THAT WAS NOT PREVENTED: ARGENTINA, THE IMF, AND GLOBALISATION 81, 94 (FONDAD 2003).

[14] *See* Lischinsky, *supra* note 13, at 94.

[15] *See* Duggan Decl. ¶¶ 4–7.

[16] *See* Duggan Decl. ¶¶ 6–7, 18–21.

[17] *See* Duggan Decl. ¶ 7.

[18] *See* Corte Suprema de Justicia de la Nación, [CSJN] [National Supreme Court of Justice], 5/4/2005, "Galli, Hugo Gabriel y otro c. Poder Ejecutivo Nacional / amparo," (Arg.); Duggan Decl. ¶ 22.

[19] No foreign court has jurisdiction to review the *Pesificacíon* or any other unilateral change by the Republic on Argentine law governed bonds. Such bonds have never been viewed as external indebtedness. The market values these bonds less than the Foreign Law Bonds based solely on their governing law, their place of payment, and the courts in which they are enforceable. *See*, *e.g.*, Ben Bain, *Bernanke Spurs Rally in Higher-Yielding Local Bonds: Argentina Credit*, BLOOMBERG (May 5, 2011) (explaining that "[i]nvestors demand an extra eight basis points . . . to hold the dollar bonds [issued under Argentine law] . . . rather than the notes covered by U.S. courts" because "[i]nvestors consider local-law debt, which affords them legal options in Argentine courts in case of a dispute or default, riskier than global bonds covered by U.S. tribunals"); *see also* Branimir Gruić & Philip Wooldridge, *Enhancements to the BIS Debt Securities Statistics*, BIS Q. Rev. 63, 66-67 & box 1 (Dec. 2012) (distinguishing (….continued)

The Republic thereafter commenced exchanges in 2005 and 2010 to replace its defaulted bonds with new bonds. Under the terms of the exchanges, only certain types of new bonds were available to holders of each type of defaulted debt. Holders of defaulted bonds governed by Argentine law could receive only new bonds governed by Argentine law and payable in Argentina (e.g., the Argentine Law Bonds). Holders of bonds governed by foreign laws could not receive Argentine Law Bonds, but could instead receive only new bonds issued under the Trust Indenture with Bank of New York Mellon ("BNY") that are governed by New York or English law and payable in the United States or Europe (the "Foreign Law Bonds").[20]

C. The Argentine Law Bonds

The Argentine Law Bonds are U.S. dollar-denominated debt instruments, governed by Argentine law and payable in Argentina, that were issued by the Republic under seven International Securities Identification Numbers ("ISINs").[21] The current total principal value of these Bonds is approximately $8.4 billion. The global certificates for Argentine Law Bonds are deposited with *CRYL*, and any interests in these Bonds can only be acquired, directly or indirectly, through an account at *CRYL*.[22] Payments on these Bonds are made by the Republic only at *CRYL*, in Argentina.[23]

(….continued)
domestic and external debt based on governing law and place of issuance because "[g]overnments might use their legislative power to modify the terms of bonds issued under domestic law, thus legalising actions that might otherwise constitute a breach of contract for bonds issued under a foreign law"); 2005 Pro. Supp. at S-33 (same).

[20] *See, e.g.*, 2005 Pro. Supp. at S-26. Holders of all defaulted bonds had the option of receiving new peso bonds governed by Argentine law, but these new peso bonds are not at issue because Plaintiffs concede that they are neither "External Indebtedness" nor subject to the Injunction. *See* Pls.' Mem. in Supp. of Mot. for Partial Reconsideration, filed July 10, 2014, *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 09 Civ. 8757 (Dkt. No. 418) ("Pls.' Mot. for Partial Reconsideration") at 1-2.

[21] Plaintiffs have defined the Argentine Law Bonds as those with the following seven ISINs: ARARGE03E162, ARARGE03E188, ARARGE03E097, ARARGE03E113, ARARGE03E154, ARARGE03G688, and ARARGE03G704.

[22] *See* Duggan Decl. ¶¶ 39–44; *see also* 2005 Pro. Supp. at S-56, S-74; 2010 Pro. Supp. at S-39, S-90. Thus, a holder outside of Argentina could hold a beneficial interest in Argentine Law Bonds through Clearstream or Euroclear, but only because "[e]ach of Euroclear and Clearstream, Luxembourg holds an account with an Argentine (….continued)

1. The Argentine Law Bonds Issued in the Exchanges

Of the Argentine Law Bonds outstanding today, only about 28% were issued as part of the Republic's 2005 and 2010 exchanges: an aggregate current principal amount of $2.1 billion in 2005, and $255 million in 2010. The Argentine Law Bonds were never issued in exchange, either directly or indirectly, for bonds issued under the FAA (the "FAA Bonds") or any other bonds constituting "External Indebtedness" under the FAA. Rather, under the terms of the exchanges, Argentine Law Bonds could only be received in exchange for defaulted bonds governed by Argentine law, which, as a result of the *Pesificación*, were all denominated and payable only in Argentine pesos.[24] Bonds that had always been denominated in pesos could only be exchanged for new peso bonds in the 2005 and 2010 exchanges, but bonds that had been converted into pesos (as a result of the 2002 *Pesificación*) could be exchanged for dollar-denominated Argentine Law Bonds or for new peso-denominated bonds.[25]

2. The Argentine Law Bonds Issued Outside the Exchanges

Most of the Argentine Law Bonds, approximately 72% of those now outstanding, with an aggregate current principal value of $6.05 billion, were not issued in either exchange. They were instead issued by the Republic in a number of local transactions subsequent to the 2005 exchange. Specifically, they were either (a) placed in the local market according to "Local Placement Procedures"; (b) issued in substitution for tax credit certificates, which had to be

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(….continued)
depositary, which acts as a link with *Caja de Valores* [and] *Caja de Valores* has an account with *CRYL*." 2005 Pro. Supp. at S-74; 2010 Pro. Supp. at S-115.

[23] *See* 2005 Pro. Supp. at S-67 ("In the case of . . . U.S. dollar-denominated New Securities governed by Argentine law [e.g., the Argentine Law Bonds], payments will be made to CRYL, which will receive the funds for distribution to the holders of such New Securities. . . . Neither Argentina nor the trustees shall have any responsibility or liability for any aspect of . . . payments made by [] the relevant clearing system or its nominee or direct participants . . . ."); 2010 Pro. Supp. at S-110 (same).

[24] *See* Duggan Decl. ¶¶ 10, 15, 18–24. None of the defaulted bonds payable in pesos could be considered "External Indebtedness" under the FAA. *See* FAA § 11 (defining "External Indebtedness" as debt denominated "in a currency other than the lawful currency of the Republic").

[25] *See* 2005 Pro. Supp. at S-39; 2010 Pro. Supp. at S-15.

tendered in Buenos Aires through *Caja*; or (c) placed with Repsol as compensation for property expropriated in Argentina, pursuant to a settlement agreement negotiated and executed in Argentina.[26]

All of the Argentine Law Bonds issued outside the 2005 and 2010 exchanges bear ISIN ARARGE03E113 ("AR 113 Bonds"), the same ISIN assigned to one of the Bonds issued in the 2005 exchange.[27] All of the AR 113 Bonds are identical. As a consequence, it is not possible to trace the origin of any particular book-entry interest in an AR 113 Bond.[28] Nor is it necessary to attempt to do so, because, as explained below, none of the Argentine Law Bonds are subject to the *Pari Passu* Clause.

D. The FAA Bonds and the Foreign Law Bonds

Holders of FAA Bonds were never offered Argentine Law Bonds in any exchange. As noted above, in the 2005 and 2010 exchanges, FAA Bonds could be exchanged only for Foreign Law Bonds issued under the Indenture with BNY.[29] Like the FAA, the Indenture provided that the Foreign Law Bonds would be governed by foreign law, payable and enforceable outside of Argentina, and entitled to *pari passu* treatment with respect to other "External Indebtedness."[30] Both the FAA Bonds and the Foreign Law Bonds are protected by their contractual provisions from unilateral changes by the Republic, like the *Pesificación*, because those changes would

[26] *See* Duggan Decl. ¶¶ 3(c), 12–13, 25–38.

[27] *See* Duggan Decl. ¶¶ 11–13. These additional issuances were authorized and governed by Joint Resolutions of the Argentine Secretaries of Treasury and Finance. *See id.* ¶¶ 25-38 & n.28. Their fungibility with the AR 113 Bonds issued in the 2005 exchange made the privately placed debt more liquid and tradable, and therefore more desirable to recipients.

[28] *See* Elewaut Decl. ¶ 23; *see also* Letter from Edward A. Friedman to Hon. Thomas P. Griesa, July 27, 2014, at 4 (Dkt. No. 610) ("[I]t is now impossible for Citibank and other financial institutions who process payments to distinguish some of the 2005 Exchange Bonds from identical later-issued bonds . . . ."); July 28, 2014 Order (Dkt. No. 613) at 3 ("Citibank cannot distinguish between [Argentine Law Bonds that are not Exchange Bonds] and [ones that are Exchange Bonds].").

[29] *See* 2005 Pro. Supp. at S-39. As noted above, holders of FAA Bonds also had the option to obtain new peso bonds governed by Argentine law, but Plaintiffs have conceded that these bonds are not "External Indebtedness" and are not subject to the Injunction. *See* Pls.' Mot. for Partial Reconsideration at 1–2.

[30] *See, e.g.*, 2005 Pro. Supp. at S-67, S-70–72; *cf.* FAA §§ 1, 6, 23.

constitute a breach of contract and could not be enforced as to debt governed by foreign law and payable outside of Argentina.

E. The Amended February 23, 2012 Injunction and Opinion

In 2010, Plaintiffs brought breach of contract claims against the Republic for violating the *Pari Passu* Clause of the FAA, and sought to enjoin the Republic from making payments on its "other External Indebtedness, including its indebtedness to the 2005 and 2010 bondholders," unless the Republic also made ratable payments to Plaintiffs.[31] Plaintiffs defined the 2005 and 2010 "Exchange Offers" as the "offer[s] [to] bondholders who owned bonds issued under the FAA . . . to exchange their defaulted bonds for a new debt issue," and defined that new debt issue as the 2005 and 2010 "Exchange Bonds."[32] In support of their motion for partial summary judgment, Plaintiffs submitted only the notes for the Foreign Law Bonds that had been defined as the "Exchange Bonds."[33]

On December 7, 2011, this Court granted Plaintiffs' motion on that factual foundation. Thus, the Court found as undisputed facts that "[t]he Republic issued other bonds in its 2005 and 2010 Exchange Offers ('Exchange Bonds'), thereby creating new unsecured and unsubordinated *External Indebtedness*," and "lowered the rank of [Plaintiffs'] bonds in violation of Paragraph 1(c) of the FAA when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under [Plaintiffs']

[31] Pls.' Mem. in Supp. of Mot. for Partial Summ. J. & Injunctive Relief, filed Oct. 20, 2010 (Dkt. No. 230) ("Pls.' Summ. J. Br.") at 17. In the same brief, Plaintiffs disclaimed any intent to enjoin Domestic Foreign Currency Indebtedness, insisting that it was "not relevant here." *Id.* at 3 n.3.

[32] *See* Pls.' Statement of Material Facts Pursuant to Local Rule 56.1, filed Oct. 20, 2010 (Dkt. No. 229) ("Pls.' 56.1 Statement") ¶ 10 ("In 2005, Argentina offered bondholders who owned bonds issued under the FAA an 'exchange offer' in which they were given the option to exchange their defaulted bonds for a new debt issue (the '2005 Exchange Bonds') worth approximately 30% of the defaulted bonds."); *id.* ¶ 20 ("In 2010, Argentina offered bondholders who owned bonds issued under the FAA an 'exchange offer' in which they were given the option to exchange their defaulted bonds for a new debt issue (the '2010 Exchange Bonds').").

[33] *See* Declaration of Robert Cohen, filed Oct. 20, 2010 (Dkt. No. 231) at Exs. L & M; *see also* Declaration of Robert A. Cohen, filed Nov. 13, 2012 (Dkt. No. 391) at 7 & Exs. X-BB (attaching global notes and Indenture for Foreign Law Bonds as the "Exchange Bond Materials").

Bonds."[34] On November 21, 2012, this Court entered the Injunction, which was expressly limited to payments made under those "Exchange Bonds":

> 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] (as defined below and as further defined in the Court's opinion of November 21, 2012).[35]

Likewise, the opinion of November 21, 2012 (the "Opinion") set out the background for the Injunction, and explained that it was "designed to remedy Argentina's breach of the *Pari Passu* Clause, including the Equal Treatment Provision, contained in the contractual provisions of the [FAA Bonds]." Opinion at 1 (Dkt. No. 424). This Court explained that the Injunction was intended to extend to "the process and the parties involved in making payments on the Exchange Bonds," plainly describing payments on the Foreign Law Bonds through BNY as Indenture Trustee. *Id*. at 10. The Second Circuit's affirmance relied upon the same description. *See NML Capital, Ltd. v. Republic of Argentina ("NML II")*, 727 F.3d 230, 239 (2d Cir. 2013) (quoting Nov. 21, 2012 Opinion (Dkt. No. 424) at 10). Neither Plaintiffs' motion papers nor the Court's Injunction or Opinion made any mention of Argentine Law Bonds or Citibank Argentina.

ARGUMENT

Plaintiffs' request during the September 26 Hearing for deferral of a final ruling by the Court as to Citibank Argentina and the Argentine Law Bonds was based on the suggestion that additional discovery and legal argument would position them to be able to persuade the Court that the Argentine Law Bonds are External Indebtedness subject to the *Pari Passu* Clause. With the record now complete, it is apparent that Plaintiffs are incorrect. As demonstrated in Point I,

[34] Dec. 7, 2011 Order (Dkt. No. 353) at 2 ¶ 5, 4 ¶ 5 (emphasis added).
[35] Amended Feb. 23, 2012 Order, filed Nov. 21, 2012 (Dkt. No. 425) at 4 ¶ 2(a).

Plaintiffs have not met and cannot meet their burden of establishing that the Argentine Law Bonds are subject to the *Pari Passu* Clause. The Argentine Law Bonds are not "External Indebtedness" within the meaning of the FAA. Moreover, as discussed in Point II below, in obtaining the Injunction with respect to the Foreign Law Bonds, Plaintiffs made no showing regarding the Argentine Law Bonds or Citibank Argentina, and they have made no showing to this day. Likewise, as demonstrated in Point III below, important principles of comity, thoroughly detailed by *amicus curiae* The Clearing House, provide fundamental and independent grounds on which the Court should rule in Citibank's favor.

I. PAYMENT ON ARGENTINE LAW BONDS CANNOT BE ENJOINED

A. The *Pari Passu* Clause and the FAA Definitions

The *Pari Passu* Clause provides that "[t]he 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 § 1(c) (emphasis added). The FAA defines "External Indebtedness" as:

> [O]bligations (other than the Securities) for borrowed money or evidenced by securities, debentures, notes or other similar instruments denominated or payable, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic *provided that no Domestic Foreign Currency Indebtedness, as defined below, shall constitute External Indebtedness.*

FAA § 11 (emphasis added).

"Domestic Foreign Currency Indebtedness," which is expressly excluded from the definition of "External Indebtedness," is defined in the same section of the FAA as:

> (i) the following indebtedness: (a) Bonos del Tesoro issued under Decree No. 1527/91 and Decree No. 1730/91, (b) Bonos de Consolidación issued under Law No. 23,982 and Decree No. 2140/91, (c) Bonos de Consolidación de Deudas Previsionales issued under Law No. 23,982 and Decree No. 2140/91, (d) Bonos de la Tesorería a 10 Años de Plazo issued under Decree No. 211/92 and Decree No. 526/92, (e) Bonos de la Tesorería a 5 Años Plazo issued under Decree No. 211/92 [a]nd Decree No. 526/92, (f) Ferrobonos issued under Decree No. 52/92

> and Decree No. 526/92 and (g) Bonos de Consolidación de Regalías Hidrocarburíferas a 16 Años de Plaxo issued under Decree No 2284/92 and Decree No. 54/93;
>
> (ii) any indebtedness issued in exchange, or as replacement, for the indebtedness referred to in (i) above; and
>
> (iii) any other indebtedness payable by its terms, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic of Argentina which is
>
> (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.]

B. All Argentine Law Bonds Are "Domestic Foreign Currency Indebtedness"

All Argentine Law Bonds fall within the definition of "Domestic Foreign Currency Indebtedness." First, Plaintiffs concede that some of the Argentine Law Bonds issued in the exchanges were exchanged for bonds falling within Section (i) of the definition of "Domestic Foreign Currency Indebtedness," rendering them "Domestic Foreign Currency Indebtedness" under Section (ii) of that definition.

In addition, *all* bonds tendered in exchange for Argentine Law Bonds had been converted to Argentine peso bonds pursuant to the *Pesificación*. Thus, all Argentine Law Bonds issued in the exchanges were exchanged for "indebtedness payable in the lawful currency of the Republic of Argentina," and fall under Section (iii)(b) of the definition of "Domestic Foreign Currency Indebtedness."

Finally, all Argentine Law Bonds—both those issued outside the exchanges as well as those in the exchanges—were "offered exclusively" in Argentina, and fall under Section (iii)(a) of the definition of "Domestic Foreign Currency Indebtedness." Consequently, none of the Argentine Law Bonds are "External Indebtedness."

1. Some Argentine Law Bonds Were Indisputably Issued in Exchange for Section (i) Bonds

Plaintiffs concede that some of the Argentine Law Bonds issued in the 2005 and 2010 exchanges were issued in exchange for bonds specifically enumerated in Section (i) of the definition of "Domestic Foreign Currency Indebtedness":

> Plaintiffs have determined that the Eligible Securities with the following ISINs *were [FAA] Category (i) bonds*: ARP04981DG19, ARARGE043901, ARARGE044032, ARARGE044198, ARP04981BA66, ARARGE043927, ARARGE044008, ARARGE044164, ARARGE030114, ARARGE044081, ARARGE043992, ARARGE044156, ARARGE030056.[36]

These Argentine Law Bonds are therefore indisputably Domestic Foreign Currency Indebtedness under Section (ii) as "indebtedness issued in exchange, or as replacement, for the indebtedness referred to in [Category] (i)."[37]

2. All Argentine Law Bonds Issued in the 2005 and 2010 Exchanges Were Exchanged for Peso Bonds

All of the Argentine Law Bonds issued in the 2005 and 2010 exchanges fall under Section (iii)(b) of the definition of "Domestic Foreign Currency Indebtedness" because they were exchanged for bonds payable in "the lawful currency of the Republic of Argentina."

As explained above, the Argentine Law Bonds issued in the 2005 and 2010 exchanges were issued in exchange for Argentine law-governed debt that had defaulted in 2001. The terms of those defaulted securities are governed by Argentine laws, decrees and resolutions, and changes in those terms can be challenged only in Argentine courts. Under the laws and decrees issued as part of the 2002 *Pesificación*, the terms of bonds that were originally denominated in dollars and governed by Argentine law were changed to make them payable only in Argentine

[36] *See* Opp'n Br. at 16 & n. 17 (emphasis added.).
[37] *See* Duggan Decl. ¶¶ 3(a), 16-17.

pesos. The Argentine Supreme Court has affirmed that the *Pesificación* was constitutional as a matter of Argentine law and has upheld the *Pesificación* against all legal challenges.[38]

Therefore, all bonds governed by Argentine law and eligible for the 2005 and 2010 exchanges were (and, to the extent not exchanged, still are) payable only in pesos.[39] As a result, all Argentine Law Bonds issued in the exchanges were "issued in . . . exchange" for "indebtedness payable in the lawful currency of the Republic of Argentin[a]," and are therefore Domestic Foreign Currency Indebtedness under Section (iii)(b) of the definition.

3. All Argentine Law Bonds Were Offered Exclusively in Argentina

The great majority of the Argentine Law Bonds (72%) were not issued in the 2005 and 2010 exchanges but were instead issued in separate transactions subsequent to 2005, primarily to raise new capital. Plaintiffs agree that payments on these bonds are "wholly irrelevant" because "the Injunction itself and the July 28 Order clarifying it pertain only to bonds that *are* 'Exchange Bonds.'"[40] Nonetheless, all of these bonds are also "Domestic Foreign Currency Indebtedness" because they were "offered exclusively within the Republic of Argentin[a]."

These Argentine Law Bonds—the additional AR 113 Bonds—were issued locally, pursuant to Spanish-language resolutions that were never filed with any foreign securities regulator, and either Local Placement Procedures, *Procedimientos* governing an exchange of local tax credit certificates, or, in the case of Repsol, a settlement agreement negotiated and executed exclusively in Argentina.[41] Further, all of these bonds were initially issued to: (a) purchasers paying through accounts at BCRA, who received the securities so purchased through an account at *CRYL*; (b) holders of local tax credit certificates; or (c) Repsol in settlement for the

[38] *See* Duggan Decl. ¶ 22.
[39] *See* Duggan Decl. ¶¶ 3(b), 18-24.
[40] Opp'n Br. at 21.
[41] *See* Duggan Decl. ¶¶ 3(c), 25-38.

expropriation of an Argentine energy company.[42] Thus, all were "offered exclusively within the Republic of Argentin[a]" and constitute "Domestic Foreign Currency Indebtedness" under Section (iii)(a) of the definition.

Indeed, all Argentine Law Bonds, including those issued in the exchanges, were offered exclusively in Argentina. Section (iii)(a) defines "Domestic Foreign Currency Indebtedness" by reference to where the "*indebtedness*" is offered, not to whom it is advertised. The Republic's "indebtedness" is represented by global notes, and all of the global notes for the Argentine Law Bonds are deposited in Argentina at *CRYL*.[43] *Cf. Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 11327, 2010 WL 2925072, at *3-4 (S.D.N.Y. July 23, 2010) ("the *situs* of the Trust Bonds is Argentina" because "they were deposited, in an ordinary commercial sense, at *Caja de Valores* in Argentina," even if the intangible "beneficial interest[s]" in the bonds were located in the United States).

The *Procedimientos* governing the exchanges in Argentina, as supplemented by the Prospectus Supplements,[44] dictated that the Argentine Law Bonds were offered at, and the offer of the bonds could only be accepted through, an account at *CRYL*.[45] *See* 2005 Pro. Supp. at S-73 ("You may hold a beneficial interest [in Argentine Law Bonds] directly if you have an account with CRYL, or indirectly through an institution that has an account with CRYL"); *cf. id.* at S-72 ("[Y]ou may elect to hold your beneficial interests [in Foreign Law Bonds] . . . *in the United States*, through DTC; *in Europe*, through Euroclear or Clearstream, Luxembourg; *[or] in Argentina*, through *Caja de Valores*" (emphasis added)). The Republic also agreed to make

[42] *See* Duggan Decl. ¶¶ 25-38. The Court has also noted that it "does not wish to upset the settlement with Repsol." July 28, 2014 Order (Dkt. No. 613) at 2.

[43] *See* Duggan Decl. ¶ 39.

[44] The *Procedimientos* supersede the Prospectus Supplements to the extent the two are inconsistent. *See* Duggan Decl. ¶ 9.

[45] *See* Duggan Decl. ¶¶ 39-44.

payments on the Argentine Law Bonds only in Argentina, at *CRYL*.[46] Therefore, all Argentine Law Bonds, even those issued in the exchanges, were "offered exclusively within the Republic of Argentin[a]" and are Domestic Foreign Currency Indebtedness under Section (iii)(a).

Consequently, there is no legal basis for enjoining payments on the Argentine Law Bonds because none of them are External Indebtedness subject to the *Pari Passu* Clause.

II. THE COURT DID NOT AND MAY NOT ENJOIN PAYMENTS ON ARGENTINE LAW BONDS HELD BY CITIBANK ARGENTINA FOR ITS CUSTOMERS

Despite their utter failure of proof, Plaintiffs continue to insist that this Court enjoined payments on Argentine Law Bonds because some of them were issued in the 2005 and 2010 exchanges and are therefore, according to Plaintiffs, subject to the Injunction. The Court has stated, and the record has demonstrated, that the Injunction never applied to payments on Argentine Law Bonds. And regardless of which payments are enjoined, the Injunction has always excluded downstream entities in Citibank Argentina's position. Thus, as this Court has said repeatedly, "certainly Citibank was not enjoined by the original injunction."[47]

A. The Injunction Did Not Address Argentine Law Bonds Because They Were Not Exchanged for FAA Bonds or Otherwise Determined to Be External Indebtedness

The Injunction does not apply to Argentine Law Bonds because Plaintiffs never sought to enjoin payments on the Argentine Law Bonds—which differ materially from the Foreign Law Bonds that Plaintiffs did address. In the absence of a valid cause of action, no injunction—or any other remedy—may be imposed with regard to such payments. *See Mariah Re Ltd. v. Am. Family Mut. Ins. Co.*, No. 13 Civ. 4657, 2014 WL 4928976, at *14 n.7 (S.D.N.Y. Sept. 30, 2014)

[46] *See* 2005 Pro. Supp. at S-67 ("In the case of . . . U.S. dollar-denominated New Securities governed by Argentine law [e.g., the Argentine Law Bonds], payments will be made to CRYL, which will receive the funds for distribution to the holders of such New Securities. . . . Neither Argentina nor the trustees shall have any responsibility or liability for any aspect of . . . payments made by [] the relevant clearing system or its nominee or direct participants . . . ."); 2010 Pro. Supp. at S-110 (same).

[47] Sept. 26, 2014 Hr'g Tr. (Dkt. No. 694) at 48:3-17.

("[S]pecific performance is an equitable remedy for breach of contract, rather than a separate cause of action.") (citation and internal quotation marks omitted).

To enjoin the Republic's payments on Argentine Law Bonds, Plaintiffs were required to prove by a preponderance of the evidence that such payments breached the FAA. *See Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011). Plaintiffs did not do so. Therefore, no payments were or could have been enjoined, as a matter of law. *See Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399 (1982) (holding that injunctions may be issued "only on the basis of a violation of the law"); *City of N.Y. v. Mickalis Pawn Shop LLC*, 645 F.3d 114, 145 (2d Cir. 2011) ("An injunction is overbroad when it seeks to restrain . . . legal conduct, or . . . conduct that was not fairly the subject of litigation.").

In the proceedings leading to the Injunction—to which Citibank was not a party—Plaintiffs asked only for an injunction against payments by the Republic on Foreign Law Bonds, and only presented evidence that Foreign Law Bonds are External Indebtedness being paid before Plaintiffs' FAA Bonds.[48] The Court granted partial summary judgment and injunctive relief only on that basis.[49] No proof was offered to demonstrate that payments on the Argentine Law Bonds breached the FAA.[50] Thus, the Court never granted summary judgment or injunctive

[48] *See* Pls.' Mem. in Supp. of Renewed Mot. for Specific Enforcement, filed Jan. 6, 2012, at 3-4, 6-7 & n.2 (Dkt. No. 361); *see also* Declaration of Robert A. Cohen, filed Jan. 6, 2012 (Dkt. No. 362) at Exs. B & C (appending copies of the relevant global notes for the Foreign Law Bonds); Declaration of Robert A. Cohen, filed Nov. 13, 2012 (Dkt. No. 391) at 7 & Exs. X-BB (attaching global notes and Indenture for Foreign Law Bonds as the "Exchange Bond Materials"); *see also* Pls' Mem. in Supp. of Mot. for Partial Summ. J. & Injunctive Relief, filed Oct. 20, 2010 (Dkt. No. 230), at 18 n.12 (describing the payment process for the specified bonds); *see also* Pls.' Mem. in Supp. of Renewed Mot. for Specific Enforcement, filed Jan. 6, 2012 (Dkt. No. 361) at 6–7 & n.2 (same).

[49] Order, dated Dec. 7, 2011 (Dkt. No. 353) at 2, 4 (emphasis added).

[50] Indeed, Plaintiffs insisted that the definition of "Domestic Foreign Currency Indebtedness" was "not relevant" to their motion for partial summary judgment, *see* Pls' Mem. in Supp. of Mot. for Partial Summ. J. & Injunctive Relief, filed Oct. 20, 2010 (Dkt. No. 230) at 3 n.3, and now concede that at least some Argentine Law Bonds plainly fit within that definition, *see* Opp'n Br. at 16 & n.17. Plaintiffs' arguments that *non-party* Citibank or the Republic should have raised this issue in the prior proceedings, *see* Opp'n Br. at 10-11, when Plaintiffs never sought injunctive relief regarding the Argentine Law Bonds, are wrong as a matter of law. *See Jackson v. Fed. Express*, 766 F.3d 189, 194 (2d Cir. 2014) ("Before summary judgment may be entered, the district court must ensure that (….continued)

relief as to payments on the Argentine Law Bonds, and did not hold that Plaintiffs have a right to *pari passu* treatment with respect to those bonds.

While Plaintiffs nevertheless argue that the term "Exchange Bonds"—defined in the Injunction to include "*the* bonds or other obligations issued pursuant to the Republic's 2005 and 2010 Exchange Offers"—must be construed to extend to Argentine Law Bonds that were issued in the exchanges, the record is clear that "Exchange Bonds" means only the Foreign Law Bonds. The Injunction defines "Exchange Bonds" by reference to "Exchange Offers," which Plaintiffs themselves defined as the offers made *to holders of FAA Bonds*:

> In 2005 [and 2010], Argentina offered bondholders who owned bonds issued under the FAA an 'exchange offer' in which they were given the option to exchange their defaulted bonds for a new debt issue (the '2005 [and 2010] Exchange Bonds').[51]

The Court adopted Plaintiffs' definitions in the Injunction, and subsequently confirmed that the Injunction extended only to the Foreign Law bonds exchanged for FAA Bonds: "Now, when I was dealing with the exchanges that occurred in 2005 and 2010, I was clearly dealing . . . with exchanges for the 1994 bonds."[52]

As the Court has recognized, the Argentine Law Bonds are "completely different" from the Foreign Law Bonds, which are indisputably External Indebtedness.[53] The Argentine Law Bonds are subject to Argentine Law; they are payable in Argentina; the Republic has not

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(….continued)

each statement of material fact is supported by record evidence sufficient to satisfy the movant's burden of production even if the statement is unopposed."). Plaintiffs had the burden of establishing the record supporting their Injunction, and they only provided evidence regarding the Foreign Law Bonds.

[51] *See* Pls.' 56.1 Statement ¶¶ 10, 20. No other definition of "Exchange Offers" appears in any of the other motion papers or the Court's orders or opinions. To the extent Plaintiffs intended to refer to all bonds issued in the exchanges, they provided misleading information to the Court suggesting that all new bonds could be obtained in exchange for FAA Bonds and all were issued under the Indenture with BNY, whereas Argentine Law Bonds were never exchanged for FAA Bonds and were not issued under any indenture.

[52] *See* Sept. 26, 2014 Hr'g Tr. (Dkt. No. 694) at 26:12-27:6.

[53] *See* Sept. 10, 2014 Hr'g Tr. (Dkt. No. 665) at 12:10-14 ("[W]hat I was dealing with, and the proceedings this summer was bonds issued in Argentina expressly subject to Argentine law, something completely different from what was covered in the injunction, the major injunction of February 23, I guess, of 2012.").

subjected itself to the jurisdiction of any court outside of Argentina with respect to those bonds; and they are protected by none of the contract provisions protecting the value of the Foreign Law Bonds and the FAA Bonds. *See* App'x A (describing differences between Argentine Law Bonds and Foreign Law Bonds). Accordingly, payment on the Argentine Law Bonds could not have been enjoined on the basis of this record.

In any event, Plaintiffs concede the Injunction does not enjoin payments on bonds not issued in the Republic's 2005 or 2010 exchanges.[54] It is undisputed that the vast majority of Argentine Law Bonds (approximately 72%) were not issued in either of the exchanges, but were instead issued in later reopenings of the AR 113 Bond. Plaintiffs offered no evidence to demonstrate that they, or anyone else, can tell which of the minority of AR 113 Bonds now trading on the market had its origins in an exchange as opposed to a later reopening. As Plaintiffs did not and cannot demonstrate which book-entry AR 113 Bonds originated in an exchange, no injunction can be narrowly tailored to target payments on those relatively few bonds. *See, e.g.*, *Mickalis Pawn Shop LLC*, 645 F.3d at 145 ("An injunction is overbroad when it seeks to restrain . . . legal conduct, or . . . conduct that was not fairly the subject of litigation.").

B. Citibank Argentina Was Not Enjoined by the Injunction

Plaintiffs also never sought to enjoin Citibank Argentina or any other entity in a similar position, and this Court issued no injunction reaching any such entity. Indeed, doing so would have exceeded the Court's power under Federal Rule of Civil Procedure 65(d)(2).[55] Plaintiffs

[54] Opp. Br. at 21.

[55] Rule 65(d)(2) permits restraints only against liable parties, their agents, and "other persons who are in active concert or participation with" them. Fed. R. Civ. P. 65(d)(2). Injunctions broader in scope would violate "fundamental limitations on the remedial powers of the federal courts," which permit their exercise "only on the basis of a violation of the law." *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 399 (citations and internal quotation marks omitted). A non-party's lawful conduct that is "independent" of a party's wrongful conduct falls outside the scope of a federal court's injunctive power. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *Shakhnes v. Berlin*, 689 F.3d 244, 257 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1808 (2013). As Judge Learned Hand wrote over (….continued)

sought only to enjoin "agents of Argentina, who receive monetary payment for their role under the Exchange Bonds under contracts with Argentina," or those "expressly named in the Exchange Bonds' offering documents as entities assisting in the payment of the Exchange Bonds."[56]

Accordingly, the Court enjoined only "Argentina, the indenture trustee, the registered owners, and the clearing system" for the "Exchange Bonds." Opinion at 10-11. Entities downstream from the clearing systems plainly cannot be construed to be agents of the Republic or to be in active concert with the Republic with regard to its payments on any bonds—such payments are complete before funds reach any clearing system, let alone the clearing system's customers.[57] Recognizing this, Plaintiffs specifically did "not request[] that the financial institutions receiving funds from the DTC be bound by the Injunctions." Opinion at 11.

Citibank Argentina is downstream from *Caja*, which is the clearing system for the Argentine Law Bonds,[58] and the "counterpart of the [DTC] in the United States." *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 419 (S.D.N.Y. 2012) (Griesa, J.).[59] Citibank

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(….continued)
eighty years ago, a court "cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); *accord EEOC v. Local 638*, 81 F.3d 1162, 1180 (2d Cir. 1996); *Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996); *Heyman v. Kline*, 444 F.2d 65, 65–66 (2d Cir. 1971).

[56] Pls.' Br. in Resp. to Remand, filed Nov. 14, 2012 (Dkt. No. 302) at 18; Pls.' Reply Br. in Resp. to Remand, filed Nov. 20, 2012 (Dkt. No. 310) at 21.

[57] *See* 2005 Pro. Supp. at S-67 ("In the case of . . . U.S. dollar-denominated New Securities governed by Argentine law [e.g., the Argentine Law Bonds], payments will be made to CRYL, which will receive the funds for distribution to the holders of such New Securities. . . . Neither Argentina nor the trustees shall have any responsibility or liability for any aspect of . . . payments made by[] the relevant clearing system or its nominee or direct participants . . . ."); 2010 Pro. Supp. at S-110 (same).

[58] *See* 2005 Pro. Supp. at S-106; 2010 Pro. Supp. at S-117-18.

[59] Notably, payments on certain of the Foreign Law Bonds are made to the BNY nominee that is both the holder of the global bond payable in Europe and the common depository for Euroclear and Clearstream, which act as clearing systems for such Foreign Law Bonds. By contrast, the global bonds for the Argentine Law Bonds are held by *CRYL*, and *Caja* is the only clearing system for the Argentine Law Bonds. *See, e.g.*, 2005 Pro. Supp. at S-106. Euroclear and Clearstream only hold Argentine Law Bonds as custodians for their own customers. Therefore, they too must hold the bonds through *Caja* or an entity like Citibank Argentina that has an account at *Caja*, *id.* at S-73, (….continued)

Argentina has no contracts with the Republic with respect to its services as custodian of Argentine Law Bonds, receives no payment from the Republic for those services, and has no assigned role in the offering documents in fulfilling the payment obligations of the Republic on the Argentine Law Bonds.[60] Citibank Argentina is therefore not subject to the Injunction, as this Court has often remarked. *See, e.g.*, Sept. 26, 2014 Hr'g Tr. (Dkt. No. 694) at 48:3-17.

III. PRINCIPLES OF COMITY AND THE SEPARATE ENTITY RULE PROVIDE INDEPENDENT AND FUNDAMENTAL REASONS WHY CITIBANK ARGENTINA CANNOT BE ENJOINED AS A MATTER OF LAW

Not only is Citibank Argentina not subject to the existing Injunction, it cannot be enjoined from remitting to customers payments on the Argentine Law Bonds because any such injunction would require Citibank Argentina to violate Argentine banking laws, and, as demonstrated by uncontradicted evidence, would subject Citibank Argentina and its employees to extreme penalties even though it has no liability to Plaintiffs.

The Second Circuit recently ruled, in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 139 (2d Cir. 2014), that when a non-party "cit[es] an apparent conflict with the requirements of [foreign] banking law, comity principles required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with [an] Injunction." *See also Ayyash v. Koleilat*, 957 N.Y.S.2d 574, 582 (Sup. Ct. N.Y. Cnty. 2012) ("Under principles of international comity, a New York court should not encroach upon another nation's sovereignty by requiring citizens to take actions within their home country that would contravene their home country's laws."), *aff'd*, 981 N.Y.S.2d 536 (App. Div. 1st Dep't 2014).

(….continued)
and in that role, they are custodial account customers of Citibank Argentina, *see* Elewaut Decl. ¶ 4. Thus the Injunction does not apply to them with respect to the Argentine Law Bonds.

[60] Elewaut Decl. ¶ 12.

The record is undisputed that an injunction prohibiting Citibank Argentina from remitting payment to customers would create an extreme conflict with Argentine banking laws, a result entirely inconsistent with principles of comity. The pressures upon Citibank Argentina were explained in Citibank's prior briefs and associated declarations.[61] The same issues have now been addressed in the *amicus* brief filed by The Clearing House.[62]

It is plain that Argentine banking laws require Citibank Argentina and its employees to comply with its customers' instructions and credit their accounts with any payments it receives on securities held by those customers.[63] Violating these laws by restraining payments on the Argentine Law Bonds could result in the loss of Citibank Argentina's banking license[64] and the imprisonment of its employees.[65] Plaintiffs have never offered evidence to contradict Citibank's proof that Citibank Argentina and its employees would be subject to harsh sanctions if they were to violate these laws. To the contrary, Plaintiffs themselves submitted evidence to this Court confirming the risks faced by Citibank Argentina—risks unique to Citibank Argentina because it is located in Buenos Aires and licensed by BCRA.[66]

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[61] *See, e.g.*, Citibank Mem. in Supp. of Renewed Mot. for Clarification or Modification, filed June 19, 2014 (Dkt. No. 550).

[62] *See* Br. of *Amicus Curiae* The Clearing House Ass'n L.L.C. in Supp. of Citibank, filed Feb. 11, 2015 (Dkt. No. 738) ("The Clearing House *Amicus* Br.") at 5–10.

[63] These laws have not been contrived by the Republic to evade the Injunction, as Plaintiffs contend, but rather are laws of long standing that are also entirely consistent with New York banking laws. *See* D'Auro Decl. ¶¶ 16-23; Beccar Varela Decl. ¶¶ 4-8.

Further, just as an order of a foreign court requiring a New York bank to violate New York law would not be recognized by a New York court, and would not be enforceable in New York pursuant to Section 134 of the New York Banking Law, *see* The Clearing House *Amicus* Br. at 8 n.7, Argentine law would not recognize an order requiring a bank licensed in Argentina to violate Argentine law. *See* D'Auro Decl. ¶¶ 21-22; Beccar Varela Decl. ¶¶ 5-7.

[64] *See* Letter from Ministry of Econ. & Pub. Fin. to Citibank Argentina, dated Aug. 6, 2014 (attached, with translation, as Exs. A & B to Letter from Robert A. Cohen to Hon. Thomas P. Griesa, filed Aug. 8, 2014 (Dkt. No. 635)).

[65] *See* Beccar Varela Decl. ¶¶ 4-7.

[66] *See* Letter from Ministry of Econ. & Pub. Fin. to Citibank Argentina, dated Aug. 6, 2014 (attached, with translation, as Exs. A & B to Letter from Robert A. Cohen to Hon. Thomas P. Griesa, dated Aug. 8, 2014 (Dkt. No. 635)); President Cristina Fernandez de Kirchner, Speech on Nat'l Radio from the Presidential Office in the Casa (….continued)

Given the extreme harm that would be imposed upon Citibank Argentina and its employees if it were directed by this Court to violate Argentine banking laws—laws substantively identical to the laws governing banks in the United States—this Court cannot as a matter of law issue any injunction prohibiting Citibank Argentina from remitting customer funds to customers in Argentina.[67] *Cf. Gucci*, 768 F.3d at 139 (citing *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 n.6 (2014)) ("noting that 'other sources of law'— including 'comity interests'—might limit district courts' discretion when issuing orders extraterritorially").

The imposition by a New York court of any such injunction is also prohibited by the separate entity rule, the vitality of which was recently reaffirmed by the New York Court of Appeals on comity grounds, in circumstances exactly like those here. *See Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 162 (2014). In answer to a question certified by the Second Circuit, the New York Court of Appeals held that the separate entity rule precluded the issuance of an order requiring a New York-chartered international bank to restrain customer funds held at its United Arab Emirates ("U.A.E.") branch, under circumstances where the U.A.E. Central Bank was simultaneously directing that branch to release the funds:

> In large measure, the underlying reasons that led to the adoption of the separate entity rule still ring true today. The risk of competing claims and the possibility of double liability in separate jurisdictions remain significant concerns, as does the reality that foreign branches are subject to a multitude of legal and regulatory regimes. By limiting the reach of a CPLR 5222 restraining notice in the foreign banking context, the separate entity rule promotes international comity and serves

(….continued)

Rosada (Aug. 19, 2014) (translation attached as Ex. A to Letter from Matthew D. McGill to Hon. Thomas P. Griesa, filed Aug. 21, 2014, *Aurelius Capital Master, Ltd. v. Republic of Argentina*, No. 09 Civ. 8757 (Doc. No. 483)).

[67] Citibank endorses and adopts The Clearing House's comity analysis under Section 403 of the Restatement (Third) of Foreign Relations Law of the United States. *See* The Clearing House *Amicus* Br. at 5-10. It would be unreasonable for the Court to order Citibank Argentina to violate Argentine banking laws when those laws are consistent with the banking laws of other states, including New York. *See Gucci*, 768 F.3d at 139 n.20 ("[W]hen a state has jurisdiction, it should not exercise it 'to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'" (citing Restatement (Third) of Foreign Relations Law of the United States § 403(1))).

> to avoid conflicts among competing legal systems (see generally *Daimler AG v Bauman*, 134 S. Ct 746, 763 [2014] [recognizing the importance of considering "the risks to international comity"]).

Id.; *see also Samsun Logix Corp. v. Bank of China*, No. 105262/10, 2011 WL 1844061, at *5-6 (Sup. Ct. N.Y. Co. May 12, 2011) (separate entity rule precluded the court from ordering foreign branches to bring assets into the United States if compliance "could expose the bank's officers and employees to civil and criminal liability" in the foreign country).

Contrary to Plaintiffs' allegations, the Second Circuit has recognized that the separate entity doctrine applies with equal force to injunctions, because of "the complications that arise out of the fact that different branches may be subject to the laws of other countries":

> [T]he policy justifications offered to support the [separate entity] rule rest not on the inappropriateness of attachment as a remedy, but on the more fundamental notion that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community.

United States v. First Nat'l City Bank, 321 F.2d 14, 22 (2nd Cir. 1963), *rev'd on other grounds*, 379 U.S. 378, 384 (1965) (finding that the injunction at issue in that case did not require the branch to "violate foreign law," but recognizing that "overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts").

Finally, the act of state doctrine and the defense of foreign sovereign compulsion, which derive from principles of comity, also preclude the injunctive relief sought by Plaintiffs here. When sovereign acts, such as the Republic's payment of Argentine Law Bonds or the enforcement of its banking laws, occur entirely within the sovereign's own borders, the act of state doctrine prevents a U.S. court from interfering with those acts, and the defense of sovereign

compulsion shields Citibank Argentina from being ordered to act contrary to the will of its host nation.[68]

CONCLUSION

For the reasons set forth above, Citibank respectfully requests that the Court enter an order clarifying that Citibank Argentina is not as a matter of law enjoined from remitting to its customers payments that it receives on Argentine Law Bonds, and vacate or modify any restraint that may have been imposed by the July 28, 2014 order.

Dated: New York, New York
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[68] *See Allied Bank Int'l v. Banco Credito Agricola de Cartego*, 566 F. Supp. 1440, 1443 (S.D.N.Y. 1983) (Griesa, J.) (holding that Costan Rican decree imposing moratorium on servicing debt was valid under act of state doctrine), *aff'd*, 733 F.2d 23 (2d Cir. 1984), *rev'd on reh'g*, 757 F.2d 516 (2d Cir. 1985) (holding that decision should not be given effect outside Costa Rica if debts were payable in New York); *In re Vitamin C Antitrust Litig.*, 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008) (recognizing defense of foreign sovereign compulsion), *appeal docketed,* No. 13-4791 (2d Cir. argued Jan. 29, 2015); *Trugman-Nash, Inc. v. N.Z. Dairy Bd., Milk Prods. Holdings (N. Am.) Inc.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997) (explaining that an actual conflict with foreign law "is sufficient to entitle defendants to invoke the doctrines of act of state, foreign sovereign compulsion, and international comity"); Restatement (Third) of the Foreign Relations Law of the United States § 441 (1987).

In the interest of brevity, Citibank incorporates its full arguments on all these points from its prior briefing. *See, e.g.*, Citibank Mem. in Supp. of Renewed Mot. for Clarification or Modification, filed June 10, 2014 (Dkt. No. 550). Citibank also incorporates the arguments contained in The Clearing House's *amicus* brief.

APPENDIX A

Chart Summarizing Distinctions Between Argentine Law Bonds and Foreign Law Bonds

	Argentine Law Bonds	Foreign Law Bonds
Governing Law[69]	The Argentine Law Bonds are governed by Argentine law.	The Foreign Law Bonds are governed by New York or English law.
Governing Documents	The Argentine Law Bonds were issued under Argentine Presidential decrees, and under various resolutions that were not officially published outside Argentina or in English.[70]	The Foreign Law Bonds were issued under an Indenture Agreement appointing BNY as Trustee.[71]
Investor Protections[72]	The Argentine Law Bonds lack critical protections found in the Foreign Law Bonds that prevent unilateral changes in terms, such as the *Pesificación*.	The Foreign Law Bonds include protective clauses such as the *Pari Passu* Clause and default/cross-default provisions that ensure parity with all other "External Indebtedness."
ISIN	The ISINs for the Argentine Law Bonds all begin with "AR," indicating that they were numbered by *Caja*, and registered in Argentina.[73]	The ISINs for the Foreign Law Bonds all begin with "US" or "XS," indicating they were numbered by CUSIP Global Services or Euroclear, and registered outside of Argentina.[74]
Submission to Jurisdiction[75]	The Republic has not submitted to the jurisdiction of any court outside of Argentina with respect to the Argentine Law Bonds.	The Republic has submitted to the jurisdiction of courts outside of Argentina with respect to the Foreign Law Bonds.

[69] *See, e.g.*, 2005 Pro. Supp. at S-61.
[70] *See* Duggan Decl. ¶¶ 8–15, 25-38.
[71] *See, e.g.*, 2005 Pro. Supp. at S-61.
[72] *See, e.g.*, 2005 Pro. Supp. at S-21.
[73] *See ISINs & ISO 6166*, ASS'N NAT'L NUMBERING AGENCIES, http://www.anna-web.org/index.php/home/isinsaiso6166 (last visited Oct. 19, 2014); *Numbering Agencies*, ASS'N NAT'L NUMBERING AGENCIES, http://www.anna-web.org/index.php/numbering-agencies (last visited Oct. 19, 2014).
[74] *See* 2005 Pro. Supp. at S-72; *Numbering Agencies*, ASS'N NAT'L NUMBERING AGENCIES, http://www.anna-web.org/index.php/numbering-agencies (last visited Oct. 19, 2014).
[75] *See, e.g.*, 2005 Pro. Supp. at S-72.

	Argentine Law Bonds	Foreign Law Bonds
Place of Payment[76]	The Argentine Law Bonds are payable in Argentina, through *CRYL* and *Caja,* neither of which is subject to jurisdiction in the United States.	The payments on the Foreign Law Bonds governed by New York and English law are made in New York and Europe through BNY as Indenture Trustee, with payments being made in New York to the nominee of DTC and in Europe to the BNY nominee that also serves as the common depository for Euroclear and Clearstream.
Place of Deposit of Global Certificates	The global certificates for the Argentine Law Bonds are all deposited at, and registered in the name of, *CRYL*.[77]	The global certificates for the Foreign Law Bonds are all deposited outside of Argentina, with the New York nominee of DTC, and with the European nominee of BNY and the shared common depository. Such certificates are registered in the names of the respective nominees.[78]

[76] *See, e.g.*, D'Auro Decl. ¶¶ 6-10; 2005 Pro. Supp. at S-67.
[77] *See* Duggan Decl. ¶ 39.
[78] *See, e.g.*, 2005 Pro. Supp. at S-72.