UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML Capital Ltd., Plaintiff, v. The Republic of Argentina, Defendant.	08 Civ. 6978 (TPG)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO INTERVENE

MORGAN, LEWIS & BOCKIUS LLP

Timothy B. DeSieno
Stephen Scotch-Marmo
101 Park Avenue
New York, NY 10178
Tel: (212) 309-6000
tim.desieno@morganlewis.com
stephen.scotch-marmo@morganlewis.com

Sabin Willett (*pro hac vice*)
Christopher L. Carter (*pro hac vice*)
One Federal Street
Boston, MA 02110
Tel: (617) 951-8000
sabin.willett@morganlewis.com
christopher.carter@morganlewis.com

Attorneys for Intervenors

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ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Yellow Crane Holdings, L.L.C., MCHA Holdings, LLC, Honero Fund I, LLC, Red Pines LLC, Procella Holdings, L.P., Trinity Investments Limited, Spinnaker Global Emerging Markets Fund, Ltd. and Spinnaker Global Special Situations Fund LP (collectively, the "Intervenors") submit this Memorandum of Law in Support of the Motion to Intervene:

PRELIMINARY STATEMENT

The Intervenors seek to intervene in this action,[1] in order to respond to expedited proceedings brought on by the Republic of Argentina (the "Republic") that seek to vacate the existing *pari passu* injunctions before the Court can consider motions for similar injunctions that the Intervenors have made in related cases.

On February 11, the Republic moved by Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012, and October 30, 2015 (the "Motion to Vacate"). This Court entered the order on February 11 (the "Order").

Vacatur would impair the Intervenors' interests, and those of many other similarly-situated holders of defaulted debt of the Republic. The Intervenors hold interests in defaulted bonds governed by foreign law issued by the Republic and are plaintiffs in related cases pending before this Court.[2] The relevant debt instruments are governed by English and German law, and

[1] To ease the practical burden, the Intervenors have sought to intervene in only the lead case of the matters holding the injunctions. Regardless of the disposition of this or any particular case, the Intervenors seek to have the injunctions remain in place until the Court has acted on the Intervenors' own motions for injunctive relief.

[2] The related proceedings are *Trinity Investments Limited, et. al. v. The Republic of Argentina* ("*Trinity*"), Case No. 14-09095 (S.D.N.Y.) (TPG), *Red Pines LLC, et. al. v. The Republic of Argentina* ("*Red Pines*"), Case No. 14-09427 (S.D.N.Y.) (TPG), *MCHA Holdings, LLC, et. al. v. The Republic of Argentina* ("*MCHA*"), Case No. 15-08529 (S.D.N.Y.) (TPG), *Procella Holdings, L.P., et. al. v. The Republic of Argentina* ("*Procella*"), Case No. 15-09579 (S.D.N.Y.)

contain equal treatment covenants substantially similar to those upon which this Court has ruled in granting the November 21, 2012 and October 30, 2015 injunctions (the "Injunctions"). Last year, the Intervenors moved for *pari passu* injunctions on debt governed by English and German law similar in form to those already issued by this Court in related cases.[3] The briefing on these motions is scheduled to close on March 18, 2016.

During the limited period necessary to complete the briefing and facilitate the Court's review of the foreign-law holders' motions, the Injunctions against the Republic protect the status quo and the interests of the Intervenors. As this Court stated: "It would be inequitable to give injunctive relief to one group of bondholders while denying that relief to other, similarly situated bondholders." The Intervenors require intervention in this matter to protect themselves from *vacatur* of the Injunctions before; and, so that under the Court's scheduling order in their own matters, their own requests for injunctions can be heard. Thus, the Intervenors respectfully request that they be permitted to intervene in this action for the purpose of opposing requests to vacate the Injunctions, until such time as the Court has reviewed their motions for *pari passu* injunctions. The Intervenors have lodged their opposition to the Motion to Vacate concurrently with this filing.[4]

The Intervenors' proposed opposition focuses on three issues:

(TPG), *ARAG-A Limited, et. al. v. The Republic of Argentina* ("*ARAG-A*"), Case No. 16-00905 (S.D.N.Y.) (TPG) and *Honero Fund I, LLC, et. al. v. The Republic of Argentina* ("*Honero*"), Case No. 16-00911 (S.D.N.Y.) (TPG).

[3] The Spinnaker entities are not plaintiffs in *Red Pines* or *Trinity*, but are plaintiffs in *MCHA*, *Procella*, *ARAG-A* and/or *Honero*. The Intervenors will seek to have *MCHA*, *Procella*, *ARAG-A* and *Honero* consolidated with *Red Pines* or *Trinity* upon an order granting an injunction in the *Red Pines* and *Trinity* proceedings.

[4] Pursuant to Fed. R. Civ. P. 24(c), the Intervenors have attached as Exhibit A to this Motion the opposition to the Motion to Vacate they wish to file. If intervention is granted, the Intervenors will promptly file this opposition on the docket in this case.

1) The request is premature. The party whose conduct prompted imposition of the Injunctions seeks to vacate them before curing its own conduct, and before settlement negotiations have even begun for holders of the vast majority of the relevant bond obligations. In so doing, the Republic would remove the key vehicle incentivizing a global compromise. A grant of the requested relief would injure, rather than promote, the substantial public interest in a global compromise.

2) The request seeks the Court's imprimatur on a proposed settlement that itself violates the *pari passu* clauses of the Intervenors and other parties, by treating one class of external debt (currently holding injunctions) better than another (not currently holding injunctions).

3) Alternatively, even if the Court believes that certain discrete settlements should be effected, vacatur is unnecessary and unwarranted. The Injunctions could be modified to permit cash payments (but not new bond financing).

In brief, no cause has been shown why the Court should vacate its Injunctions now. Denying the requested relief will incentivize all parties to negotiate in good faith toward a global compromise.

The Intervenors have a right to be heard in this matter under Federal Rule of Civil Procedure 24(a)(2) because they meet all the requirements of that rule. They are making a timely request (literally a few days after the Republic made its surprising filing), they have an interest (as they hold almost 14% of the holdings of the untendered bondholders), that interest may be impaired (the Injunctions are the reason that the Republic has made its latest unilateral settlement offer), and they are not adequately represented (no one speaks for the bondholders who do not hold injunctions of their own, and certainly no one speaks for these particular bondholders). Giving the Intervenors a voice in required by the rule and will promote settlement and reduce future litigation.

BACKGROUND

I. The Injunctions

The events that led to the Injunctions are a matter of record in this Court. In late 2001, the Republic declared a moratorium on the payment of principal and interest with respect to all

of its foreign debt. *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012). The Republic ultimately ceased payment on all of its external indebtedness, extended this moratorium in its annual budget and refused to pay principal or interest to any creditors subject to the moratorium. *Id.* In 2004, through Decree 1735, the Republic instituted bond exchanges for defaulted public debt. A year later, in 2005, the Republic offered a bond exchange to all holders of non-performing external debt.

Approximately 25% of the Republic's non-performing bonds did not participate in the 2005 bond exchange. *See NML Capital*, 699 F.3d at 252. Participating bondholders received 2005 exchange bonds, *id.*, and the Republic made all scheduled payments on those bonds until June 30, 2014. *See NML Capital, Ltd. v. Republic of Argentina*, No. 14 Civ. 8601, 2015 WL 3542535, at *1-3 (S.D.N.Y. June 5, 2015).

The Republic's legislature enacted Law 26,017 (the "Lock Law") on February 9, 2005, preventing the Republic from entering into a compromise or settlement with bondholders that did not participate in the exchange process. *Id.* at *1. The Republic's courts have held that the Lock Law and the Republic's moratorium on payment prevent the Republic's courts from recognizing and enforcing any non-tendering bondholders' New York judgments. *NML Capital*, 699 F.3d at 254.

In 2010, the Republic carried out another bond exchange. The legislature enacted Law 26,547, which barred the Republic from paying non-tendering bondholders more than that which was offered to 2005 exchange bondholders, effectively prohibiting the Republic from complying with its payment obligations on untendered bonds. *NML Capital*, 2015 WL 3542535, at *1. As in 2005, participants received exchange bonds (together with the 2005 exchange bonds, the

"Exchange Bonds"), as to which payments were made from 2010 until June 30, 2014. *See id.* at *3.

NML Capital and other similarly situated bondholders sought equitable relief with respect to the equal treatment provision of their bonds. In 2011, this Court ruled in those actions, holding that (a) the Republic's actions violated the Equal Treatment Clause of the 1994 Fiscal Agency Agreement; (b) NML had no adequate remedy at law and absent equitable relief, would suffer irreparable harm, and (c) the equities strongly supported injunctive relief. This Court subsequently issued the Injunctions at issue in the Order which required the Republic to make ratable payment to NML (and the Me Too plaintiffs) whenever it made payments on the exchange bonds.[5] *See NML Capital*, 2015 WL 6656573; *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978, 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012), *aff'd*, 727 F.3d 230, 248 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014).

In response to the orders issued by this Court and the Second Circuit Court of Appeals, the Republic doubled down. Elected officials declared that the Republic would not comply with the Court's orders, nor treat NML or other plaintiffs in the U.S.-law cases equally with other holders of external indebtedness. *See NML Capital*, 2015 WL 3542535, at *3. In 2013, the Republic's legislature enacted Law 26,886. Law 26,886 barred the Republic from paying non-tendering bondholders more than that which was offered to exchange bondholders, effectively prohibiting the Republic from complying with its payment obligations in respect of the untendered bonds. *See id.*

[5] On October 30, 2015, this Court issued injunctions in the "me-too" proceedings, *see NML Capital, Ltd. v. The Republic of Argentina*, No. 14 Civ. 8601, 2015 WL 6656573, at *5 (S.D.N.Y. Oct. 30, 2015), *app. pending*, No. 15-3715 (2d Cir. Nov. 10. 2015), which the Republic is also seeking to have vacated.

In June 2014, the Republic tried to circumvent its obligations by transferring funds to certain financial intermediaries in respect of interest due on the exchange bonds. *See id*. On September 11, 2014, the Republic enacted Law 26,984, authorizing a government ministry to remove the Bank of New York Mellon as trustee of the exchange bonds and to appoint an Argentinian bank as successor trustee, notwithstanding the exchange bondholders' contractual right to appoint a new and different trustee. Law 26,984 also opens an account (in the name of a putative successor trustee) with the Republic's central bank to hold funds necessary to make payments on the exchange bonds. These measures were undertaken to try to perpetuate the effective re-ranking of the exchange bonds in a higher rank than that of the untendered notes.

On February 5, 2016, the Republic published a proposed settlement of all outstanding defaulted Republic debt. The proposal provides different settlement amounts for three categories of bondholders: (1) those bondholders with debt judgments and an injunction, (2) those bondholders without a debt judgment but with an injunction, and (3) those bondholders who do not hold an injunction from this Court.

On February 11, 2016, the Republic filed its Motion to Vacate. On February 12, 2016, the Court entered the Order.

II. Procedural History of the Intervenors' Matters

On November 14, 2014, the Intervenors filed the *Trinity* complaint against the Republic, seeking damages for nonpayment of their bond interests and equitable relief for violation of the Republic's equal treatment obligations. The *Trinity* case involves bonds governed by German law. On November 26, the Intervenors filed the *Red Pines* complaint against the Republic, seeking damages for nonpayment of their note interests and equitable relief for violation of the Republic's equal treatment obligations. The bonds at issue there arise under English law. In each case, the relevant instruments contain *pari passu* clauses that are similar in all material

respects to the clauses at issue in this litigation. The Intervenors later submitted to this Court affidavits from a distinguished English jurist and German academic opining that the *pari passu* clauses have been breached under operative law, and addressing other technical defenses raised by the Republic.

On November 13, 2015, responding to Argentina's motions for summary judgment, the Intervenors cross-moved for partial summary judgment, seeking the entry of *pari passu* injunctions in the same form that this Court previously has issued. The Republic responded on February 12, 2016 with a memorandum of law and responsive affidavits. The Intervenors' replies are due March 18, 2016.

In 2015 and 2016, the Intervenors have filed additional complaints (adding the Spinnaker entities and updating the holdings of the other Intervenors). On October 29, 2015, the Intervenors filed the *MCHA* complaint against the Republic, seeking damages for nonpayment of bonds issued by the Republic and specific performance of the Republic's equal treatment obligations under the issued bonds. On December 8, 2015, the Intervenors filed the *Procella* complaint against the Republic, seeking damages for nonpayment of their note interests and seeking an order for injunctive relief in respect of the Republic's breaches of its equal treatment obligations under the note instruments. On February 5, 2016, the Intervenors filed the *ARAG-A* complaint against the Republic, seeking damages for nonpayment of their note interests and seeking an order for injunctive relief in respect of the Republic's breaches of its equal treatment obligations under the note instruments. Also on February 5, 2016, the Intervenors filed the *Honero* complaint against the Republic, seeking damages for nonpayment of bonds issued by the Republic and specific performance of the Republic's equal treatment obligations under the issued bonds.

ARGUMENT

I. The Limited Basis Under Which the Intervenors Seek to Intervene

The Intervenors seek to intervene for the limited purpose of responding to the Order or any other efforts made by the Republic seeking to have the Injunctions withdrawn or limited prior to this Court's review in the *Trinity*, *Red Pines*, and related cases, of the Intervenors' requests for *pari passu* injunctions. Given that limited purpose, the Intervenors propose that this intervention be terminated when this Court has ruled on the Intervenors' pending motions for injunctions in their own cases. Courts frequently allow intervention under Rule 24 for a limited purpose. *See, e.g.*, *N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc.*, No. CV 12-1633, 2015 WL 777248, at *24 (E.D.N.Y. Feb. 13, 2015), *R. & R. adopted*, No. 12-CV-1633, 2015 WL 1345814 (E.D.N.Y. Mar. 25, 2015) (granting permission to intervene in the litigation for the limited purpose of engaging in discovery).

II. The Intervenors Qualify for Intervention as of Right Under Rule 24(a)(2).

Federal Rule of Civil Procedure 24(a) provides that a court "must permit" a non-party to intervene where disposition of an action may impair that person's ability to protect an interest relating to the property or transaction that is the subject of the litigation, unless existing parties adequately represent that interest. To intervene as of right, "a movant must: (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 128-29 (2d Cir. 2001). The Intervenors plainly meet the requirements of Rule 24(a).

A. Timeliness.

Timeliness should be "evaluated against the totality of the circumstances before the court." *EEOC v. Mavis Disc. Tire*, No. 12 Civ. 0741, 2013 WL 5434155, at *4 (S.D.N.Y. Sept. 30, 2013).

As described above, the Intervenors have been seeking injunctions of their own, like the Me Too recipients of injunctions. *See supra*, at 7. Until late afternoon, February 11, 2016, this was the appropriate course for the Intervenors to protect their interests while the Injunctions were in place. The Order raised the possibility that the Injunctions might be lifted prior to the Court's review of the Intervenors' own requests for injunctions. As a result, the Intervenors' interests were put at great risk. Without any injunctions in place, the Republic could freely reenter the debt marketplace without any further effort to resolve the claims of the large number of bondholders, like the Intervenors, with whom the Republic has not yet negotiated. That group is believed to include holders of over 80% of the outstanding defaulted bonds.

In rapid response, the Intervenors filed the instant motion. Once their interests were at stake, the Intervenors "moved almost immediately, and their intervention has neither delayed this proceeding nor prejudiced any party." *Delaware Trust Co. v. Wilmington Trust, N.A.*, 534 B.R. 500, 510 (S.D.N.Y. 2015). The Intervenors satisfy the timeliness requirement.

B. The Intervenors' Interest in the Action.

A financial interest is "direct, substantial, and legally protectable for purpose of the Rule 24(a) analysis." *In re Pandora Media*, No. 12 Civ. 8035, 2013 WL 6569872, at *8 (S.D.N.Y. Dec. 13, 2013) (internal quotations omitted). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Brennan*, 260 F.3d at 129 .

The Intervenors have a substantial and direct interest in the Injunctions. "Rule 24(a)(2) requires not a property interest but, rather, an interest relating to the property or transaction which is the subject of the action." *Id.* at 130.

The Intervenors are a beneficiary of the Injunctions, which effectively bar the Republic from re-entering the capital markets, and thus provide all parties great incentive to engage in good-faith negotiations. As this Court stated: "It would be inequitable to give injunctive relief to one group of bondholders while denying that relief to other, similarly situated bondholders." *NML Capital,* 2015 WL 6656573, at *5 (S.D.N.Y. Oct. 30, 2015). The Intervenors are also beneficiaries of the Injunctions because the Intervenors have pending motions for injunctions of their own, and the calendar does not permit the Court's review prior to the time sought by the Republic in its fast-tracked Order. The Intervenors' interest is neither remote nor contingent, as they are already seeking to legally protect that interest and must intervene here to continue to protect that interest. *See N.J. Carpenters Health Fund v. Residential Capital, LLC,* No. 08 Civ. 8781, 2010 WL 5222127, at *4 (S.D.N.Y. Dec. 22, 2010) (Rule 24(a) interest merely needs to "relate[] to" the property or transaction at issue and "need not even be a property interest"). Accordingly, the Intervenors have a direct economic interest in the subject matter of the Order.

C. Impairment of the Interest.

The impairment-of-the-interest inquiry overlaps substantially with the substantial interest and adequate representation requirements. A "party whose interest is at stake in litigation and is not adequately represented is likely to suffer impairment in its ability to protect its interest." *In re Pandora Media*, 2013 WL 6569872, at *9. Because the Intervenors have a cognizable interest, as described above, and because it is far from certain that the Intervenors will be

adequately represented by Plaintiffs in this Order to Show Cause, as is described below, this prong of the test is satisfied. *See id.*

Lifting the Injunctions would impede the Intervenors' ability to protect their interest, because the Intervenors are beneficiaries of the Injunctions. *See NML Capital*, 2015 WL 6656573, at *5. Defendants may argue that the Intervenors can still negotiate or litigate the status of their own holdings, even if the Injunctions are lifted. However, as a practical matter, the Intervenors' ability to protect their interests will be impaired. Once Argentina can re-enter the capital markets, it will lose all incentive to negotiate. *See Maryland Cas. Co. v. W.R. Grace & Co.*, No. 88 Civ. 4337, 1996 WL 34154, at *2 (S.D.N.Y. 1996) (The inquiry into impairment of interest looks to "the practical disadvantage suffered, and does not require the would-be intervenor to go so far as to show that *res judicata* principles would affect any later suit they might bring."); *Herdman v. Town of Angelica*, 163 F.R.D. 180, 194 (W.D.N.Y. 1995) (impairment is "a practical matter"). The impairment of the interest analysis is also satisfied by the Intervenors.

D. Inadequacy of Current Representation.

Once the Intervenors have established an interest in the action, the "burden of demonstrating inadequacy of representation is generally speaking minimal." *Republic of the Philippines v. Abaya*, No. 14 Civ. 3829, 2015 WL 6758088, at *5 (S.D.N.Y. Nov. 5, 2015) (internal quotation marks omitted). The Second Circuit has, however, "demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) ("Where there is an identity of interest . . . the movant to intervene must rebut the presumption of adequate representation by the party already in the action."). Thus, Defendants

may suggest that the Intervenors and Plaintiffs have the "same ultimate objective" of obtaining the best settlement possible.

However, the Intervenors do not have an "identity of interest" with Plaintiffs and, as a result, they have different "ultimate objective[s]." The Intervenors' interest is not aligned with the interests of injunction-holders. Unlike those parties, the Intervenors hold foreign-law bonds, as to which the Republic has asserted defenses it did not raise in the New York-law actions. Further, Plaintiffs, who hold injunctions, are advantaged by one of the legal defects of the settlement proposal: its improved treatment, or "Pari Passu Offer," for holders with injunctions, while the Intervenors are to consider the "Standard Offer." *See* Mem. of Law in Supp. of the Republic of Argentina's Mot., by Order to Show Cause, at 9-10. Theoretically, any holder might negotiate to improve its own position at the expense of others, and so no holder can be said to represent the interests of all holders. Parties with incentives to settle a dispute in a way that harms the interests of non-parties cannot adequately represent those non-parties. *See Brennan*, 260 F.3d at 131-32.

Plaintiffs in the matters at hand all hold injunctions, and the Intervenors are in the different situation of seeking injunctions, and thus the Intervenors' interest is unrepresented here. "[W]here a proposed intervenor's interests are otherwise unrepresented in an action, the standard for intervention is no more burdensome than the standing requirement." *Id.* at 131. This is not a class action in which a class representative stands in for a group of bondholders. The Intervenors' interest is inadequately represented by the parties to the action.

The Intervenors have satisfied all four of the requirements for intervention by right, and should be allowed to intervene for the limited purpose of filing an opposition to the Motion to Vacate.

III. Alternatively, This Court Should Exercise Its Discretion to Allow Permissive Intervention Under Rule 24(b).

Alternatively, the Intervenors meet the lesser standard required for a permissive intervention, as exercise of this Court's discretion to permit intervention is warranted when the Intervenors raise "a defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

In exercising its discretion to grant a permissive intervention, the court considers the following factors: "the nature and extent of the intervenors' interests, the degree to which those interests are adequately represented by other parties, and whether parties seeking intervention will significantly contribute to [the] full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Jamie Music Publ'g Co. v. Roc-A-Fella Records, LLC*, No. 05 Civ. 9922, 2007 WL 1129333, at *2 (S.D.N.Y. Apr. 12, 2007) (internal quotation marks omitted).

Even where not all of the requirements for intervention as of right are met, a court may still permissively grant a motion to intervene. *See EEOC v. Local 638*, No. 71 Civ. 2877, 2003 WL 21767772, at *2 (S.D.N.Y. July 30, 2003) (holding that even if the requirements for intervention as of right "had not been met, permissive intervention would [still] be appropriate"). The degree of discretion afforded to the court in considering permissive intervention is extremely deferential. *See id*.

Each of the factors weighs in favor of a permissive intervention. As shown above, the Intervenors have both a substantial and direct interest in the Republic's debt and in the Injunctions, and that interest will not be adequately represented without addressing the substantial concerns of those parties that, like the Intervenors, do not presently hold injunctions.

Here, the pervading "common question of law" is whether it is reasonable to grant the relief sought by the Republic – to lift the Injunctions at this premature stage, without any certainty that the Republic will have cured its prior conduct. Without permitting the Intervenors, as the non-holders of injunctions, to voice opposition, the Court would be unable to fully and equitably adjudicate the legal issue, and the Intervenors would be left substantially impaired and without remedy should the Court agree to vacate the Injunctions.

In short, substantial factual and legal grounds should be presented to this Court as to the requests for relief in the pleadings and in the cross motions. These arguments should be presented in an orderly fashion before the Court considers relief on the pending Motion to Vacate. The Intervenors submit that they have a right to appear and present those grounds, and in the alternative that they should be permitted to do so.[6]

CONCLUSION

For the foregoing reasons, the Intervenors request that the Court grant their Motion to Intervene for the limited purpose of prosecuting their opposition to the Motion to Vacate, until their own requests for injunctive relief are considered by this Court.

[6] In the event this Court denies the Intervenors' applications to appear by right and permissively, the Intervenors request that they be permitted to file an *amicus* brief in response to the Order.

Dated: February 18, 2016
New York, New York

Respectfully Submitted,

MORGAN, LEWIS & BOCKIUS LLP

Timothy B. DeSieno (TD-4316)
Stephen Scotch-Marmo (SS-6202)
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
(212) 309-6000

-and-

/s/ Sabin Willett
Sabin Willett (*pro hac vice*)
Christopher L. Carter (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 951-8000

Attorneys for Intervenors