12-105-cv(L)

12-109-cv(CON), 12-111-cv(CON), 12-157-cv(CON), 12-158-cv(CON), 12-163-cv(CON), 12-164-cv(CON), 12-170-cv(CON), 12-176-cv(CON), 12-185-cv(CON), 12-189-cv(CON), 12-214-cv(CON), 12-909-cv(CON), 12-914-cv(CON), 12-916-cv(CON), 12-919-cv(CON), 12-920-cv(CON), 12-923-cv(CON), 12-924-cv(CON), 12-926-cv(CON), 12-939-cv(CON), 12-943-cv(CON), 12-951-cv(CON), 12-968-cv(CON), 12-971-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

—against—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Clearing House Association L.L.C. ("The Clearing House") hereby certifies that The Clearing House is not a subsidiary of any other corporation. The Clearing House is a limited liability company and as such has no shareholders. Rather, each member holds a limited liability company interest in The Clearing House that is equal to each other member's interest, none of which is more than a 10% interest in The Clearing House.

Dated: New York, New York
April 4, 2012

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INTRODUCTION

The Clearing House Association L.L.C. ("The Clearing House") submits this brief, with consent of all parties, as *amicus curiae* in the appeal by defendant the Republic of Argentina ("Argentina") from orders entered by the United States District Court for the Southern District of New York (Griesa, J.) on February 23, 2012 (the "Injunction" (A-3382–89)[1]) and underlying orders entered on December 7 and 13, 2011 (the "December 2011 Orders" and together with the Injunction, the "Orders") (A-2164–68, A-3047–53). The Clearing House supports Argentina's position that the Court should reverse the Orders.[2]

This brief addresses an issue of vital importance to the U.S. and international credit markets for trillions of dollars of debt obligations governed by New York law. The critical question posed is the effect, as a matter of New York law, of the *pari passu* covenant included in Section 1(c) of Argentina's Fiscal

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1 Citations to "A-" refer to the Joint Appendix. Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), The Clearing House states that this brief was authored by The Clearing House and its counsel; was neither authored nor funded by any party to this action; and no person other than the *amicus curiae*, its members, or counsel contributed money that was intended to fund preparing or submitting this brief.

2 On March 30, 2012, the Court granted The Clearing House's unopposed emergency motion for an extension of time to file this brief. *NML Capital, Ltd.* v. *Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Mar. 30, 2012) (Dkt No. 176).

Agency Agreement dated as of October 19, 1994 (the "FAA"), A-157, and in the bonds issued thereunder and held by plaintiffs. Our member banks and other participants in the credit markets have long understood such a clause—which is standard language included in substantially the same form in numerous credit documents—to prohibit a debtor from creating unsecured debt that ranks senior in legal right of payment to the payment obligations the debtor has to creditors for whose benefit the covenant is made.

On December 7 and 13, 2011, the district court entered orders that adopted a markedly different, broader interpretation of this clause: that it also serves to prevent a debtor from paying certain of its unsecured, unsubordinated creditors without making a "Ratable Payment" to each of its other unsecured, unsubordinated creditors, and to permit an unpaid creditor to interfere with payments to other creditors. The district court ruled that the enactment of a 2005 (and 2009) Argentine statute, known as the "Lock Law," that prohibited the Argentine government from re-opening the then-pending exchange offer without approval of the Argentine Congress, and from settling later with non-tendering bondholders, constituted a violation of the *pari passu* clause. A-3053. The district court separately ruled that Argentina, apparently irrespective of the Lock Law, would violate the clause if it "fail[ed] to pay the obligations currently due under [plaintiffs'] Bonds while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness." A-3052. The court postponed the question of remedy for later consideration.

On February 23, 2012, the district court granted plaintiffs' motions for injunctive relief. The Injunction requires that Argentina make "Ratable Payments" to plaintiffs when Argentina "pays any amount due under the terms of the bonds or other obligations issued pursuant to [Argentina's] 2005 or 2010 Exchange Offers" (the "Exchange Bonds"). A-3387 (Injunction ¶ 2.a). The Injunction defines Ratable Payment to mean the portion of the total amount owed to plaintiffs that corresponds to the *percentage* of the amount then due and owing on the Exchange Bonds that is being paid (not the actual dollar amount being paid). A-3387 (Injunction ¶ 2.b & c). (That is, if Argentina pays 100% of an installment owed on the Exchange Bonds it must pay 100% of the accelerated amounts of principal and interest due on the plaintiffs' bonds (a much larger sum). A-3387 (Injunction ¶ 2.b & c).) More generally, and vaguely, Argentina is enjoined from "violating [the *pari passu* clause in the FAA], *including* by making any payment under the terms of the Exchange Bonds without . . . concurrently or in advance making a Ratable Payment to" plaintiffs. A-3387 (Injunction ¶ 2.d) (emphasis added). Thus, apparently any payment to any unsecured creditor could be said to trigger the prohibition. Moreover, the Injunction purports to bind "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds." A-3388 (Injunction ¶ 2.e). It prohibits such "Participants" from processing payments made pursuant to the Exchange Bonds unless Argentina certifies to the district court that Argentina has made or concurrently is making a Ratable Payment to plaintiffs and provides notice of the certification to the Participants. A-3388 (Injunction ¶ 2.e-f).[3]

The Clearing House respectfully submits that its interpretation—not the unique interpretation of the court below—reflects the view of how credit markets have negotiated and understood these clauses to operate for many decades, and is the correct reading of New York law. The Orders, on the other hand, are based upon an interpretation that constitutes a dramatic and disruptive departure

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[3] Plaintiffs and the district court in the hearing at which the Injunction was signed indicated that the Injunction was intended to reach both entities with a designated role in the payment to bondholders—such as The Bank of New York (the trustee for the Exchange Bondholders) and Cede & Company (the registered Exchange Bondholder)—and unspecified "banks" and "intermediaries" who might participate in making payments to Exchange Bondholders. *E.g.*, A-2296–97 (Feb. 23, 2012 Tr. 7:22-8:2 ("THE COURT: The banks wouldn't be aiding and abetting [a violation of an order directed only at Argentina]. The banks only pay the exchange offer people. That's what they do. Now, if I entered this order, this would impose an obligation on the banks and it might impose an impediment upon the banks with respect to the exchange offer people which does not exist now."); *see also* A-2293, 2295-97, 2329 (*id.* at 4:12-19, 4:23, 6:13-15, 7:10, 8:17-24, 40:15-17) (referring to effect of order on "banks" and "intermediaries").

from how New York law-based credit markets have functioned in this area.[4] We do not address in this brief whether Argentina's Lock Law in itself constitutes a breach of the *pari passu* clause,[5] but we submit that the district court's holding that paying the Exchange Bondholders without also paying other unsecured creditors was by itself a breach of the *pari passu* clause was clearly wrong. This Court should reverse the Orders and reaffirm the long-understood meaning of these clauses in the market.

The Clearing House wishes to highlight for the Court two independent reasons for vacating the Orders of particular importance to The Clearing House

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4 On two occasions, courts in Brussels, Belgium, have interpreted New York law to give *pari passu* clauses the second, broader meaning—that is, barring payments to some unsecured creditors if other unsecured creditors are not paid pro rata. In each case, however, the Belgian court ruled without citing any New York authority. *See Elliott Assocs., L.P.* v. *Banco de la Nacion*, Hof van Beroep [HvB] [Court of Appeal] Brussel, 8e Kamer, Sept. 26, 2000, A.R. Nr. 2000/QR/92 (Belg.) (A-1356–67); *LNC Inv. LLC* v. *Republic of Nicaragua*, Rechtbanken van Koophandel [Kh.] [Commercial Court] Brussel, Sept. 11, 2003, R.K. 240/03 (Belg.) (A-1333–55).

5 It is important, however, to distinguish between changes in *ranking* of subordinated debt and decisions by a debtor to pay one creditor over another. On its face, Argentina's Lock Law appears to be nothing more than an expression of a sovereign's intent in the context of a restructuring not to give a better deal to bondholders who do not accept the restructured terms being offered. Such statements are common, necessary in any sovereign restructuring and not ordinarily understood as changing the legal right to enforce the right to be paid. In any event, enjoining payment to certain bondholders would not appear to be a proper remedy for a breach of a *pari passu* clause in unsecured debt held by other creditors.

and its members. *First*, the district court's interpretation of the standard *pari passu* clause conflicts with longstanding market practice and understanding and, significantly, is inconsistent with the existence of other clauses that specifically provide for sharing and other allocation of payments by debtors and that are widely used in domestic and international credit agreements. *Second*, if applied in accordance with its terms, the Injunction would impose undue burdens on the bank Participants, risk unacceptable delays to the clearing and settlement of unrelated payments, and threaten the orderly functioning of the U.S. and international credit markets and payment systems.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1853, The Clearing House is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits.[6] The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment

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[6] The members of The Clearing House are: Banco Santander, S.A.; Bank of America, N.A.; The Bank of New York Mellon; The Bank of Tokyo-Mitsubishi UFJ Ltd.; Branch Banking and Trust Company; Capital One, N.A.; Citibank, N.A.; Comerica Bank; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; PNC Bank, N.A.; Regions Bank; The Royal Bank of Scotland N.V.; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

letters, *amicus* briefs and white papers, the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C. ("PaymentsCo"), provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-house, funds-transfer, and check-image payments made in the U.S.[7]

PaymentsCo operates the Clearing House Interbank Payments System ("CHIPS"), a real time, final payment funds transfer system that serves 53 U.S. and foreign banks and that each day processes, on average, over 377,967 payment orders, with an aggregate daily value of $1.522 trillion as of February 29, 2012.[8] CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal payment systems for international funds transfers in the United States.[9]

The Clearing House has a substantial interest in the outcome of this action because the lower court's broader interpretation of the *pari passu* clause so as to prevent the payment of one debtor in preference to another is not only wrong but also dangerous. This is the first New York court to reach that conclusion.

7 *See* http://www.theclearinghouse.org.

8 *See* http://www.chips.org/docs/000652.pdf.

9 Average daily funds transfers using Fedwire amounted to $2.513 trillion in the fourth quarter of 2011. *See* http://federalreserve.gov/paymentsystems/fedfunds_qtr.htm.

Unless and until reversed, it may be looked to by foreign courts as the only statement of New York law on the issue. Maintaining the correct interpretation of this widely used clause is important to Clearing House members not only as parties to the debt instruments that include the clause. An interpretation of the standard *pari passu* clause in debt instruments to permit some of a debtor's creditors to interdict payments to other creditors, as the Injunction does, would impose undue costs on intermediary banks and almost certainly delay some payments beyond those targeted by the court's order, incrementally degrading the reliability of the worldwide payment systems.[10] Moreover, an erroneous interpretation of that clause in debt instruments threatens the proper functioning of U.S. and international credit markets and, especially, the negotiation of orderly workouts and restructuring of debt where necessary and appropriate.

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[10] For these reasons, in 2004 The Clearing House, the United States and the Federal Reserve Bank of New York all submitted *amicus* briefs to the district court opposing the proposed new interpretation. Mem. of *Amicus Curiae* The New York Clearing House Ass'n L.L.C., *Macrotecnic Int'l Corp.* v. *Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004) (A-1805–22); Statement of Interest of the United States, *Macrotecnic Int'l Corp.* v. *Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004) (A-1760–85); Mem. of Law of *Amicus Curiae* Federal Reserve Bank of New York, *Macrotecnic Int'l Corp.* v. *Republic of Argentina*, No. 02 Civ. 5932 (TPG) (S.D.N.Y. Jan. 12, 2004) ("FRBNY Mem.") (A-1786–1804). At that time, the district court resolved this issue without reaching the merits because plaintiffs represented to the court that they were not asserting a claim under the *pari passu* clause. A-2016–17. Each of these briefs was placed before the district court anew in connection with the motions that resulted in the Orders.

ARGUMENT

I. INTERPRETING THE *PARI PASSU* CLAUSE TO REQUIRE RATABLE PAYMENTS TO UNSECURED CREDITORS IS INCONSISTENT WITH THE LANGUAGE OF THE CLAUSE, OTHER PROVISIONS OF THE CONTRACT, AND MARKET PRACTICE AND UNDERSTANDING.

A. Interpreting and Understanding *Pari Passu* Clauses.

Trillions of dollars of outstanding unsecured debt obligations governed under New York law benefit from *pari passu* clauses. Like all contractual provisions, the *pari passu* clause must be interpreted to reflect the intent of the parties, as such intent is expressed in the language of the clause read in the context of the entire contract. The function of the clause, as its language provides, is to affirm that the obligations to which it relates will be unsecured and unsubordinated obligations, ranking *pari passu* and without preference among defined categories of unsecured debt. The *pari passu* clause contrasts directly with a subordination clause in which holders of debt agree to be subordinate in right of payment to certain specified debt obligations.

Pari passu clauses are usually not included in domestic U.S. debt instruments because the general parity of unsecured debt obligations, absent statutory priorities[11] or the exercise of a court's equitable powers of

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[11] *See*, *e.g.*, 12 U.S.C. § 1821(d)(11); 11 U.S.C. § 507(a).

subordination,[12] is well established by law.[13] Indeed, it is so established that the prospectuses pursuant to which U.S. domestic corporate debt is sold typically refer to the *pari passu* status of the debtor's obligation even without inclusion of a specific contractual *pari passu* clause.

In contrast, for non-U.S. debt, it is the practice to include such clauses in the debt contracts because there is not always the same certainty that the legal regimes generally applicable to such debtors will necessarily protect creditors from involuntary subordination.[14] The clause is not intended, however, to do more than what it says—to provide certainty on the issue of involuntary subordination. The *pari passu* clauses in both the FAA and the bonds held by plaintiffs reflect this standard approach.

There is no basis for concluding that a *pari passu* clause serves the broader function of prohibiting a debtor from choosing to pay some unsecured creditors without simultaneously paying others, or, if a debtor attempts to make

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12 *See* 3 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 55.07 (Alan Resnick & Henry J. Sommer ed. 2011).

13 *See* Debra J. Schnebel, *Intercreditor and Subordination Agreements – A Practical Guide*, 118 BANKING L.J. 48, 53 (2001).

14 *See* 2 PHILIP R. WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE § 6.03 (1990); William Tudor John, *Sovereign Risk and Immunity Under English Law and Practice*, 1 INTERNATIONAL FINANCIAL LAW 79, 95 (2d ed. R. Rendell ed. 1983); Lee C. Buchheit & Jeremiah S. Pam, *The Pari Passu Clause in Sovereign Debt Instruments*, 53 EMORY L.J. 869, 902–04 (2004).

such payments, permitting an unpaid unsecured creditor to enlist the aid of a court to interfere with payments to other creditors. Before the December 2011 Orders, no New York or other U.S. court had interpreted the *pari passu* clause in such a way.[15] There is, however, significant legal commentary criticizing such a broad interpretation of New York law-governed *pari passu* clauses.[16]

B. Reading the *Pari Passu* Clause in the Context of the Entire FAA Confirms That the Lower Court's Interpretation is Erroneous.

Our conclusion about the limited purposes of the *pari passu* clause and the error in the analysis of the court below is confirmed when the clause is read in the context of the provisions included in and absent from the remainder of the FAA. Most telling is the absence of a "sharing clause."

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[15] To date no court in New York has adopted either the *Elliott* or *Nicaragua* interpretation of the *pari passu* clause. The *Elliott* case was cited but not followed in *Nacional Financiera, S.N.C.* v. *Chase Manhattan Bank, N.A.*, No. 00 Civ. 1571 (JSM), 2003 WL 1878415 (S.D.N.Y. Apr. 14, 2003), which noted only that the presence of an injunction such as was entered in *Elliott* would present a different case. Similarly, the English courts have not addressed the merits of the issue with respect to *pari passu* clauses in English-law debt instruments. *See Kensington Int'l Ltd.* v. *Republic of the Congo*, 2002 No. 1088, transcript at 27 (Eng. Commercial Ct. Apr. 16, 2003) (noting absence of English authority and denying injunction on equitable grounds) (A-1991–97).

[16] *See*, *e.g.*, Buchheit & Pam, *supra* note 14, at 10–15; Philip R. Wood, *Pari Passu Clauses – What Do They Mean?*, BUTTERWORTHS J. INT'L BANKING & FIN. L. 371, 374 (2003); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 637-39 (2001).

A "sharing clause" is the vehicle for lenders or other creditors to agree among themselves on a contractual basis—typically in syndicated loan agreements—that, if any one of them receives a payment from a debtor that is disproportionate to any amounts received by all of the creditors who are party to the agreement, the excess payment will be shared with the others. These "sharing clauses" generally provide either that a lender is to pay over any disproportionate payment it receives to the other lenders as though it had been received from the debtor or that the lender receiving the disproportionate payment is to purchase participations in the loans held by the other banks. *See* Lee C. Buchheit, HOW TO NEGOTIATE EUROCURRENCY LOAN AGREEMENTS 76–81 (2d ed. 2004). The FAA and Argentine bonds at issue do not have such a clause.

There are three important points to note in relation to sharing clauses. First, these clauses are often found in loan agreements under which the creditors separately are protected against involuntary subordination through a *pari passu* clause, because these two types of clauses serve different purposes. It is, in fact, standard practice in syndicated loan agreements with non-U.S. debtors to include both sharing clauses, to protect against disproportionate payments to lenders in the group, and *pari passu* clauses, to protect against involuntary subordination to new or existing classes of debt.[17]

Second, sharing clauses protect a narrowly defined set of creditors: the lenders who agree among themselves in the inter-creditor agreement in which they appear. In contrast, *pari passu* clauses relate to unilateral action by the debtor with respect to an extremely broad set of creditors: the holders of all sorts of unsecured debt. That could be trade debt, such as the bill owed to the electric company, short-term bank borrowings, or multi-billion dollar bond issuances.[18] Moreover, sharing clauses contain complex "payover" provisions that are necessary to reallocate disproportionate payments among creditors. That is not necessary for *pari passu* clauses, which address only the ranking of legal right to, as opposed to the fact of, payment. Thus, given the specificity and restrictions on

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[17] *See* Financial Markets Law Committee, Issue 79 – Pari Passu Clauses, at 4, 17–18 (Mar. 2005) (A-1830, 1843–44).

[18] Although the Injunction limits its certification requirement to payments from Argentina to Exchange Bondholders, it expressly enjoins Argentina from making any payments that would breach the *pari passu* clause as interpreted by the district court. A-3387 (Injunction ¶ 2.d). The Injunction provides no basis to limit payments that would trigger the requirement to pay the plaintiff bondholders. It is utterly implausible that the parties to a *pari passu* clause intended it to prevent any timely payment to any other creditor (including trade creditors) without Ratable Payment to plaintiffs, as that would prevent the Argentine national government from operating in the event of a default, yet that is the inevitable result of the district court's interpretation.

standard sharing clauses, it is implausible to contend that the market intends *pari passu* clauses to accomplish the same thing in a much vaguer and open-ended way.[19]

Third, sharing clauses are generally not included in New York law-governed fiscal agency agreements, such as Argentina's FAA, or, for that matter, in bond issuances generally.[20] This practice as it relates to sovereign debt securities, and the effect of not having them in that context, has been the subject of considerable debate and commentary in the market. In the 1990s, official sector participants (the G-10 governments and the International Monetary Fund) proposed that emerging market sovereign bonds begin to incorporate sharing clauses modeled on those typically found in syndicated commercial bank loans. *See*, *e.g.*, Working Group on International Financial Crises, REPORT OF THE WORKING GROUP ON INTERNATIONAL FINANCIAL CRISES 19–20 (1998). Prominent trade associations representing bond market investors argued strongly against the

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19 Similarly, when lenders agree to be subordinated to other debt, they do so through subordination clauses that, as typically drafted, (a) apply strictly for the benefit of a specified group of senior creditors (and, in most cases, not generally to the debtors' unsecured obligations) and (b) expressly provide that any subordinated creditor who receives a payment otherwise prohibited by the subordination provisions must pay it over to the beneficiaries of the clause.

20 *See*, *e.g.*, Ad Hoc Comm. For Revision of the 1983 Model Simplified Indenture, Am. Bar Ass'n, *Revised Model Simplified Indenture*, 55 BUS. LAW. 1115 (2000).

inclusion of such clauses. *See*, *e.g*., Edward Luce, *Pakistan a warning for bondholders*, FIN. TIMES, Feb. 18, 1999, at 6, *cited in* Buchheit & Pam, *supra* note 14, at 12 n.35. Ultimately, the market did not adopt the proposal. This debate clearly demonstrates that market participants and governments around the world did not consider *pari passu* clauses, which had been in use for decades, to impose a Ratable Payment obligation on debtors or to give rights to unpaid creditors to interfere with payments to other creditors.[21]

The FAA's lack of a sharing clause shows that plaintiffs (or the investors from whom plaintiffs purchased the bonds issued under the FAA) had not bargained for the right to Ratable Payments. Moreover, the FAA contains another provision, the inclusion of which is wholly inconsistent with the lower court's broad reading of the *pari passu* clause. Section 9(c) of the FAA (A-169) provides:

> The Republic may at any time purchase Securities at any price in the open market or otherwise, provided that in

[21] Although *pari passu* clauses apply to protect creditors against legal subordination to other *unsecured* obligations of the debtor, they do not address the terms under which the debtor may create *secured* obligations. That task is left for "negative pledge" clauses, which customarily are included in debt instruments—including the FAA at Section 11 (A-170–72) and agreements with the World Bank. Such clauses, for example, preclude the debtor from preferring other creditors by granting them security interests or liens over the debtor's assets or revenues without equally and ratably securing the creditors benefiting from the clause. *See*, *e.g*., International Bank for Reconstruction and Development, GENERAL CONDITIONS APPLICABLE TO LOAN AND GUARANTEE AGREEMENTS FOR SINGLE CURRENCY LOANS § 9.03 (1995).

> any such case such purchase or purchases are in compliance with all relevant laws, regulations and directives. Securities so purchased by the Republic, may, at the Republic's discretion, be held, resold or surrendered to the Fiscal Agent for cancellation. The Securities so purchased, while held by or on behalf or for the benefit of the Republic shall not entitle the registered holder thereof to vote at any meetings of registered holders of Securities and shall not be deemed to be outstanding for the purposes of calculating quorums at meetings of the registered holders of the Securities. Notwithstanding the foregoing, the Republic will not acquire any beneficial interest in any Securities unless it gives prior written notice of each acquisition to the Fiscal Agent. The Fiscal Agent will be entitled to rely without further investigation on any such notification (or lack thereof).

Pursuant to this clause, the issuer may purchase bonds (i) at any time, (ii) at any price, and (iii) in the open market or otherwise (*e.g.*, in privately negotiated transactions). The only conditions imposed upon the issuer are that purchases be made in accordance with applicable law and regulations, the issuer not vote securities held by it at bondholders' meetings, and the issuer give the fiscal agent prior notice of each purchase. There is nothing in this provision (or in its companion provision that sets out procedures for the issuer to cancel purchased bonds (FAA § 9(d) (A-169))) that contractually imposes upon the debtor any obligation to make ratable purchases at equal prices among holders of the securities, or to make payments to any bondholders upon cancellation of other outstanding bonds. Because, from the perspective of the recipient of the funds, issuer repurchases are the functional equivalent of repayments, it would be irrational for bondholders to provide issuers with this broad flexibility to make repurchases if the intention of the *pari passu* clause were to prohibit payments to bondholders absent Ratable Payments to other creditors.

II. INTERPRETING THE *PARI PASSU* CLAUSE TO REQUIRE RATABLE PAYMENT TO UNSECURED CREDITORS, AND THE INJUNCTION BASED UPON THAT INTERPRETATION, THREATENS THE ORDERLY FUNCTIONING OF THE PAYMENT SYSTEMS AND CREDIT MARKETS.

The district court's conclusion that a *pari passu* clause requires a debtor to make Ratable Payments to its unsecured unsubordinated creditors, and the Injunction permitting unpaid creditors to interfere with payments that a debtor makes to other unsecured creditors, would impose undue burdens on banks and risk delay of unrelated payments. Further, because of the prevalence of New York law-governed debt instruments, the Injunction threatens the orderly functioning of the credit markets, particularly in cases of sovereign debt in or perceived to be near default.

A. The Injunction Would Place Undue Burdens on the Payment Systems That Are Inconsistent with New York Law and This Court's Precedents.

The Clearing House members act as intermediary banks for electronic funds transfer ("EFT") payments hundreds of thousands of times each day. *See supra* p. 7. The Injunction and its confirmation regime (A-3388 (Injunction ¶ 2.f)) would place significant burdens on intermediary banks that are inconsistent with New York law and this Court's precedents. The Injunction evidently depends on Participants—defined in the Injunction to include intermediary banks—to verify that no payment is made by Argentina to Exchange Bondholders unless and until the Participants have received notice that Argentina has filed a certification with the district court demonstrating that a Ratable Payment has been made to plaintiffs. This system, or any system that seeks to force intermediary banks to stop payments by a particular entity for a particular purpose, imposes significant costs on intermediary banks and risks delays in payments unrelated to the targeted Exchange Bond payments.[22]

[22] Plaintiffs have suggested in conversations prior to filing this brief that the Injunction was not intended to reach intermediary banks that might process payments made to the Exchange Bondholders. Such a limitation would be welcome but should have been included in the Injunction itself, which the district court directed be served on all "Participants" "involved, directly or indirectly, in . . . processing . . . any payment on the Exchange Bonds." A-3388. Moreover, that limitation apparently would not extend to the trustee for the Exchange Bondholders, a Clearing House member, which would be faced with a court order purporting to direct it not to carry out its fiduciary obligations to those Bondholders if it receives a payment of principal and interest for distribution to them. This attempt to interdict such payments could not be achieved by the ordinary means of attachment. *Brown* v. *J.P. Morgan & Co.*, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach money in the hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), *aff'd*, 295 N.Y. 867 (1946).

Under the 2005 and 2010 Exchange Bonds, Argentina makes principal and interest payments not to Exchange Bondholders directly but to a trustee for the Bondholders in Argentina. A-2207; A-2288. Pursuant to a trust indenture, dated June 2, 2005, The Bank of New York (now The Bank of New York Mellon, a Clearing House member) was appointed trustee (the "Trustee"). A-2281.

Payment from the Trustee to the U.S.-registered Exchange Bondholder takes the form of an EFT from the Trustee's bank outside the United States to the registered holder's bank in the United States, with the funds transfer often routed through one or more intermediary banks. An EFT is "a series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order." N.Y. U.C.C. § 4-A-104(1). Only the originator's bank and the beneficiary's bank in an EFT have a contractual relationship with the ultimate originator and beneficiary, respectively; the remaining transactions in a typical EFT are with, or between, intermediary banks. *See Shipping Corp. of India Ltd.* v. *Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 60 n.1 (2d Cir. 2009) (explaining the operation of EFTs). As a consequence, while information about the ultimate originator and beneficiary is included in payment processing information to ensure that the payment is ultimately credited properly, from the perspective of intermediary banks, the critical information to know in executing EFTs is the identity of the banks before and after them in the payment chain.

Payment order forms provide for the identification of the originator and ultimate beneficiary in "free text" fields, so that the identification may be abbreviated or appear with other variations.[23] For example, the originator or beneficiary could be identified by account number, or by an identifying code assigned by a funds-transfer network, with or without a name. If the name were included, the name could be abbreviated or otherwise shortened. In any case, under the procedures described in the trust indenture, the originator of any funds transfer to pay the U.S.-registered Exchange Bondholder would not be Argentina, but the Trustee, a large commercial bank that makes tens of thousands of payments every day, so one could not simply flag all payments from that bank. Moreover, even if a Participant could properly identify the originator, payment orders do not need to indicate the purpose of the payment and there is no uniform method for doing so. If the purpose of the funds transfer as a payment on the Exchange Bonds

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[23] Cross-border funds transfer systems use computer-readable structured payment-order formats that require information to be placed in limited fields. The most common funds-transfer system used for cross-border payments is the Society for Worldwide Interbank Financial Telecommunication ("SWIFT"), and SWIFT payments coming into the United States are frequently routed through Fedwire or CHIPS.

is mentioned in any way in the payment orders, it would be in a free-form reference field.

In connection with counter-terrorism initiatives and economic-sanctions programs administered by the Treasury Department's Office of Foreign Assets Control ("OFAC"),[24] banks electronically screen all of their EFTs to identify payments that must be blocked or rejected under OFAC rules. This process frequently generates false positives. The process of eliminating those false positives is extremely labor-intensive, involving both iterative refinement of search terms and manual review of numerous "hits." This process is not only very costly to the banks, but sometimes results in delays in payments. This is because the process of eliminating false positives is not always completed in the course of a single payment day, resulting in some delay to payments having no connection to the target payment. The extent of that impact is impossible to predict, as it depends entirely on the specificity of the information provided with respect to the target payment.

The only way that banks would be able to comply with the Injunction as written would be to search for the enjoined payments using the screening procedures used to comply with OFAC sanctions, yet the Injunction provides very

[24] OFAC programs include sanctions against Iran, North Korea, and global terrorists. *See*, *e.g.*, 31 C.F.R. parts 500, 510, 535, and 594.

little information that could be used to identify the enjoined payments or reduce the costs to the banks or the risk of delayed payments. The Exchange Bond payment apparently would be originated by the Trustee—which, as noted earlier, is one of the largest participants in automated electronic payment systems—and be directed to one or more custodians in the United States or elsewhere who might or might not be known. There might or might not be an indication on the payment order that it was related to the Exchange Bonds. As a consequence, any attempt to identify a particular payment to Exchange Bondholders would generate numerous false hits. The banks' operations staff would need to review the entire message for the originator's and ultimate beneficiary's name, abbreviations or variations thereof, account or identifying numbers, or information concerning the purpose of the payment. Such an effort would raise significant problems with the speed of payment processing and, because it would require the use of the same personnel and procedures that the banks use for OFAC compliance, complicate the banks' ability to effectively identify and block payments that are subject to OFAC sanctions.

As the FRBNY noted in its 2004 *amicus* brief filed in the court below, this kind of manual review of transfers would increase costs for banks and the payment system. The FRBNY noted that it would have "a wholly unacceptable impact both on the speed of the system and the certainty of the payments it handles." FRBNY Mem. at 8 (this issue is not "unique to Fedwire or to the Reserve Banks. If dollar settlements can be restrained while they are being made in the Fedwire system, which is the model for payment systems globally, then all payments are at risk for such restraints") (A-1798).

New York law has long recognized the critical need to protect the payment systems from interference of this kind. Under Article 4-A of the Uniform Commercial Code, intermediary banks are not subject to attachment or injunctions relating to payment orders. *See*, *e.g.*, N.Y. U.C.C. § 4-A-503 cmt. ("No other injunction is permitted. In particular, intermediary banks are protected . . . .");[25] *Grain Traders, Inc.* v. *Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) ("[T]hese are matters as to which an intermediary bank ordinarily should not have to be concerned."). As this Court has observed, permitting EFTs to be interdicted at intermediary banks "would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs." *Id.*

Similarly, this Court in *Jaldhi* explained that, during a period in which this Circuit's law permitted restraint of EFTs by means of maritime attachments

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[25] The "Official Comments" of the Uniform Commercial Code "are powerful dicta for the Code is 'well on its way to becoming a truly national law of commerce,' and is, therefore, as we have noted, a most appropriate source of federal law." *In re Yale Express Sys., Inc.*, 370 F.2d 433, 437 (2d Cir. 1966) (citation omitted).

under *Winter Storm Shipping Ltd.* v. *Thai Petrochemical Industry PCL*, 310 F.3d 263, 278 (2d Cir. 2002), the resulting volume of restraints served on New York banks "led to strains on federal courts and international banks operating within" the Second Circuit to such an extent that "some ha[d] even suggested that *Winter Storm* ha[d] threatened the usefulness of the dollar in international transactions." *Jaldhi*, 585 F.3d at 61 (citing Permanent Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: Sections 4A-502(d) and 4A-503 (July 1, 2009)).[26]

B. The Orders Threaten the Proper Functioning of Credit Markets and the Certainty of Necessary Negotiated Workouts and Debt Restructurings.

Leaving to one side the logistical difficulty of requiring Participants to administer the Injunction in real time, as a more general matter, the payment regime envisioned by the Orders will increase litigation both in the United States and elsewhere and make orderly restructuring of much of the world's New York law-governed sovereign debt impossible.

[26] As the Court in *Jaldhi* reported, ultimately the impact that maritime attachments had on banks and international funds transfers post-*Winter Storm* was limited in part because a district court denied a plaintiff's request for a "continuous service" provision. 585 F.3d at 63 (discussing *Cala Rosa Marine Co., Ltd.* v. *Sucres et Deneres Grp.*, 613 F. Supp. 2d 426, 432 (S.D.N.Y. 2009)). Because an attachment is void unless the bank holds an attachable interest of the debtor at time of service, that district court decision rendered "many maritime attachments effectively unenforceable." *Jaldhi*, 585 F.3d at 63. In contrast, the Injunction at issue in this proceeding purports to impose a continuing obligation on bank Participants.

First, as a practical matter, the lower court's interpretation of the *pari passu* clause and the Injunction would spur further litigation, rather than provide an effective remedy to plaintiffs. Using the case of the Argentine debt crisis as an example, suppose that when plaintiffs commenced litigation, the Republic had paid them in full in accordance with its obligations under the bonds. Under the lower court's reading of the *pari passu* clause, other bondholders (and, for that matter, any other creditors under instruments containing a *pari passu* clause), could have sought to interfere with the payment to plaintiffs. And if those other creditors succeeded in receiving a Ratable Payment (assuming *arguendo* proration in the context of Argentina's billions of dollars of unsecured and unsubordinated debt entitled to *pari passu* treatment could have sensibly been made), then Argentina and such other creditors (and for that matter these plaintiffs) in turn would be at risk that yet another set of unpaid bondholders would bring a similar action. The resulting web of claims, counterclaims, and cross-claims against Argentina and among creditors would place an enormous burden on courts and make virtually impossible an orderly restructuring of Argentina's indebtedness.

Second, such a broad reading of the *pari passu* clause poses additional threats to the reliable functioning of international payment systems. By stimulating a proliferation of injunctions aimed at payment intermediaries—along the lines of the *Nicaragua* case with respect to Euroclear Bank S.A.—such an interpretation would inhibit the free flow of funds among financial institutions, create uncertainty as to rights and liabilities, and place intermediary banks in the middle of civil disputes. In this particular instance, it also exposes banks to burdensome discovery. A-3388 (Injunction ¶ 3). Given the prevalence of New York law as the law governing international debt obligations, the Court should not allow a New York court ruling that adopts an interpretation of standard contractual language that is contrary to settled market understanding and expectations and would have such global disruptive implications to stand.

Moreover, if this improbable and unexpected interpretation is affirmed, it will raise questions for market participants about the stability of New York contract law. In the already close competition between New York and other law—particularly English law—when drafters choose a governing law, the outcome of this case is likely to tip the balance, in some instances, away from New York law and New York courts, which will have a deleterious long-term impact on New York's financial institutions and its preeminence as a financial center.

Finally, such a reading would be highly disruptive to the credit markets that support trillions of dollars of existing non-U.S. unsecured debt issued under New York law with *pari passu* clauses. It is a common and long-established practice for troubled debtors to seek to manage their liabilities by satisfying the obligations of certain creditors (such as short-term trade creditors and holders of short-term sovereign debt) in order to maintain ongoing operations or, in the case of a foreign sovereign, to cover potential budget deficits relating to necessary domestic programs, while holding off on satisfying obligations to other creditors. These liability management activities in which many debtors engage in the ordinary course with respect to their general, unsecured, unsubordinated obligations would become susceptible to challenge. Any obligor in financial distress and engaged in an effort to manage and negotiate its liabilities could find those efforts frustrated and be driven to insolvency even if insolvency, with its enormously disruptive impact, could otherwise have been avoided. Taken to its logical conclusion, a financially troubled debtor could never pay any unsecured obligation without making a Ratable Payment (which under the Injunction is the full payment of principal and interest) on all other unsecured claims (both financial obligations and trade claims), an absurd and counterproductive proposition.

CONCLUSION

The Clearing House respectfully urges the Court to reverse and vacate the Orders and reaffirm the long-understood meaning of *pari passu* clauses of the type included in Argentina's external debt offerings. Such clauses reflect standard practice and, under New York law, are not properly interpreted to prevent a debtor from paying certain of its unsecured unsubordinated creditors without making Ratable Payment to its other creditors. Allowing courts to convert a bargained-for *pari passu* clause into universal sharing clauses would be inconsistent with expectations of credit market participants. Further, the Injunction would impose undue burdens on banks, risk delaying the timely settlement of unrelated payments, and disrupt the stability of these markets.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I certify that the length of this brief, as measured by the "Word Count" function of Microsoft Word software, is 6,988 words, exclusive of this certificate and other permissible exclusions contained in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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