UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD.,	:	
	:	08 Civ. 6978 (TPG)
Plaintiff,	:	09 Civ. 1707 (TPG)
	:	09 Civ. 1708 (TPG)
- against -	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
AURELIUS CAPITAL MASTER, LTD. and ACP MASTER, LTD.,	:	
	:	09 Civ. 8757 (TPG)
Plaintiffs,	:	09 Civ. 10620 (TPG)
	:	
- against -	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	
AURELIUS OPPORTUNITIES FUND II, LLC and AURELIUS CAPITAL MASTER, LTD.,	:	
	:	10 Civ. 1602 (TPG)
	:	10 Civ. 3507 (TPG)
Plaintiffs,	:	10 Civ. 3970 (TPG)
	:	10 Civ. 8339 (TPG)
- against -	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	

(captions continue on following pages)

MEMORANDUM OF THE REPUBLIC OF ARGENTINA IN OPPOSITION TO PLAINTIFFS' MOTION TO HOLD ARGENTINA IN CIVIL CONTEMPT AND TO IMPOSE SANCTIONS

BLUE ANGEL CAPITAL I LLC,		
Plaintiff,	:	10 Civ. 4101 (TPG)
	:	10 Civ. 4782 (TPG)
- against -		
THE REPUBLIC OF ARGENTINA,		
Defendant.		
OLIFANT FUND, LTD.,		
Plaintiff,	:	10 Civ. 9587 (TPG)
- against -		
THE REPUBLIC OF ARGENTINA,		
Defendant.		
PABLO ALBERTO VARELA, et al.,		
Plaintiffs,	:	10 Civ. 5338 (TPG)
- against -		
THE REPUBLIC OF ARGENTINA,		
Defendant.		

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Defendant the Republic of Argentina (the "Republic") submits this memorandum in opposition to plaintiffs' motion by order to show cause, dated September 24, 2014, to hold the Republic in contempt and to impose sanctions (the "Motion").

PRELIMINARY STATEMENT

Plaintiffs' Motion for contempt – which asks the Court to impose for the first time in this litigation the drastic remedy of monetary sanctions, as well as other, unidentified "non-monetary" sanctions – should not be granted. The *pari passu* Injunctions do not and cannot prohibit sovereign acts, including speeches by political officials, the publishing of newspaper advertisements, or engaging in other communications with third-party financial institutions or with third parties generally. Contempt sanctions are moreover illegal under international law and practice, and undermine the dignity of foreign states. Plaintiffs' Motion is just another attempt to require the Republic to pay money – here, *more than $18 million a year* to the district court – unless and until the Republic pays plaintiffs full principal and interest on their defaulted debt, which it cannot do. Plaintiffs' demand is legally impermissible, unenforceable, and impossible to comply with. It must be denied.

First, as the United States Government itself has repeatedly stated in numerous court filings, entering contempt sanctions against a foreign state in these circumstances is legally improper not only under international law and practice, but under the Foreign Sovereign Immunities Act ("FSIA") as well, which incorporates those international principles. As recently as this month, the U.S. Government, in a brief to the Second Circuit involving another foreign state, reiterated once more its position that such sanctions cannot be entered against sovereigns as a matter of law.

Second, what plaintiffs seek – to compel the Republic to pay them in full – is an impossibility, given all the other parties who are now or soon will assert that they have the same *pari passu* "rights" as plaintiffs, as well as the other constraints on the Republic, of which the Court is aware. Nor is there otherwise any proper basis for contempt. Civil contempt is a device designed to force a party to perform an *affirmative* act to "purge" ongoing conduct violative of a court order; it is not and cannot be – as plaintiffs seek to apply it here – a punishment for past actions.

The Court should accordingly not enter plaintiffs' proposed order, particularly given that international law and practice are uniform in rejecting the application of contempt to foreign states and plaintiffs offer no basis for why the Court should stray from this norm. The proposed order will not resolve the impasse currently facing the parties and the Court as a consequence of the *pari passu* Injunctions (with which it is impossible to comply), but will instead aggravate the situation. It will no doubt be used by plaintiffs only to heighten further their negative rhetoric in their self-defeating public attacks on the Republic.

ARGUMENT

I. APPLICABLE LAW BARS CONTEMPT ORDERS AGAINST FOREIGN STATES

A. International Law And Practice Do Not Permit Contempt Orders Against Foreign States

As a matter of international law and practice followed uniformly by other states, and supported by the United States Executive Branch, the sanction of contempt against a foreign sovereign is illegal. The United Nations Convention on Jurisdictional Immunities of States and Their Property (the "Convention") explicitly states that "no fine or penalty shall be imposed on [a] State by reason of [its] failure or refusal" to comply with a court order. *See* Brief for the

United States of America as *Amicus Curiae* in Support of Partial Reversal at 23, *SerVaas Inc. v. the Republic of Iraq*, No. 14-385 (2d Cir. Sept. 9, 2014), 2014 WL 4656925 ("U.S. *SerVaas Amicus* Brief") (Ex. D) (quoting United Nations Convention on Jurisdictional Immunities of States and Their Properties, art. 24(1), G.A. Res. 59/38, annex, Dec. 2, 2004, 44 I.L.M. 803 (2005)).[1] Member state support for the prohibition of monetary penalties was unanimous. *See id.* at 23-24 (citing Int'l Law Comm'n, *Jurisdictional Immunities of States and Their Property, Comments and Observations Received from Governments*, [1988] 2 Y.B. Int'l L. Comm'n 45, U.N. Doc. A/CN.4/410 (excerpt)). Although the Convention is not yet in force and the United States is not a signatory to it, it nonetheless reflects the customary international law and practice applied by other states.[2] For example, Canada, the United Kingdom, Israel, and Australia have all outlawed monetary sanctions against a foreign state for its failure to comply with an injunction. The Court should not depart from this uniform framework by imposing a sanction whose only likely effect will be to affront the sovereign dignity of the Republic.

International law conceives of sovereigns as peers and equals. The laws of another State therefore apply to a sovereign only to the extent of the sovereign's consent. Here, the Republic did not consent to subjecting its sovereign acts, including its internal governance and relationships with third parties, to attacks by creditors in commercial disputes in the United States.

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[1] All exhibits are attached to the Declaration of Carmine D. Boccuzzi, dated September 29, 2014.

[2] Brief of the United States as *Amicus Curiae* in Support of Defendant Appellant at 15, *Af-Cap, Inc. v. Republic of Congo*, No. 05-51168 (5th Cir. Mar. 10, 2006) (Ex. J) ("The United Nations Convention [on Jurisdictional Immunities of States and Their Properties] is not yet in force, and the United States is not a signatory to the Convention. Nevertheless, a number of its provisions, including Article 24(1), generally reflect current international norms and practices regarding foreign state immunity. Notably, the principle reflected in Article 24 of the Convention was uniformly supported by member states, which disagreed only about whether to extend even further a state's immunity from coercion.").

This foundational principle of international coexistence finds expression in the Charter of the United Nations, which states that the U.N. "is based on the principle of the sovereign equality of all its Members." U.N. Charter art. 2, para. 1 (Ex. O). The Charter of the Organization of American States makes this general prohibition more specific, explicitly proscribing the "use or encourage[ment of] the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." Organization of American States Charter, art. 20 (Ex. N). This prohibition is confirmed by the United Nations International Law Commission's writings on state immunity: "If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State . . . it follows *a fortiori* that no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against another." *Report of the International Law Commission to the General Assembly on the work of its 38th Session*, [1986] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1986/Add.l (Ex. M). As the U.S. Government has emphasized in repeated *amicus* submissions, a state's violation of this principle of equality could negatively impact the United States' foreign relations and open the United States and its property to similar adverse treatment. *See e.g.*, U.S. *SerVaas Amicus* Brief at 26-29 (Ex. D) (noting "the risk that monetary contempt sanctions orders will undermine efforts to resolve underlying disputes, and have negative consequences for the United States overseas").

Contempt would be particularly offensive to international law and practice on this record, given plaintiffs' demand that the Republic be punished for statements by political officials, domestic laws, and other occurrences over which this Court lacks jurisdiction. The international community – including the United Nations General Assembly, the United Nations Human Rights Council, and the International Monetary Fund – has recognized the difficulties

that exist in the wake of this Court's Injunctions, and there is no reason to exacerbate the situation by adding to it unenforceable contempt orders and sanctions. *Cf.* Human Rights Council, A/HRC/27/L.26, 27th Sess., Sept. 8-26, 2014, U.N. G.A., 69th Sess. (Sept. 24-30, 2014) (Ex. B) ("Condemn[ing] the activities of vulture funds for the direct negative effect that the debt repayment to those funds, under predatory conditions, has on the capacity of Governments to fulfil[l] their human rights obligations, particularly economic, social and cultural rights and the right to development") (emphasis omitted).

B. The FSIA Precludes The Entry Of Contempt Sanctions Against Foreign States

The FSIA provides the sole, comprehensive scheme for jurisdiction and enforcement against foreign sovereigns in civil litigation. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). A foreign state's property is "immune from attachment arrest and execution except as provided in sections 1610 and 1611." 28 U.S.C. § 1609. Because these provisions do not permit the enforcement of contempt sanctions against a foreign sovereign, absent an explicit waiver, the FSIA does not provide a U.S. court with the power to enter enforceable contempt orders against a foreign state. Without the power to affect sovereign property, an order for monetary sanctions is unenforceable.

The Fifth Circuit is the only federal court of appeals to have directly ruled on the question of the propriety of entering, outside the discovery context, an unenforceable contempt judgment against a foreign state (as opposed to an agency or instrumentality). Focusing on the exclusive methods of enforcement against sovereign property enumerated under the FSIA, the Fifth Circuit answered that question in the negative and vacated the lower court's contempt order against the Republic of Congo. *Af-Cap, Inc.*, 462 F.3d at 428-29 (Sections 1610 and 1611 "describe the available methods of attachment and execution against property of foreign states.

Monetary sanctions are not included. Therefore, in issuing the contempt order, the district court relied on an erroneous conclusion of law."). *Id.*

The Fifth Circuit's decision is supported by the U.S. Government, which has, including as recently as this month, consistently taken the position that monetary contempt sanctions, absent consent, are unenforceable under the FSIA. *See* U.S. *SerVaas* Amicus (Ex. D); Brief of the United States as *Amicus Curiae* in Support of Appellant at *7-*14, *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, No. 10-7046 (D.C. Cir. Oct. 7, 2010) (Ex. I).[3] The United States government submitted its most recent *amicus* brief to address this issue on September 9, 2014, in *SerVaas Inc.*, which is currently pending in the Second Circuit. *See* No. 14-385; U.S. *SerVaas* Amicus (Ex. D). There, the Government explained not only that "it is generally inappropriate for courts to impose unenforceable orders of monetary contempt sanctions against a foreign state," but also that, contrary to the plaintiffs' assertions here, the Supreme Court's recent decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) does nothing to change that analysis. U.S. *SerVaas* Amicus at 16, 6-7 (Ex. D). Given the special expertise of the Executive Branch on issues of foreign sovereign immunity, this Court should give weight to its views in interpreting the FSIA. *See Af-Cap, Inc.*, 462 F.3d at 428 n.8.

The analysis of the court in *Af-Cap*, and of the United States, requires rejection of plaintiffs' motion, given that plaintiffs are in fact seeking the payment of money by a foreign state. For that reason, the Supreme Court's decision in *NML Capital, Ltd.* that the FSIA does not

[3] International practice can help a court gauge the likelihood of compliance versus the chance that its order will prove ineffective – a necessary consideration given the unenforceability of contempt sanctions issued against a sovereign. Although the D.C. Circuit in *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo* discounted the international practice cited by the United States as "irrelevant," 637 F.3d 373, 380 (D.C. Cir. 2011), as discussed *infra*, what is relevant for purposes of the FSIA is that contempt sanctions are not found among the exclusive exceptions to the presumptive immunity granted to a foreign sovereign's property.

prohibit discovery about a foreign state's assets because "[t]here is no . . . provision forbidding or limiting discovery," is inapposite. *Id.* at 2256. While the Supreme Court reasoned that the FSIA is silent on discovery, the FSIA is *not* silent on the treatment of foreign state assets. Rather, Sections 1609-1611 are explicit, limiting judicial process over foreign state assets to property in the United States being used for a commercial activity here. 28 U.S.C. §§ 1609-1611; *see also FG Hemisphere Assocs., LLC*, 637 F.3d at 378-79 (in context of discovery dispute, observing that the FSIA does not mention discovery and so finding contempt permissible).

Plaintiffs' attempt here to use contempt as a sanction for judgment enforcement, under an injunction or otherwise, is radically different from the discovery context. The FSIA may not explicitly mention discovery, but it treats the power to affect sovereign property explicitly and at length. So too with the legislative history of the FSIA, which makes clear that under the FSIA "a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609-1610." H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621.[4]

Other cases plaintiffs cite also fail to address the question at issue in this case, as they involve monetary contempt sanctions issued against a foreign state agency or instrumentality – rather than the foreign state itself – or have suggested in dictum that sanctions

[4] The plaintiffs and *FG Hemisphere* both rely on the Seventh Circuit's ruling in *Autotech Techs. LP v. Integral Research & Dev.,* 499 F.3d 737 (7th Cir. 2007). The *Autotech* court reviewed a monetary sanction imposed on a foreign agency or instrumentality – not a foreign state itself, on which basis alone *Autotech* is distinguishable – and held that the FSIA does not abrogate or limit a court's contempt powers. *Id.* at 744. The Seventh Circuit based its holding on the notion that "[o]nce a court is entitled to exercise subject matter jurisdiction over the suit, it has the full panoply of powers necessary to bring that suit to resolution and to enforce whatever judgments it has entered." *Id.* This claim misreads the FSIA, which divides a court's powers between jurisdiction and enforcement, creating in at least some contexts a right without a remedy. *See Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002); *see also FG Hemisphere*, 637 F.3d at 377 ("The FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the state holds certain kinds of property subject to execution.") (citing *De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984)).

might be available against a foreign state, but without considering the enforceability of such sanctions or whether they were justified under traditional equitable principles. *See, e.g.*, *First City, Texas-Houston N.A. v. Rafidain Bank,* 281 F.3d 48, 52-55 (2d Cir. 2002) (affirming sanctions order against state instrumentality – rather than state itself – for failure to comply with post-judgment discovery order, but addressing only question whether court had authority to order discovery); *Richmark Corp. v. Timber Falling Consultants,* 959 F.2d 1468, 1477-1478 (9th Cir. 1992) (upholding monetary contempt sanctions against state instrumentality for failure to comply with post-judgment discovery order, but limiting analysis to whether FSIA permitted requirement of supersedeas bond or letter of credit pending appeal); *SerVaas Inc. v. Republic of Iraq*, No. 09 Civ. 1862 (RMB), 2014 WL 279507, at *3 (S.D.N.Y. Jan. 24, 2014) (imposing sanctions for failure to comply with asset discovery order); *Belize Telecom Ltd., and Innovative Commc'n Co., LLC v. The Gov't of Belize*, No. 05 Civ. 20470, 2005 U.S. Dist. LEXIS 18592 at 20 (S.D. Fla. Apr. 12, 2005) (holding Government of Belize in contempt, but without considering the issue of the court's ability to do so given the limitations of the FSIA). This Court should follow the only court of appeals that faced the issue squarely, *Af-Cap, Inc.*, 462 F.3d at 428, and reject the plaintiffs' request for a finding of contempt against the Republic.

II. THERE IS OTHERWISE NO BASIS FOR HOLDING THE REPUBLIC IN CONTEMPT AND IMPOSING SANCTIONS

Even if plaintiffs' motion were not directed at a foreign state, the circumstances here would not warrant a contempt finding. A contempt order is a "potent weapon," and a district court's power to use it "is significantly circumscribed." *Latino Officers Ass'n of N.Y. v. City of New York*, 558 F.3d 159, 164 (2d Cir. 2009) (quoting *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n, Local 1291*, 389 U.S. 64, 76 (1967) and *Cal Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885)); *see also E.E.O.C. v. Local 638*, 81 F.3d 1162,

1171 (2d Cir. 1996) ("the power of a district court to impose contempt liability is carefully limited").

First, apart from the procedural infirmities discussed below, plaintiffs' Motion fails because the actions alleged by plaintiffs do not constitute "evasions" of the Injunctions that could warrant a contempt finding. Decisions of the central political organs of the Argentine State (including statements by the head of the Argentine Executive Branch or by members of her Cabinet, as well as laws enacted by the Legislative Branch) constitute sovereign acts and are therefore beyond the Court's jurisdiction. Moreover, speeches by political officials, newspaper advertisements, and other communications with third-party financial institutions, Pls. Br. at 14-16, are just that – communications, and are thus similarly outside the jurisdiction of the Court and the scope of any Court order. The Injunctions' so-called "anti-evasion" provision, NML Injunction ¶ 4 (Ex. H), cannot and does not sweep so broadly so as to bar the Republic's officials from communicating with the Argentine people and other interested constituencies about matters that are of the utmost importance to, and that will have a great impact on, the country's economy and sovereignty. Nor can the Republic's democratic process of considering and passing legislation, an indisputably sovereign act, be considered an "evasion." Pls. Br. at 15-16. A U.S. court cannot bar a foreign state from debating and enacting a law any more than it can prohibit the United States Congress from doing so.

Second, because, as the Republic has previously explained, it is not possible for the Republic to comply with the Injunctions' ratable payment requirement, plaintiffs necessarily cannot meet their burden of showing that the Republic "was not reasonably diligent in attempting to [do so]." *S. Eng. Tel. Co. v. Global Naps Inc.*, 624 F.3d 123, 145 (2d Cir. 2010); *see also Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984) ("Inability to comply is, of

course, a long-recognized defense to a civil contempt citation."). There are a total of approximately $10 billion in claims on defaulted debt pending in this Court alone, and another approximately $10 billion pending in other jurisdictions or not yet subject to suit. As a factual matter, the Republic – whose reserves stand at less than $30 billion and must be used for critical macroeconomic purposes – simply cannot afford to pay the holders of its defaulted debt in full under the Court's application of the *pari passu* clause. Nor could any other country that went through a restructuring the magnitude of Argentina's, which is why the United Nations General Assembly recently – in response to the Injunctions entered by the Court – reaffirmed international practice by passing a resolution, supported by 124 nations, aimed at preventing such orders from being entered again by "adopt[ing] through a process of intergovernmental negotiations . . . a multilateral legal framework for sovereign debt restructuring processes with a view . . . to increasing the efficiency, stability and predictability of the international financial system." *See* G.A. Res. 68/304, U.N. Doc. A/RES/68/304 (Sept. 17, 2014), Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes (Ex. C).

Moreover, as a legal matter, the Republic is constrained by other contractual obligations, including the so-called Rights Upon Future Offers ("RUFO") clause that is contained in the debt of the Exchange Bondholders. *See, e.g.*, Specimen Registered Global Security No. 6 representing 8.28% U.S. Dollar-Denominated Discount Bonds due 2033 (Ex. K). The RUFO clause, which expires on December 31, 2014, in general terms gives the Exchange Bondholders the right to seek the same terms of any deal offered to holdout creditors. Thus, if the RUFO clause is triggered by a "Ratable Payment" to plaintiffs (which runs counter the inter-creditor equity principle), the result could be billions of dollars of additional claims against the

Republic. *See* Marcelo Etchebarne, *Una cesación de pagos selectiva: ¿el escenario más probable?*, La Nación (July 6, 2014), http://www.lanacion.com.ar/1707622-una-cesacion-de-pagos-selectiva-el-escenario-mas-probable (Ex. G) (estimating potential liability of over $500 billion). In light of the magnitude of the potential consequences of triggering the RUFO clause, even a small probability of triggering it renders the risk unacceptable. *See* Mary Anastasia O'Grady, *The Argentine Bond Mess Gets Messier*, The Wall Street Journal (July 13, 2014), http://online.wsj.com/articles/ogrady-the-argentine-bond-mess-gets-messier-1405291417 (Ex. C) ("Making holdouts whole could trigger the [RUFO] clause in the new bonds. . . . Argentina could not support the estimated $120 billion in new debt that would be needed to comply with the [RUFO] clause. Any effort by Argentina to argue that [a deal] with the holdouts is not voluntary would likely be challenged and lead to lengthy litigation."); *see also* Carlos E. Alfaro, *RUFO: mitos y leyendas*, El Cronista (July 30, 2014), http://www.cronista.com/columnistas/RUFO-mitos-y-leyendas-20140730-0030.html (Ex. E).

Contempt under these circumstances is wholly unwarranted and unsupported even by plaintiffs' own authority. Nor, for that matter, is there any basis for coercing the Republic to pay plaintiffs in full under the Injunctions themselves. The Court already declined plaintiffs' initial request to hold the Republic in contempt two months ago, recognizing that a finding of contempt will not help the difficult situation created by the Injunctions.

Third, plaintiffs' Motion also fails because they otherwise seek to hold the Republic in civil contempt for past, completed actions in violation of various Orders and "directives" instructing the Republic to *refrain* from those actions. *See, e.g.*, Proposed Order at 6 (seeking to hold the Republic in contempt for, *inter alia*, a speech given over two months ago by its Finance Minister); Pls. Br. at 14-16 (listing various statements of Argentine government

officials made over the last several months). Civil contempt, however, is remedial, not punitive,[5] and thus can only be entered to bring a party into compliance with an *affirmative* order to do some specific act "through which the contemnor may purge his sentence" or fine, *i.e.*, a purge mechanism. *United States v. Ayer*, 866 F.2d 571, 573 (2d Cir. 1989) (2d Cir. 1989) ("A purge mechanism can be employed where the underlying injunction requires the contemnor to take some action and not, as the order here requires, to refrain from a prohibited action."); *see also Sunbeam*, 252 F.2d at 469 (civil contempt order directing defendant to pay plaintiff "$1000 as compensation for *past violations* of the injunction . . . . cannot stand") (emphasis added). Here, other than the "ratable payment" issue discussed above, plaintiffs do not point to a single other "violation" for which the Republic could purge contempt by taking an affirmative remedial act. While plaintiffs suggest that any fines imposed on the Republic could be lifted if the Republic somehow provides in the future "evidence" demonstrating that it has ceased engaging in the past prohibited acts, Proposed Order at 7, as the Second Circuit has recognized, no party, including the Republic, can prove a negative, thus civil contempt – separate and apart from the reasons set forth in Section I – is unavailable as a matter of law in this context. *Ayer*, 866 F.2d at 573-74.

Given the absence of any remedial qualities, it is clear that the contempt plaintiffs[6] seek is punitive and therefore not civil but *criminal* in nature, and accordingly "may

[5] In addition to being "coercive," civil contempt may be compensatory in nature, "where a fine is paid directly to the other party rather than the court." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 658 (2d Cir. 2004). Plaintiffs' conclusory statement to the contrary aside, Pls. Br. at 19, the latter form of civil contempt is clearly inapplicable here, as plaintiffs seek fines payable to the Court. Proposed Order at 7. Regardless, even if plaintiffs *were* seeking fines payable to them, compensatory sanctions would be equally improper because the "violations" that plaintiffs allege have caused plaintiffs no economic harm. *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 6 (2d Cir. 1989) ("[T]his type of award . . . 'does not take from the defendant assets not related to its wrongful conduct . . . it is not punitive.") (quoting *Sunbeam Corp.v. Golden Rule Appliance Co.*, 252 F.2d 467, 470 (2d Cir. 1958)).

[6] Plaintiffs no doubt would like the sanction imposed to include in their inflammatory rhetorical war against the Republic. *See, e.g.*, American Task Force Argentina, *Riposte to Blackman*, http://factcheckargentina.org/riposte-to-blackman/ (Aug. 8, 2014); *see also* Aug. 8, 2014 Hr'g Tr. at

not be imposed unless federal constitutional protections are applied," *Hicks v. Feiock*, 485 U.S. 624, 637 (1988), including the safeguards embodied in Federal Rule of Criminal Procedure 42(b), such as a heightened standard requiring proof beyond a reasonable doubt and proof of willfulness. *Ayer*, 866 F.2d at 573 ("[T]he order does not become civil merely because it is calculated to coerce future compliance, as criminal contempts also have a coercive effect. . . . [T]he coercion in the instant case was not designed to force compliance with a purge-mechanism condition, but to affect general future conduct (i.e., the cessation of secreting funds in violation of the injunction). There is nothing that [the defendant] could have done to undo the past violations of the injunction"). Indeed, plaintiffs even seek to have the Republic pay the requested monetary fines to the Court, rather than to plaintiffs, which is yet another hallmark of criminal sanctions. No U.S. court has ever found that a foreign sovereign state can be held in criminal contempt, and plaintiffs cite nothing to support that drastic, unprecedented remedy here.

* * *

The Injunctions entered by the Court – which are unprecedented in their impact on a foreign state's service of its sovereign debt – are now fully operative and have resulted in blocking hundreds of millions of dollars of payments to the Exchange Bondholders on over $28 billion of indebtedness. While various parties and commentators continue to disagree on the Injunctions' underlying merits, no one can dispute that they have created immense, far-reaching difficulties, both foreseen and unforeseen, that the affected parties have never before encountered. These difficulties have no easy solution. Plaintiffs' demand that the Court hold the Republic in contempt and impose unenforceable, effectively indefinite monetary sanctions with

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10:23-12:11 (counsel for Republic noting that NML Capital, Ltd.'s parent corporation Elliott Management created organization (American Task Force Argentina) that has been publicly attacking the Republic and its counsel).

which it is impossible to comply will not help matters, but will only create more problems and difficulties for the parties as they try to reach some acceptable resolution.

In light of the serious issues that plaintiffs' Motion raises, the Republic has sent a diplomatic note to the U.S. Secretary of State enclosing a copy of this brief. *See* Ex. A. The *pari passu* Injunctions themselves have impacted bilateral relations between the Republic of Argentina and the United States, as the U.S. Government anticipated in its filings in this litigation, including by leading the Republic to file a claim in the International Court of Justice in an effort to reach an amicable resolution. The demands in plaintiffs' Motion here threaten to negatively affect those relations further.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' Motion.

Dated: New York, New York
September 29, 2014

Respectfully submitted,

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