

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SELJAS et al.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

----- x

AURELIUS CAPITAL PARTNERS, LP et al.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

----- x

CATTO et al.,

Plaintiffs,

- against -

THE REPUBLIC OF ARGENTINA,

Defendant.

----- x

04 Civ. 401 (TPG)

ORDER

07 Civ. 2715 (TPG)

07 Civ. 937 (TPG)

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MACROTECNIC CORP., :
 :
Plaintiff, : 02 Civ. 5932 (TPG)
 :
- against - :
 :
THE REPUBLIC OF ARGENTINA, :
 :
Defendant. :
----- x
MAZZINI et al., :
 :
Plaintiffs, : 03 Civ. 8120 (TPG)
 :
- against - :
 :
THE REPUBLIC OF ARGENTINA, :
 :
Defendant. :
----- x

ORDER GRANTING PRELIMINARY INJUNCTION

The following findings and conclusions are rendered pursuant to the direction of the United States Court of Appeals for the Second Circuit in its Summary Order of November 5, 2009.

WHEREAS on April 25, 2008, the court entered an Order to Show Cause why an order should not be made and entered, *inter alia*: (a) attaching the Republic of Argentina's beneficial interest in certain bonds in which it is alleged that Argentina has an attachable interest (the so-called "Trust Bonds"); (b) preliminarily enjoining and restraining Argentina, its servants, employees,

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agents, representatives and any person acting in concert with them (including, without limitation Caja de Valores Sociedad Anonima ("Caja")) from taking any action to transfer, sell, pledge, loan, cancel, terminate or otherwise encumber or alienate any Trust Bonds held by Caja in an account at the Depository Trust Corporation ("DTC"); (c) requiring Argentina to instruct Caja or any other person, to cause the deposit of the Trust Bonds into an account to be designated by the court for plaintiffs' benefit; (d) preliminarily enjoining Argentina, its servants, employees, agents, representatives and any person acting in concert with them, from issuing any notices or instructions to the Fiscal Agent for the Trust Bonds; and (e) requiring discovery from Argentina, Caja, and any other appropriate person to the extent necessary to implement transfer of the Trust Bonds for plaintiffs' benefit;

WHEREAS the court further ordered *ex parte* on April 25 that, pending hearing and determination of the Application, defendant, its servants, employees, agents, representatives and any person acting in concert with them (including without limitation Caja) are enjoined and restrained, pursuant to Fed. R. Civ. P. 65(b), from (i) taking any action or issuing any instructions to Caja, or to any other person, to take any action to transfer, sell, pledge, loan, cancel, terminate or otherwise encumber or alienate Trust Bonds held by Caja in an account at DTC; and (ii) from issuing any notices or instructions to the Fiscal Agent for the Trust Bonds;

WHEREAS on April 29, 2008, defendant submitted omnibus opposition papers both to Plaintiffs' Application and to similar or identical applications previously filed by other plaintiffs on April 18, 2008 seeking the same relief;

WHEREAS at a hearing held on April 30, 2008 on Plaintiffs' Application and similar applications filed by other plaintiffs seeking the same relief, the court heard argument from all of the parties and reserved decision to allow plaintiffs to take discovery and further directed that the restraining orders then in place should remain in place until such time as the court decides the Application;

WHEREAS on May 1 and May 2, 2008, plaintiffs and defendant respectively submitted letters further in support of and in opposition to the Application;

WHEREAS on May 7, 2008, defendant wrote to the court and stated that the restraining orders extended by the court at the April 30 hearing would expire on May 16, 2008 pursuant to Fed. R. Civ. P. 65(b)(2), but that defendant consented to an extension of the restraining orders until May 23, 2008 to accommodate further briefing by Argentina and certain plaintiffs who are not parties to the above-captioned cases;

WHEREAS on May 8, 9, and 12, 2008, the court received further letters from plaintiffs and from defendant addressing defendant's May 7 letter;

WHEREAS on May 8, 2008, plaintiffs in separate cases seeking similar or identical relief to plaintiffs here submitted a Reply Memorandum to the court;

WHEREAS on May 16, 2008, defendant submitted a Sur-Reply to the Reply Memorandum of certain other plaintiffs;

WHEREAS on May 19, 2008, plaintiffs wrote to the court requesting leave to submit a Supplemental Memorandum of Law in Further Support of Plaintiffs' Request for Preliminary Injunction and Attachment, to which defendant responded by letter to the court the same day;

WHEREAS on May 21, 2008, plaintiffs submitted a proposed form of order for a preliminary injunction;

WHEREAS on May 23, 2008, the temporary restraining orders that were continued by the court pending discovery converted, as a matter of law, to preliminary injunctions;

WHEREAS on June 6, 2008, Argentina filed a Notice of Appeal of the court's restraining orders;

WHEREAS on November 5, 2009, the United States Court of Appeals for the Second Circuit issued a Summary Order remanding the case with the restraining orders intact, but with an instruction that this court undertake the necessary analysis for a preliminary injunction within ten days of the Summary Order;

WHEREAS having reviewed all of the above submissions and correspondence and after hearing argument from the parties on April 30, 2008, pursuant to Fed. R. Civ. P. 65(d)(1), which requires that the court state reasons for issuing any restraining order or preliminary injunction, the court finds, that:

Plaintiffs hold final money judgments against Argentina totaling more than \$553 million, excluding post-judgment interest.

A preliminary injunction is appropriate here, where plaintiffs have demonstrated (1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor. *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir. 2002).

Plaintiffs seek to enforce their judgments against Argentina's rights under a November 2001 trust contract to receive defaulted interests in Global Bonds that Argentina issued in New York through a Fiscal Agency Agreement ("FAA").

The FAA permits Argentina "at any time [to] purchase Securities at any price in the open market or otherwise. . . . Securities so purchased by the Republic, may, at the Republic's discretion, be held, resold or surrendered to the Fiscal Agent for cancellation." See Declaration of Barry R. Ostrager, dated

April 25, 2008 (“Ostrager Decl.”), Ex. 5 at 14.

In November 2001, Argentina instituted a *Procedimiento de Canje* whereby Argentina obtained control, *inter alia*, over participating beneficial interests in Global Bonds issued by Argentina in New York pursuant to the FAA and issued to participating bondholders local-Argentine guaranteed loans, to be paid down with dedicated tax revenues, but at lower interest rates and over longer maturities. Ostrager Decl. ¶ 7.

However, unlike in a true refinancing or exchange of debt, the Global Bond interests that were reacquired by Argentina “remain[ed] valid” and “all present and future economic rights” comprising those bond interests were then used as collateral, pursuant to a *Contrato de Fideicomiso*, dated December 7, 2001 (“Trust Contract”), to secure the repayment of the domestic Argentine guaranteed loans issued in their place. Declaration of Christopher Moore, dated April 28, 2008 (“Moore Decl.”), Ex. 2 at 1, 3.

The Trust Contract specifically provides that “it is a fundamental condition thereof that the [reacquired bond interests] remain valid, both in respect of their financial and political rights so that, under specific circumstances, the owners thereof may recover the full ownership” Moore Decl., Ex. 2 at 1.

Argentina is identified as the “Original Beneficiary” under the Trust Contract and the participating bondholders (through their settlor banks) are

identified as “Alternative Beneficiaries.” Caja holds the reacquired bond interests “for the benefit of the Republic of Argentina as Original Beneficiary and, as the case may be, of the Settlers, as Alternative Beneficiaries” Argentina, as Original Beneficiary, owns all of the present and future economic rights comprising the reacquired bond interests (hereafter referred to as the “Trust Bonds”) - subject only to the security interest of the Alternative Beneficiaries. Moore Decl., Ex. 2 at 1, 3.

At the time the Trust Contract was created, Argentina was making payments on its Global Bond obligations. The Trust Contract contemplated that Argentina would continue to make those payments and, as payments were made, Caja would write down Argentina’s Certificates of Participation, thereby eventually retiring the Trust Bonds. Declaration of Carlos Maria Tombeur, dated April 29, 2008 (“Tombeur Decl.”), ¶ 9.

In December 2001, however, Argentina defaulted on its Global Bond obligations, including its obligations under the Trust Bonds. *Id.* As a result of the default, the Trust Bonds did not retire, but remain in default with whatever market value they may have as fungible securities. Moore Decl., Ex. 2 at 4.

Meanwhile, the guaranteed loans for which the Trust Bonds were to serve as collateral continued to be paid down with tax revenues and once the collateral interest is extinguished, Argentina has an unencumbered right to the

Trust Bonds. Moore Decl., Ex. 2 at 3. While Argentina may intend to cancel the Trust Bonds, as New York-law obligations, the terms of the FAA governing the Trust Bonds do not require Argentina to do so. Ostrager Decl., Ex. 5 at 14. Under the FAA, the Trust Bonds “may, at the Republic’s discretion,” be “held” or “resold,” in addition to being “surrendered to the Fiscal Agent for cancellation.” *Id.*

As a result of the 2001 Trust Contract, Argentina therefore holds a right to its own New York-issued fungible, marketable debt securities. Those securities are in default, but they still have a market value and there is a market in which they are bought and sold. It is Argentina’s right to those defaulted, but marketable, securities that plaintiffs have asked the court for a turnover order to obtain from Argentina, in partial satisfaction of their judgments. Ostrager Decl. ¶ 9.

For present purposes, and subject to further briefing in the case, the court finds that there is a substantial likelihood that plaintiffs will succeed in obtaining a turnover order entitling them to the Trust Bonds. At a minimum, plaintiffs have demonstrated “sufficiently serious questions going to the merits” of the application “to make them a fair ground for litigation.” *Merkos*, 312 F.3d at 96.

Plaintiffs have demonstrated a likelihood of success that Article 8 of the New York Uniform Commercial Code (“UCC”) does not preclude the relief

they seek, as argued by Argentina. Under the Trust Contract, Argentina has a right to receive beneficial interests in Global Bonds that it issued in New York and which are subject to New York law. Here, plaintiffs have demonstrated that they do not seek to enforce their money judgments against a “securities account” held by a “securities intermediary,” as those terms are defined and governed by the UCC. *See* Official Comment to UCC § 8-501, ¶ 1 (“the term securities account does not cover the relationship between a bank and its depositors or the relationship between a trustee and the beneficiary of an ordinary trust”). They seek a turnover order requiring Argentina to deposit with the court, New York bond interests that Argentina is entitled to receive by contract. The UCC does not apply to Argentina’s right to the Trust Bonds under a contract. *See* Plaintiffs’ Supp. Mem. of Law in Further Support of Plaintiffs’ Request for Preliminary Injunction and Attachment at 4-11.

Plaintiffs have also demonstrated a likelihood of success that the Foreign Sovereign Immunities Act (“FSIA”) does not preclude the relief they seek. Under the FSIA, a judgment creditor of a foreign state may only attach or execute against “property in the United States of a foreign state” that is “used for a commercial activity in the United States.” 28 U.S.C. § 1610(a). For FSIA purposes, the location of an intangible asset, like the electronic bond interests at issue here, must be determined using a “common sense appraisal of the requirements of justice and convenience.” *Af-Cap Inc. v. Republic of Congo*, 383

F.3d 361, 371 (5th Cir. 2004); *see also ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675 (1976) (fictional “situs” of an intangible contractual right of foreign debtor not subject to New York jurisdiction to receive a share of profits under a license agreement was New York where the garnishee obliged by contract to pay licensing profits to the debtor could be found). Here, plaintiffs have demonstrated that Argentina, as debtor, and as issuer of the bond interests that are the subject of the Trust Contract, is in New York because the Republic has expressly submitted to New York jurisdiction in connection with those very bond interests. The Global Bond certificates upon which beneficial interests in the bonds are electronically traded throughout the world were issued and deposited in New York and they are administered under a New York fiscal agency agreement, which is governed by New York law. Ostrager Decl., Ex. 5; *Cf. EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2009 WL 2568433, at *9 (S.D.N.Y. Aug. 18, 2009) (where action by bank in New York must be taken in order for Republic’s interests in assets to be satisfied, situs of those interests is New York).

The balance of hardships tips decidedly in plaintiffs’ favor. Plaintiffs will be irreparably harmed if Argentina is not restrained while plaintiffs seek a turnover order. As this court has repeatedly observed in the past, Argentina has sought to take all necessary actions to avoid paying the lawful judgments entered against it by this court. The court finds that

Argentina will likely take actions to render the Trust Bonds unavailable to satisfy plaintiffs' judgments if a preliminary injunction is not entered and plaintiffs will be deprived of a significant opportunity to execute on their judgments.

In contrast, there is little burden or prejudice to Argentina. Argentina states that its interest in the Trust Bonds is limited to cancellation and has not demonstrated any prejudice it will suffer if it is restrained. The preliminary injunction will only preserve the status quo while the court determines plaintiffs' right to a turnover order.

It is therefore ordered that pursuant to Fed. R. Civ. P. 65(a) and 65(d), defendant, its officers, agents, servants, employees, and attorneys and any other person acting in concert with them, including without limitation Caja, is preliminarily enjoined from:

- a. taking any action or issuing any instructions to Caja, or to any other person, to take, any action to transfer, sell, pledge, loan, cancel, terminate or otherwise encumber or alienate Argentina's right to beneficial interests in New York Global Bonds issued by Argentina that are held by Argentina or Caja as a result of the above-described 2001 Trust Contract; and
- b. issuing any notices or instructions to the Fiscal Agent for the bond interests at issue until such time as (i) the court receives any further submissions from the parties following discovery, and (ii) the court finally determines the issues presented in the

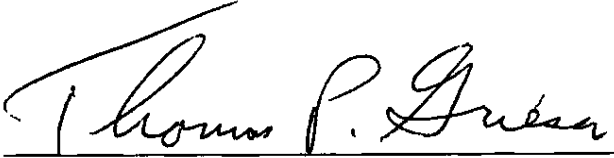
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Application and either enters further
injunctive relief or vacates this Order.

It is further ordered that no security is required under Fed. R. Civ.
P. 65(c). *See Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997)
("Rule 65(c) gives the district court wide discretion to set the amount of a bond,
and even to dispense with the bond requirement where there has been no proof
of likelihood of harm" requiring the District Court to make such determination
(internal quotation omitted)).

Finally, it is ordered that all of the above referenced submissions to
the court, including letters which are not otherwise entered on the docket,
shall be included as part of the record for the purposes of any appeal of this
Order that may be taken by Argentina.

Dated: New York, New York
November 19, 2009


THOMAS P. GRIESA
U.S.D.J.