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In the United States Court of Appeals for the Second Circuit

AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., AURELIUS OPPORTUNITIES FUND II, LLC, BLUE ANGEL CAPITAL I LLC, DIETER SCHECK, LYDIA SCHECK, AURELIUS CAPITAL PARTNERS, LP,

Plaintiffs-Appellees,

NML CAPITAL, LTD.,

Plaintiff-Counter-Defendant - Appellee,

EM LTD.,

Plaintiff,

-v.-

THE REPUBLIC OF ARGENTINA,

Defendant-Counter-Claimant - Appellant,

(*caption continued on inside cover*)

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

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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ADMINISTRACION NACIONAL DE SEGURIDAD SOCIAL, UNION DE ADMINISTRADORAS DE FONDOS DE JUBILACIONES Y PENSIONES, ARAUCA BIT AFJP S.A., CONSOLIDAR AFJP S.A., FUTURA AFJP S.A., MAXIMA AFJP S.A., MET AFJP S.A., ORIGENES AFJP S.A., PROFESION AUGE AFJP S.A.,

Defendants,

BANK OF AMERICA, N.A.,

Respondent.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel state that:

NML Capital, Ltd. is not publicly traded and has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

Aurelius Capital Master, Ltd. ("ACM") is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital International, Ltd., is the parent of ACM. No publicly held corporation owns 10% or more of the stock of ACM.

ACP Master, Ltd. is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital Partners, LP is the parent of ACP Master, Ltd. Aurelius Capital GP, LLC is the sole general partner of Aurelius Capital Partners, LP, and is the indirect parent of ACP Master, Ltd. No publicly held corporation owns 10% or more of the stock of ACP Master, Ltd.

Aurelius Capital Partners, LP ("ACP") is a limited partnership organized and existing under the laws of the State of Delaware. ACP is not a corporation and therefore Rule 26.1 does not require any disclosures with respect to it.

Aurelius Opportunities Fund II, LLC ("AOF") is a limited liability company organized and existing under the laws of the State of Delaware. AOF is not a corporation and therefore Rule 26.1 does not require any disclosures with respect to it.

Blue Angel Capital I LLC ("Blue Angel") is a limited liability company organized and existing under the laws of the State of Delaware. Blue Angel is not a corporation and therefore Rule 26.1 does not require any disclosures with respect to it.

Dieter Scheck and Lydia Scheck are not corporations, and therefore Rule 26.1 does not require any disclosures with respect to them.

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PRELIMINARY STATEMENT

In *EM Ltd. v. Republic of Argentina*, this Court held that the Foreign Sovereign Immunities Act of 1976 ("FSIA") does not bar post-judgment discovery relating to any asset that Argentina might deem "categorically immune from attachment." 695 F.3d 201, 208 (2d Cir. 2012), *cert. granted sub nom. Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 895 (Jan. 10, 2014). This Court instead held that, "[o]nce the district court had subject matter and personal jurisdiction over Argentina, it could exercise its judicial power over Argentina as over any other party, including ordering third-party compliance with the disclosure requirements of the Federal Rules." *Id.* at 209 (citing *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998) ("*Rafidain I*")).

Under the Federal Rules, this Court explained, "broad post-judgment discovery in aid of execution is the norm," "constrained principally in that it must be calculated to assist in collecting on a judgment." *EM Ltd.*, 695 F.3d at 207 (citing Fed. R. Civ. P. 69(a)(2) and Fed. R. Civ. P. 26(b)(1)). Under New York state procedures made applicable in federal court through Federal Rule of Civil Procedure 69, "a 'judgment creditor may compel disclosure of *all* matter relevant to the satisfaction of the judgment.'" *EM Ltd.*, 695 F.3d at 207 (emphasis added) (quoting N.Y. C.P.L.R. § 5223).

The *EM Ltd.* decision did not leave recalcitrant sovereign judgment debtors like Argentina defenseless. To the extent that post-judgment discovery would "reveal sensitive information," the Court noted, Argentina could "avail [itself] of the other protections contained in the Federal Rules and our precedents"—including "'concepts of governmental privilege'" and protective orders—"as necessary to protect any confidential information." *EM Ltd.*, 695 F.3d at 210 (quoting H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6621). "[T]hese mechanisms will provide Argentina all the protection to which it is entitled." *Id.* But, the Court cautioned, if Argentina's objections amounted only to an effort to "keep sensitive data about its finances away from [a judgment creditor]—i.e., to prevent [the judgment creditor] from collecting on its judgments—its concerns are entitled to no weight." *Id.* at 210 n.7.

It is against this background that Argentina renews its objections to creditors' continued efforts to locate assets to satisfy their valid judgments. Argentina acknowledges that *EM Ltd.* forecloses its contention that the FSIA bars the creditors' discovery, but nonetheless argues that creditors should not be able to obtain any other discovery relating to property—even from third-party banks—should Argentina unilaterally determine the property unavailable for execution. To the extent Argentina appeals the aspects of the orders commanding it to comply with

discovery requests, there is no jurisdiction. But Argentina's arguments all lack merit.

Argentina first contends that the Vienna Conventions on Diplomatic and Consular Relations preclude any discovery about any entity that Argentina might characterize as "diplomatic." But the only provision of the Vienna Conventions that is even conceivably relevant here provides that the "archives," "documents," and "official correspondence" of a diplomatic mission shall be "inviolable." Business records of third-party banks most certainly are not archives or correspondence of a diplomatic mission. And to the extent Argentina believes that the discovery propounded directly against it seeks those types of documents, that objection should be addressed by an appropriately substantiated claim of privilege with respect to those particular documents. Argentina, however, has tellingly declined to assert any such claim of privilege; to the contrary, Argentina has irretrievably waived any such privilege.

Argentina next argues that various categories of discovery sought by the plaintiffs here ("Plaintiffs")—regarding purported military or diplomatic entities, entities that purport to be separate from Argentina, and Argentine officials—are not "relevant" because ***Argentina*** has determined that the requested discovery will not lead to assets that its judgment creditors could execute upon. Thus, Argentina argues that there should be no discovery about entities that it deems "military" or

"diplomatic." But even in the United States, it is simply not true that all property owned by the "military" is immune from execution; to be immune, property must be used for a military purpose. *See* 28 U.S.C. § 1611(b). The same is true with respect to "diplomatic" property. *See*, *e.g.*, *Thai Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 526 (S.D.N.Y. 2013); *cf. Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311, 313 (D.D.C. 1980). And many of Argentina's characterizations of certain entities or property as "military" or "diplomatic" are patently absurd.

Under the Federal Rules of Civil Procedure, Argentina has no right to determine for itself whether its property satisfies the legal requirements for execution. Nor can it be trusted to determine which of its purportedly separate instrumentalities might be an inseparable part of the state or an alter ego liable for the state's debts, which is why this Court has authorized discovery on such topics from sovereign judgment debtors. *See Rafidain I*, 150 F.3d at 177. And after NML located an executable asset of Argentina held in the name of an official, *see EM Ltd. v. Republic of Argentina*, 389 F. App'x 38, 40, 42 (2d Cir. 2010), the relevance of discovery of individual officials' accounts and transactions is manifest.

Finally, Argentina argues that the district court abused its discretion by allowing discovery that Argentina believes to be "overbroad" and "inconsistent with the grace, comity, and respect owed a foreign state." Argentina Br. 29, 41. Plain-

tiffs respectfully submit that a foreign sovereign that "has not acted honestly and in good faith," *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010), and tells this Court that it "would not voluntarily obey" an order of the Court, *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 238 (2d Cir. 2013), is not particularly deserving of "grace, comity, and respect." But, in any event, it does this foreign sovereign no indignity to affirm and enforce its "consent" to "any process" relating to enforcement of a judgment, which would include any and all discovery of the types at issue here. Argentina's complaints about overbreadth and burden—in addition to being entirely the result of its obdurate refusal to honor the concededly valid judgments entered against it—are nothing more than an effort to keep financial information from its creditors. And that concern, this Court rightly decided, is "entitled to no weight." *EM Ltd.*, 695 F.3d at 210 n.7.

COUNTER-STATEMENT OF JURISDICTION

Under this Court's decision in *EM Ltd.*, this Court has jurisdiction to review Argentina's objections to discovery requests directed to third-party banks, 695 F.3d at 206 & n.6, but this Court lacks jurisdiction over Argentina's appeal from the portions of the district court's order upholding requests directed to Argentina itself. "To obtain appellate review, the subpoenaed person ordinarily must defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under [28 U.S.C.] § 1291." *United States v.*

Punn, 737 F.3d 1, 5 (2d Cir. 2013); *see also Cent. States v. Express Freight Lines, Inc.*, 971 F.2d 5, 6 (7th Cir. 1992). Argentina contends that all of the relevant discovery can be appealed together under the doctrine of pendent jurisdiction, but as relevant here that "narro[w]" doctrine applies only where resolution of one issue would *necessarily* resolve the other. *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010). Because different analyses may apply to discovery directed to a third party or the sovereign itself, that standard is not met. *See infra* at 23-26.

COUNTER-STATEMENT OF THE ISSUES

1. In *EM Ltd.*, this Court exercised jurisdiction to review discovery orders directed to third-party banks. This case involves some discovery directed to third-party banks, but also discovery directed to Argentina directly. Does this Court have jurisdiction over the portion of the discovery order directed to Argentina?

2. The provisions of the Vienna Conventions on Diplomatic and Consular Relations immunize certain property from attachment, and immunize certain diplomatic officials from judicial process. Plaintiffs do not seek to attach any property, and do not seek to subject covered diplomatic officials to any form of judicial process. Do the Vienna Conventions nevertheless allow Argentina to block all discovery relating to any entity Argentina characterizes as "diplomatic" and to

conceal from its creditors even the existence of property held in the name of such entities?

3. Argentina has engaged in a decade-long campaign to evade valid judgments entered against it and conceal assets from its creditors, and has announced its intention to defy the remedial orders of this Court. Given the need for creditors to obtain information concerning the location of Argentina's assets, the district court ordered discovery similar to that approved by this Court in *EM Ltd.* and *Rafidain I*. Did the district court's order fall within the scope of its broad discretion to structure post-judgment discovery?

COUNTER-STATEMENT OF THE CASE

A. Argentina Defaults On Its Obligations To Its Creditors, And Embarks On An Ambitious, Worldwide Effort To Evade The Judgments Entered By The District Court Following Argentina's Default.

This case involves sovereign debt instruments in which Argentina—seeking to entice creditors to lend it money—"irrevocably agreed not to claim and . . . irrevocably waived" all immunities to which it otherwise would be entitled, and "consent[ed] generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process," subject only to a few excep-

tions not relevant to this appeal. JA-2042-43; *see also* DE 35, at 2, No. 1:10-cv-05167-TPG (S.D.N.Y. Sept. 1, 2011).[1]

In December 2001, in what was at the time the largest sovereign default in history, Argentina announced a moratorium on public-sector debt payments—including on the debt instruments at issue in this litigation. *See EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). More than three years later, Argentina instead offered restructured securities to investors, worth only 25 to 29 cents on the dollar, on a take-it-or-leave-it basis. Plaintiffs, who hold beneficial interests in the debt instruments at issue in this litigation, did not engage in the restructurings. As a result, Argentina has steadfastly refused to make payments to them—even though Argentina has enjoyed notable financial success over the past decade and "has the ability to pay." *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273, 301 (S.D.N.Y. 2010); *see also NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 246 (2d Cir. 2013).

Relying on the waiver of immunity in the bond instruments, two sets of plaintiffs—Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, Blue Angel Capital I LLC, and Aurelius Capital Partners, LP

[1] "JA" refers to the Joint Appendix. "SPA" refers to the Special Appendix. "DE" refers to a docket entry in a specified district-court case.

(the "Aurelius Plaintiffs") and NML Capital, Ltd. ("NML")—filed several actions between 2003 and 2010 in the United States District Court for the Southern District of New York to collect on the defaulted bonds. The district court has entered more than $2.3 billion in judgments in favor of Plaintiffs, and pre-judgment claims in the remaining cases amount to more than $1.8 billion.

Plaintiffs Dieter and Lydia Scheck (the "Schecks"), two individual German citizens, secured final judgments on their debt obligations in Germany and, in 2010, instituted an action in the Southern District of New York to secure recognition and enforcement of those judgments. *See* DE 35, at 1, No. 1:10-cv-05167-TPG (S.D.N.Y. Sept. 1, 2011). The district court entered judgments in favor of the Schecks totaling more than $44.5 million. *See* DE 38, No. 1:10-cv-05167-TPG (S.D.N.Y. Nov. 22, 2011).

Argentina does not dispute that these judgments are valid and enforceable. Yet Argentina repeatedly has "made clear its intention to defy any money judgment issued by this Court." *NML*, 727 F.3d at 241; *see also id.* at 238 & n.4. As previously explained by the district court: "The Republic gave all kinds of assurances in the original bonds . . . [that] they would submit to jurisdiction and they gave assurance that the judgments would be honored. All of that was basically fraud. . . . They have got the money to [pay the judgments], but they have arbitrari-

ly and contemptibly refused to do what they are legally obligated to do." DE 385-1, at 31:23-32:6, No. 1:03-cv-08845-TPG (S.D.N.Y. Dec. 17, 2010).

To further its unlawful refusal to honor its debts, Argentina has structured its finances to keep assets "safe from the threat of attachmen[t]." JA-1023 (statement of Argentine Cabinet Chief Alberto Fernandez). Argentina has maintained an unusually large percentage of its liquid international reserves—by some estimates, as high as 86 percent—at the Bank of International Settlements in Basel in order to take advantage of the immunity enjoyed by that organization, notwithstanding the significantly lower interest rates paid by that bank.[2] To shield its remaining assets, Argentina has divided its governmental functions and assets among dozens of entities that purport to be separate from the Argentine state. For instance, Argentina placed assets used to pay for infrastructure improvements in a trust account held in the name of Banco de la Nación Argentina ("BNA") as trustee; although Argentina retained and continued to exercise the ability to control the use of those funds, Argentina declared the trust to be a separate entity under Argentine law. *See EM Ltd. v. Republic of Argentina*, 389 F. App'x 38, 40, 42 (2d Cir. 2010) (permitting attachment of these funds because, under New York law, the trust was not "a valid

[2] *See* Keith Boyfield & Brian Sturgess, *Last Tango in Basel: A Gaucho's Guide to Avoiding the Repayment of Debt*, Institute of Economic Affairs (Aug. 11, 2011); *see also* JA-1022-1024 (La Nación, *The Government Is Protecting Itself from Attachment* (Feb. 5, 2004)).

trust"). Argentina also held an account at BNA in the name of one its ministers, and used the account for commercial activity. *See EM Ltd. v. Republic of Argentina*, No. 03-cv-2507-TPG, 2009 WL 3149601 (S.D.N.Y. Sept. 30, 2009), *aff'd in relevant part*, 680 F.3d 254, 256 (2d Cir. 2012). In this manner, Argentina has structured its affairs to frustrate enforcement of the district court's judgments.

B. Argentina's Creditors Seek Discovery In Order To Locate Assets Available To Satisfy The Judgments.

To locate assets available to satisfy their judgments, Plaintiffs have sought discovery under Federal Rule of Civil Procedure 69 from Argentina and from banks that do business with Argentina.

In 2010, NML served subpoenas on BNA and Bank of America seeking information about Argentina's accounts and fund-transfer activities. *See EM Ltd.*, 695 F.3d at 203-04. The subpoenas defined "Argentina" to include the Republic, as well as its agencies, ministries, instrumentalities, and political subdivisions. *See id.* at 204; JA-1828-34, 1849-56.[3] Argentina argued both that the subpoenas infringed its immunity under the FSIA (that it had waived) and that the discovery was "not permitted under the Federal Rules" because discovery is not "relevant . . .

[3] The subpoenas also sought information about the banking activities of several then-current and former officials. NML ultimately narrowed this request to include only Argentina's current President and her late husband, himself a former President of Argentina. *See EM Ltd.*, 695 F.3d at 204.

where the property targeted for such discovery as a matter of law is not subject to attachment." Br. of Def.-Appellant at 32-33, *EM Ltd. v. NML Capital, Ltd.*, 695 F.3d 201 (2d Cir. 2012) ("Argentina *EM Ltd.* Br."). The district court denied Argentina's motion to quash, and this Court affirmed, holding that the FSIA does not provide immunity from post-judgment asset discovery, and that the discovery sought by NML fell within the district court's broad discretion. *EM Ltd.*, 695 F.3d at 210. "[B]road post-judgment discovery in aid of execution is the norm," this Court explained, and a party seeking such discovery "need not satisfy the stringent requirements for attachment in order to simply receive information." *Id.* at 207, 209. This Court further observed that Argentina's interest in protecting sensitive information from discovery would be adequately addressed by doctrines of privilege, but that Argentina had not asserted any privilege claim. *Id.* at 210.

In accordance with this Court's decision, Plaintiffs served a series of further discovery requests both on Argentina and on additional third-party banks:

1. Bank Subpoenas. In December 2011 and January 2012, the Aurelius Plaintiffs served subpoenas on five banks and their affiliated entities, and NML served its own subpoenas on eight banks and their affiliated entities in April and May 2013 (collectively, "Bank Subpoenas"). *See* JA-1242-1518, 2950-3507.

The Bank Subpoenas are similar to the subpoenas upheld in *EM Ltd.* The Aurelius Plaintiffs' Bank Subpoenas request information about Argentina's assets,

accounts, transactions, and debts, and also seek information about specific categories of property—such as real estate, natural resources, and securitizations—as well as services being rendered to Argentina. *See*, *e.g.*, JA-2991-2999. The NML Bank Subpoenas request two sets of documents: (1) documents concerning fund transfers through U.S. banking facilities "to, from, or through accounts owned or controlled by Argentina" since January 1, 2011, and (2) documents identifying property, assets, and accounts held by the banks since January 1, 2011, for which Argentina was (in whole or in part) the owner, beneficiary, or a signatory. *See*, *e.g.*, JA-1252.

Like the subpoenas at issue in *EM Ltd.*, the Bank Subpoenas define "Argentina" to include "the Republic of Argentina" as well as its "ministries," "political subdivisions," "representatives," and "all other persons" acting or purporting to act on behalf of the Republic, "whether or not authorized to do so." JA-1247, 2986. The requests also provide non-exhaustive lists of entities and officials who fall within that general definition. *See* JA-1254, 3000. Reflecting the splintered structure of government that Argentina has adopted in its efforts to avoid enforcement of Plaintiffs' judgments, the lists name dozens of entities and persons.

2. Argentina Asset Requests. In December 2011, the Aurelius Plaintiffs served discovery requests directly on the Republic. *See* JA-2920. NML served additional, similar requests on Argentina in August 2012, *see* JA-2056, and the

Schecks followed suit in December 2012, JA-5465. These requests (the "Argentina Asset Requests") seek information about Argentina's accounts, assets, and transactions. NML's discovery seeks information about property and transactions located at least partially within the United States, *see* JA-2061-62, 2065-66, and the Aurelius Plaintiffs and the Schecks seek information about Argentina's assets wherever located, although the Aurelius Plaintiffs' requests are not targeted to assets located wholly within Argentina, *see*, *e.g.*, JA-2933. The definition of "Argentina" in the Argentina Asset Requests parallels the definition in the Bank Subpoenas.[4]

Argentina has provided virtually no information in response to the Argentina Asset Requests. Instead, Argentina has maintained that it need disclose only information relating to specifically identified assets that it would concede are subject to execution under the FSIA—unsurprisingly, a null set. Responding to requests to disclose its accounts in the United States, for instance, Argentina has stated only that it has no U.S. accounts "in which it keeps funds used for a commercial activity in the United States." JA-2129-30, 2131, 2138-39, 2141. Similar representations

[4] The Schecks' Argentina Requests initially defined "Judgment Debtor" to include only "[t]he Republic of Argentina and its agencies, instrumentalities and its alter egos." JA-5468. In upholding the requests, the district court stated that "Judgment Debtor" should be construed to include "the entities identified as being part of the Republic in the NML Requests and the Aurelius Requests." JA-2270 n.1.

in the past have proven to be false. *Compare* JA-1910-11, 1916, *with NML*, 680 F.3d at 256.

3. Argentina Alter Ego Requests. In addition to serving Argentina with requests for information about its assets, NML also served Argentina with requests (the "Alter Ego Requests") patterned on the alter ego discovery described in *Rafidain I*, 150 F.3d 172, 177 (2d Cir. 1998). These requests seek information about potential alter egos of the Republic—specifically BNA, Banco Central de la República Argentina ("BCRA"), Energía Argentina S.A. ("ENARSA"), and Yacimientos Petroliferos Fiscales ("YPF"). *See* JA-2062-65; JA-2066-69. The requests ask about communications between Argentina and these potential alter egos "concerning the bonds at issue in this lawsuit" or "payment, or non-payment of Argentina's foreign obligations"; information about "the role of the Republic of Argentina" in overseeing the financial activities of these entities; and information about the organization of the entities, such as the identity of "officers and directors." JA-2063-65. They also request documents that could potentially shed light on the relationship between these entities and the Republic, including organization charts, board minutes, and other documents. JA-2066-69.

In response to the Argentina Alter Ego Requests, Argentina has provided only extremely limited information, such as the entities' charters and lists of current officers. Argentina refused to produce any other requested information, objecting

in circular fashion that NML is not entitled to alter ego discovery regarding these entities because they have not been demonstrated to be alter egos liable for Argentina's debts.

C. The District Court Overrules Argentina's Discovery Objections.

At the hearing to consider the propriety of the requested discovery, the district court noted its familiarity with this litigation and the particular issue of discovery—an issue that had been "before the Court over these many years." JA-2250. The court recognized that Plaintiffs had been pursuing, "in all of these years, various ways to recover their just debts, including attempts to find assets against which they could recover." JA-2250. Yet they were "still faced with a republic who will not pay what is required." JA-2249. Argentina's obstinate defiance of its obligations had, the district court noted, "force[d] the plaintiffs either to give up, or to pursue a difficult path of getting information and trying to see if any information . . . yields information about recoverable assets." JA-2251.

Turning to the scope of the discovery, the court stated that the requests had "surely been refined in response to what has gone on with the Court, and with the parties, in the past." JA-2251. Indeed, they had—the Aurelius Plaintiffs, for example, had narrowed their Argentina Asset Requests from thirty categories of documents to nine, and from 460 entities to 393. DE 576, at 15-21, No. 1:07-cv-02715-TPG (S.D.N.Y. May 27, 2013). Their Bank Subpoenas were similarly nar-

rowed to five categories. *See id.* at 13-15. The court further found that the requested discovery "reasonably reflect[s] the facts of this case, not facts of some other case, but the facts of this case." JA-2251. Familiar with Argentina's use of purportedly separate entities to conceal assets, the court recognized that "plaintiffs are anything but frivolous in seeking to have information about the possible use of some branch of the Republic to do something that that branch does not normally do, that is, deal with assets." JA-2252. It thus rejected Argentina's argument that discovery into assets held by Argentina's ministries of defense and foreign affairs should be categorically barred. JA-2251-52. The court acknowledged that failure to exclude military or diplomatic property from the scope of the requests might, taken out of context, seem "strange." JA-2251. But the court stressed that "we do not have a normal case." JA-2252.

Recognizing that less comprehensive discovery would provide Argentina with a loophole to avoid disclosing any of the information needed by its creditors, the district court found the scope of the requested discovery necessary to prevent "the Republic from evading its discovery obligations." JA-2269. Other than to argue that the court should categorically bar any discovery about whatever entities Argentina characterized as "military" or "diplomatic," Argentina made no claim of governmental privilege to shield information that it might deem sensitive. And it

suggested no narrowing of the discovery requests except to argue that they should reach none of the entities Argentina claimed were separate from itself.

On September 25, 2013, the court issued an order generally upholding the requested discovery. The court held that Argentina did not need to respond to NML's alter ego requests concerning BNA, given the court's prior ruling that BNA was not an alter ego of the Republic, but otherwise ordered Argentina and the third-party banks to comply. JA-2269; *see also* JA-2252. The banks, after much protest, have begun to comply. Argentina, by contrast, has provided no information to supplement its initial responses—even though it never moved to stay the district court's order, and even though the order specifically required Argentina to respond to the discovery requests within "30 days." JA-2270.[5]

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over the portion of Argentina's appeal challenging discovery directed solely to Argentina. In *EM Ltd.*, the Court found jurisdiction over an interlocutory discovery appeal because the discovery was directed exclusively to third-party banks, and Argentina thus could not pursue im-

[5] On March 20, 2014, one of the third-party banks moved for a stay of proceedings in the district court pending the Supreme Court's disposition of *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842. *See* DE 571, No. 1:03-cv-08845-TPG (S.D.N.Y.). The district court granted that stay on April 18, 2014. *See* DE 584, No. 1:03-cv-08845-TPG (S.D.N.Y.).

mediate review by refusing to comply, being held in contempt, and then appealing the contempt order. That rationale does not apply to discovery directed to Argentina itself.

Argentina cannot salvage its premature appeal through pendent appellate jurisdiction. That doctrine applies where resolution of one issue will *necessarily* resolve the other. In this case, however, the Court could potentially draw a meaningful distinction between discovery directed to third parties and discovery directed to the sovereign. While this Court's decision with respect to third-party discovery issues *could* control all of Argentina's challenges to the discovery order, it will not *necessarily* do so.

II. While Argentina objects that post-judgment asset discovery is prohibited by the FSIA, that is the precise claim this Court rejected in *EM Ltd.* Argentina's primary legal objection to the ordered discovery is thus squarely foreclosed by binding Second Circuit precedent.

III. Argentina also cannot rely upon the Vienna Conventions on Diplomatic and Consular Relations to protect "diplomatic" property. As relevant here, the Vienna Conventions provide immunity from judicial process only to certain diplomatic personnel and otherwise protect only the archives, documents, and official correspondence of a mission or consular post. These provisions do not apply to discovery neither directed at diplomatic personnel nor seeking access to the in-

ternal papers or correspondence of a diplomatic mission. That includes the entirety of the discovery directed to third-party banks and the overwhelming majority of the discovery directed to Argentina. To the extent that Argentina believes the requested discovery calls for production of documents rendered privileged by the Vienna Conventions, then, consistent with *EM Ltd.*, Argentina may raise specific claims of privilege with respect to specific documents. After all, that is what the United States government must do to protect its own sensitive information in litigation. Any contrary rule would make discovery effectively meaningless, since Argentina would undoubtedly seize on a categorical exception for "diplomatic" property by self-determining that *all* potentially attachable assets are "diplomatic" in nature.

In any event, Argentina has expressly waived *any* immunity that the Vienna Conventions might provide. Argentina has expressly consented to *all* judicial process, and has expressly agreed not even to "assert" any immunity that it would otherwise enjoy. This broad waiver of immunity easily encompasses any immunity that might be conveyed by the Vienna Conventions.

IV. This Court also should reject Argentina's fallback argument that the district court abused its broad discretion to permit post-judgment discovery.

Argentina claims that discovery into military or diplomatic property is not "relevant" because such property is shielded from *attachment and execution* by the

Vienna Conventions and by provisions of the FSIA, at least in some cases. This Court rejected a similar argument in *EM Ltd.* when Argentina contended that the FSIA's restrictions on attachment and execution should bar discovery. The Court made clear that a creditor "need not satisfy the stringent requirements for attachment in order to simply receive information." 695 F.3d at 209. Instead, it need only show that the discovery is "calculated to assist in collecting on a judgment." *Id.* at 207. There can be no question that discovery into property that Argentina would characterize as "diplomatic" or "military" is so calculated, because this property could be subject to attachment and execution under the FSIA or the laws of other nations. The Federal Rules do not give Argentina authority to determine unilaterally whether property may be available to satisfy the judgments. Argentina's creditors are entitled to review the information themselves, and the parties may present any disputes for the ultimate determination of the district court.

Argentina's other relevance-based objections are equally meritless. Argentina challenges the Alter Ego Requests on the ground that Plaintiffs first must prove an alter ego theory, but this Court's decision in *Rafidain I* refutes that conclusion. Plaintiffs are entitled to discovery in order to *determine* whether a valid alter ego claim exists; any contrary rule would put the proverbial cart before the horse by requiring Plaintiffs to prove the very issue about which they seek discovery.

Meanwhile, the definition of "Argentina" in the Bank Subpoenas and Argentina Asset Requests, which includes political subdivisions, related entities, and Argentine officials, is necessary to avoid evasion by Argentina. Argentina has engaged in a pattern of holding assets in the name of purportedly separate entities in order to shield those assets from its creditors; as a result, discovery against Argentina alone would be inadequate. This Court rejected Argentina's challenge to a similar definition of "Argentina" in *EM Ltd.*, and Argentina points to no reason to depart from that holding here.

Nor does Argentina otherwise demonstrate that the discovery is an abuse of discretion. The starting point for this Court's review must be Argentina's decade-long history of defiance of court orders and evasion of its creditors. Against that backdrop, the district court would be justified in ordering discovery to the *full* extent allowed by Rule 69. The district court was clear that it believed Plaintiffs' discovery was necessary in light of the facts of the case, and to overcome Argentina's previous attempts to hide its assets. The order below reflects a sound exercise of the district court's broad discretion to tailor discovery to these particular facts and circumstances.

STANDARD OF REVIEW

This Court reviews post-judgment discovery orders for abuse of discretion, affording the district court "broad latitude to determine the scope of discovery and

to manage the discovery process." *EM Ltd.*, 695 F.3d at 207. An abuse of discretion occurs only if the district court bases its ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence," or if the court renders a decision that "cannot be located within the range of permissible decisions." *Id.* (quoting *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008)) (internal quotation marks omitted). The Court will "ordinarily defer to the discretion of district courts regarding discovery matters." *In re "Agent Orange" Prod. Liab. Litig.*, 517 F.3d 76, 103 (2d Cir. 2008) (internal quotation marks omitted).

ARGUMENT

I. This Court Lacks Jurisdiction To Review Discovery Requests Directed Solely To Argentina.

This Court generally lacks jurisdiction to review an interlocutory discovery order. Instead, such orders are "reviewable on appeal from a final judgment or by an appeal from a contempt citation." *EM Ltd.*, 695 F.3d at 206 (citations omitted); *see also Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009). The requirement to "submit to contempt before appealing promotes the strong congressional policy . . . against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *In re Air Crash at Belle Harbor*, 490 F.3d 99, 105 (2d Cir. 2007) (internal quotation marks omitted); *see also Mohawk Indus.*, 558 U.S. at 111-12.

The Court recognized a limited exception to this settled rule in *EM Ltd.*, where the underlying discovery was directed to third-party banks, because Argentina could not "obtain review through disobedience and contempt." 695 F.3d at 206. That reasoning, however, is "relevant only to appeals . . . where the disputed subpoena is directed at *someone else*." *In re Air Crash*, 490 F.3d at 106. In this appeal, by contrast, the bulk of the discovery is directed at Argentina, and thus falls outside the exception recognized in *EM Ltd.* As relevant here, the Schecks have sought discovery *only* from Argentina. And, while NML and Aurelius have served some discovery on third-party banks, both of them also served Argentina directly. As to requests directed against Argentina, Argentina's appeal should be dismissed.

Argentina nonetheless contends that, because *some* of the challenged discovery is directed to third parties, it may appeal the discovery order *in its entirety* under the doctrine of pendent appellate jurisdiction. This Court, however, has "emphasized" the "narrowness of the pendent appellate jurisdiction standard." *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010). Pendent appellate jurisdiction is appropriate only where review of the non-appealable order is "necessary to ensure meaningful review of the appealable order," *id.* at 552 (internal quotation marks omitted), or where the rulings at issue are "'inextricably intertwined,' in that the 'same specific question' . . . 'underl[ies] both the appealable order and the non-appealable order,' such that [the Court's] resolution of the question will *necessari-*

ly resolve the appeals from both orders at once," *id.* (emphasis added) (quoting *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 576 (2d Cir. 2005)). While Argentina contends that it has satisfied this narrow standard because the district court's rulings on the validity of the discovery requests are purportedly "inextricably intertwined," Argentina Br. 3-4, it is not enough that the Court is "confronted with two similar, but independent, issues," *Blue Ridge Invs., LLC v. Republic of Argentina*, 735 F.3d 72, 81 (2d Cir. 2013) (internal quotation marks omitted)—even when "considerations of efficiency might argue for deciding both issues together," *Myers*, 624 F.3d at 554 (citation and internal quotation marks omitted)). Instead, Argentina must show that any determination of the validity of the third-party discovery would "necessarily resolve" the validity of discovery directed to Argentina directly. *Id.* at 553. Argentina cannot make that showing.

This Court's resolution of objections to third-party discovery about Argentina will not "necessarily resolve" Argentina's objections to discovery against it. As an initial matter, the Scheck discovery requests at issue here do not seek information from third parties *at all*, so in the Scheck case (No. 13-4114), Argentina's appeal from the order allowing discovery from it is pendent to nothing. And in the NML and Aurelius cases, this Court readily could resolve Argentina's objections to the Bank Subpoenas by following *EM Ltd.*'s holding that such third-party discovery requests do not implicate any privilege or immunity that Argentina might

enjoy. 695 F.3d at 210. Such a decision would not resolve, for example, whether the Vienna Conventions preclude certain discovery against Argentina. Resolution of the issues relating to third-party discovery thus will not "necessarily resolve" the issues relating to discovery against Argentina directly, and there accordingly can be no pendent appellate jurisdiction over the Argentina requests. Consistent with *EM Ltd.*, this Court may exercise jurisdiction over discovery orders directed at third-parties, but Argentina may not leverage that jurisdiction to obtain premature review of *other*, fundamentally separate, discovery requests.

II. *EM Ltd.* Forecloses Argentina's Argument That The FSIA Blocks Post-Judgment Discovery.

Argentina continues to assert that discovery into its property is barred by the attachment immunity provisions of the FSIA. *See* Argentina Br. 27-29. As Argentina acknowledges, that argument is squarely foreclosed by this Court's decision in *EM Ltd.*, which held that a judgment creditor "need not satisfy the stringent requirements for attachment [under the FSIA] in order to simply receive information about Argentina's assets." 695 F.3d at 209.

III. The Vienna Conventions On Diplomatic And Consular Relations Do Not Preclude Discovery Into Whatever Entities Or Property Argentina Might Unilaterally Characterize As "Diplomatic."

Argentina can no more rely upon the Vienna Conventions to block discovery than it can the FSIA. Argentina claims that the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 ("VCDR") (SPA 58),

and the Vienna Convention on Consular Relations, Apr. 24, 1963, 23 U.S.T. 77, 596 U.N.T.S. 261 ("VCCR") (SPA 80), block any discovery—whether directed to third parties or to Argentina itself—relating to "diplomatic" entities or property. That assertion finds no support in the Vienna Conventions, the cases interpreting them, or even the views of the United States. And, even putting all that aside, Argentina also waived and promised never to claim the immunity that it now invokes. Argentina's sweeping claim of immunity under the Vienna Conventions therefore should be rejected.

A. The Vienna Conventions Do Not Immunize Sovereign Judgment Debtors From Post-Judgment Discovery.

Argentina seeks to warp the Vienna Conventions into something they are not. Those treaties provide limited protections for diplomatic missions and their staff. They do not address, and are not intended to address, the availability of discovery against a sovereign judgment debtor. The discovery ordered here in no way implicates the Vienna Conventions.

1. The Text Of The Vienna Conventions Provides No Support To Argentina.

Argentina cannot rely upon the text of the Vienna Conventions for support. As the Supreme Court has recognized, "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín v. Texas*, 552 U.S. 491, 506 (2008); *see also BG Grp. PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208

(2014) (stating that a treaty's interpretation "normally is, like a contract's interpretation, a matter of determining the parties' intent"). None of the several provisions of the Vienna Conventions invoked by Argentina confers the sweeping immunity that it asserts here.

a. Argentina relies on Articles 31 and 37 of the VCDR, which confer limited immunity from judicial process on diplomats and their affiliates. Article 31 confers immunity on "diplomatic agent[s]," SPA-69, and Article 37 confers immunity on "members of the family of a diplomatic agent," "[m]embers of the administrative and technical staff of the mission," "[m]embers of the service staff of the mission," and "[p]rivate servants of members of the mission," SPA-73; *see also Vulcan Iron Works, Inc. v. Polish Am. Mach. Corp.*, 472 F. Supp. 77, 78 (S.D.N.Y. 1979) (applying these provisions); VCCR arts. 43, 44 (SPA-96, 97) (conferring limited immunities on certain individuals associated with consular posts). These provisions have no relevance here for the simple reason that the discovery requests were served only on third-party banks and Argentina itself, and do not require any action by *any* of these categories of individuals. The Vienna Conventions simply have no bearing upon the immunities of sovereigns, much less those of non-sovereign banks.

b. Argentina also claims that Article 24 of the VCDR denies Plaintiffs the discovery they seek. Article 24 provides that the "archives and documents of

the mission" and "official correspondence of the mission" (defined as "all correspondence relating to the mission and its functions") shall be "inviolable." VCDR, arts. 24, 27(2) (SPA-67, 68); *see also* VCCR arts. 33, 35(2) (SPA-93) (providing similar protection to diplomatic consulates). That provision does not grant Argentina the categorical immunity it asserts here.

The Bank Subpoenas are directed to non-sovereign banking entities that have no claim whatsoever to "any . . . sort of immunity." *EM Ltd.*, 695 F.3d at 210. Those requests cannot possibly implicate Article 24, because bank records are indisputably not the documents, archives, and correspondence "*of the mission*." *See United States v. Miller*, 425 U.S. 435, 440-43 (1976) (bank records are "business records of the bank[s]," not a litigant's "private papers"). Argentina characterizes the Bank Subpoenas as attempting an "end-run" around the Vienna Conventions, Argentina Br. 33, but this Court recognized in both *EM Ltd.* and *Rafidain I* that it is entirely appropriate for a judgment creditor to direct its discovery to entities that have no conceivable claim to any form of immunity.

The requests served directly on the Republic likewise do not implicate Article 24. Article 24's limited protection for diplomatic papers does not confer a blanket immunity from *any* discovery relating to purportedly diplomatic entities and property, and Plaintiffs' discovery requests do not seek an opportunity to examine the "archives," "documents," or "official correspondence" of a diplomatic

mission. Rather, they seek information concerning the location of Argentina's assets and the Republic's relationships with potential alter egos. Interrogatories directed to Argentina, for example, simply call for Argentina to identify the location of its assets. Far from "inviolable" confidential documents of a diplomatic mission, these requests require Argentina to state facts that are known to others in the world, already disclosed, at a minimum, to the banks where accounts are held or to other transactional counterparties. Argentina may not turn a limited protection for confidential diplomatic correspondence into a shield against disclosure relating to any entity or property Argentina might deem "diplomatic."

To the extent that Argentina believed that any of Plaintiffs' discovery requests would require the production of diplomatic papers, Argentina could assert and appropriately substantiate a claim of privilege with respect to those particular documents by producing a privilege log to the court, consistent with the requirements of the Federal Rules of Civil Procedure. Notably, however, Argentina has never asserted (much less substantiated) that responsive information is held in the files of any diplomatic mission; indeed, rather than meet and confer in a meaningful attempt to narrow discovery, Argentina has simply asserted that *all* discovery should be quashed and disallowed. The remote possibility that certain unspecified documents may later allow Argentina to invoke the Vienna Conventions' protections to narrow the scope of discovery is no reason to accept Argentina's present

argument that Article 24 gives it a right to withhold any information—wherever located—concerning its purportedly "diplomatic" assets and entities.

c. Finally, while Argentina relies on Article 25 of the VCDR, that provision only imposes an obligation on the receiving state to accord a diplomatic mission "full facilities for the performance of [its] functions," SPA-67; *accord* VCCR, art. 28 (SPA-91), and on its face has nothing to do with the availability of post-judgment asset discovery. Discovery relating to the assets of a recalcitrant judgment debtor simply does not deprive the judgment debtor of the use of "full facilities" for its diplomatic mission.

Some cases have interpreted this provision to shield diplomatic bank accounts from *attachment*—on the theory that a diplomatic bank account is one of the "facilities" necessary to maintain a diplomatic mission. *See*, *e.g.*, *Liberian E. Timber Corp. v. Gov't of Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987) (finding diplomatic funds "immune from attachment to satisfy a civil judgment" and declining to "freeze" purportedly diplomatic assets).[6] But the only decision to

[6] Other cases cited by Argentina likewise pertain to attachment—not discovery—of diplomatic assets. *See Sales v. Republic of Uganda*, No. 90 Civ. 3972, 1993 WL 437762, at *1 (S.D.N.Y. Oct. 23, 1993) (addressing steps by creditors to "attach the rents in the hands of the tenants" of mission to United Nations); *Avelar v. J. Cotoia Constr., Inc.*, No. 11-cv-2172, 2011 WL 5245206 (E.D.N.Y. Nov. 2, 2011) (addressing whether diplomatic assets are "immune from execution"); *cf. 767*

[Footnote continued on next page]

consider whether this provision's limitation on the seizure of property likewise limits discovery concluded that it does not. *See Thai Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 526 (S.D.N.Y. 2013) (finding "no support" for such an extension).[7] Indeed, this Court emphatically rejected a similar logical leap from execution to discovery in the context of the FSIA. *See EM Ltd.*, 695 F.3d at 208-09. While seizure of a bank account used for diplomatic purposes arguably could deprive a mission of the use of a "facility" needed for the "performance of its functions," mere discovery of the bank account's information has no such effect. And Argentina has made no effort at all to demonstrate how disclosure of the information sought by plaintiffs here would interfere with a diplomatic mission's performance of its functions—much

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[Footnote continued from previous page]

Third Ave. Assocs. v. Permanent Mission, 988 F.2d 295, 300 (2d Cir. 1993) (addressing attempt to evict diplomatic mission).

[7] Laos's appeal from this decision was withdrawn under Local Rule 42.1. *See Thai-Lao Lignite (Thai.) Co. Ltd. v. Gov't of the LAO People's Democratic Republic*, No. 13-495 (2d Cir. Nov. 7, 2013). Though the United States has ***not*** filed a brief in this case, Argentina (at 32) trumpets the *amicus* brief the United States filed in support of Laos's appeal in *Thai-Lao Lignite* before that appeal was dismissed. That case was different in at least two relevant respects, either of which could explain the absence of the United States here: (1) the judgment creditor there sought to depose government officials arguably entitled to diplomatic immunity, and (2) the government instrumentality there had not waived immunity. *See Thai Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 522, 525 (S.D.N.Y. 2013).

less to substantiate such claims in a way that would be subject to judicial testing. There is accordingly no basis for this Court to conclude that compliance with Plaintiffs' discovery requests somehow will deprive Argentina of the use of its diplomatic facilities.

2. Argentina's Sweeping Claim Of Immunity Is Divorced From The Purpose Of The Vienna Conventions.

Argentina's attempt to invoke diplomatic immunity to block all post-judgment discovery relating to any asset or entity that it identifies as "diplomatic" twists not only the text of the Vienna Conventions, but also their defining purpose.

The Vienna Conventions seek to "ensure the efficient performance of the functions of diplomatic missions as representing States," SPA-59, 81, but that purpose does not even remotely suggest, much less require, that any asset or entity a sovereign designates as "diplomatic" must be walled off from disclosure. Rather, it suggests immunity only when the assets are being used to carry out diplomatic functions, such that seizure of those assets would interfere with the sovereign's performance of its diplomatic missions. The purposes of the Vienna Conventions are not implicated at all where the property in question is not being used for a diplomatic purpose.

Argentina complains that Plaintiffs' discovery requests require Argentina to disclose property that is held in the name of purportedly diplomatic entities, whether or not it is used for diplomatic purposes. But diplomatic property may be

subject to attachment under proper circumstances, *see*, *e.g.*, *Birch Shipping Corp. v. Embassy of the United Arab Republic of Tanzania*, 507 F. Supp. 311, 311-12 (D.D.C. 1980), and Argentina cannot be allowed to determine for itself whether property is used for a diplomatic purpose and thus immune from attachment and execution. Just as adversarial testing generally is required to determine whether property is used for a commercial activity, *see*, *e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 257-60 (2d Cir. 2012), adversarial testing likewise is needed to determine whether property is used for a diplomatic purpose, *see*, *e.g.*, *Thai Lao Lignite*, 924 F. Supp. 2d at 527; *cf. Birch Shipping Corp.*, 507 F. Supp. at 311-12. And there can be no adversarial testing with respect to the ***use*** of particular property unless its ***existence*** first is disclosed. Argentina should not be permitted to shield its property that is used for non-diplomatic purposes from creditor process by concealing its existence.

To the extent that Argentina believes the discovery requests threaten to reveal sensitive information, Argentina again may address that concern through appropriately substantiated claims of privilege. *See EM Ltd.*, 695 F.3d at 210 ("To the extent Argentina expresses concern that the subpoenas will reveal sensitive information, it is asserting a claim of privilege and not a claim of immunity."). Indeed, this is how the United States government shields its *own* sensitive information in litigation. The United States does not assert blanket immunity from dis-

covery, but rather asserts specific claims of privilege to withhold specific information. *See*, *e.g.*, *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

Crucially, such claims of privilege must be adequately supported, whether through the submission of a declaration or by the submission of a privilege log, in order to show "a reasonable danger that disclosure of the *particular facts* in litigation will jeopardize" protected national interests. *Doe v. CIA*, 576 F.3d 95, 104 (2d Cir. 2009) (emphasis added); *see also United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). That requirement makes it possible for courts and litigants to test the government's claim of privilege, rather than allowing the sovereign to stonewall any and all requests for information through a blanket assertion that the sovereign is "immune" from discovery, as Argentina has attempted here.

While the position advanced by Argentina would not serve the aims of the Vienna Conventions, it *would* provide Argentina—and any other recalcitrant sovereign judgment debtor—with a roadmap for continued evasion of its creditors. If Argentina were permitted to withhold information about property that it determines is used for "diplomatic" purposes, for instance, Argentina undoubtedly would find that broad categories of assets are used for such purposes. And, critically, Plaintiffs would have no way to even know what information has been withheld, much less to challenge that decision in the courts. In this manner, the Vienna Conventions' narrow exception quickly would swallow the rule that, under Federal Rule of

Civil Procedure 69, a judgment creditor is entitled to discovery into a sovereign judgment debtor's assets. *See EM Ltd.*, 695 F.3d at 209, 210. Nothing in the Vienna Conventions mandates such an unfair, unworkable, and absurd regime.

B. Argentina Has Waived Any Immunity That It Might Possibly Invoke Under The Vienna Conventions.

While the evident mismatch between the Vienna Conventions and Argentina's claim of diplomatic immunity provides ample basis to resolve this case, this Court need not even reach that issue, because Argentina has waived any immunity to which it might be entitled under the Vienna Conventions.

"Diplomatic immunity, like sovereign immunity, belongs to the foreign state," and thus can be waived by the state. *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.41 (11th Cir. 1999). A person or entity contracting with a sovereign thus may "protect itself by requesting a waiver of inviolability [of the embassy premises] in advance" of the transaction. *767 Third Ave. Assocs. v. Permanent Mission*, 988 F.2d 295, 303 (2d Cir. 1993); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 456.

That is exactly what the bondholders did here. In its bond agreements, Argentina executed a broad and unconditional waiver of immunity:

> To the extent that the Republic or *any* of its revenues, assets or properties shall be entitled . . . to *any* immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, f[ro]m attachment in aid of execution of judgment, from execution of a judgment or from *any other legal or judicial process* or

> remedy . . . the Republic has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction . . . .

JA-2043 (emphasis added).[8] This waiver applies to "any" property, "any" legal process, and "any" immunity and therefore plainly encompasses any immunity afforded under the Vienna Conventions.

This waiver of (and agreement not to claim) immunity should be enforced. As this Court has explained, diplomatic immunity is "founded on the need for mutual respect and comity among foreign states," and "[r]efusing to give effect to a waiver would not advance that objective." *In re Doe*, 860 F.2d 40, 45-46 (2d Cir. 1988). To the contrary, judicial refusal to enforce a sovereign's valid contractual waivers would deny sovereigns their right to seek out favorable credit terms by waiving the various immunities accorded them by law. And in so doing, this Court not only would *deny* the foreign state an aspect of its sovereignty, but it also would consign the sovereign to borrowing on more onerous terms, undermining its ability to raise needed capital. *Cf. NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013) ("[B]orrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to

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[8] The waiver provision in the Schecks' bond agreements likewise waives "*any* immunity (sovereign *or otherwise*) from the jurisdiction of any court or from any legal process." DE 35, at 2, No. 1:10-cv-05167-TPG (S.D.N.Y. Sept. 1, 2011) (emphasis added).

those terms."). Argentina's waiver applies, and should be enforced. And doing so would dispose of Argentina's claim of immunity under the Vienna Conventions at the threshold.

IV. The District Court Did Not Abuse Its Discretion In Ordering The Challenged Discovery.

Apart from its meritless claims to immunity from post-judgment discovery, Argentina's remaining arguments do not assert that discovery is legally impermissible, but rather that the district court exceeded its "broad discretion to limit discovery in a prudential and proportionate way." *EM Ltd.*, 695 F.3d at 207. Argentina bears a heavy burden to establish an abuse of discretion by the district court, and has not carried it here.

A. The Requested Discovery Is Relevant To The Enforcement Of Plaintiffs' Judgments.

Federal law permits "broad post-judgment discovery" that is "constrained principally in that it must be calculated to assist in collecting on a judgment." *EM Ltd.*, 695 F.3d at 207; *see also*, *e.g.*, *Credit Lyonnais, S.A. v. SGC Int'l, Inc.*, 160 F.3d 428, 430 (8th Cir. 1998). Under Federal Rule of Civil Procedure 69(a)(2), "[a] judgment creditor . . . may obtain discovery from any person—including the judgment debtor"—"[i]n aid of . . . execution," under the same rules that govern pre-trial discovery, and also under "the procedure of the state where the court is lo-

cated." *See*, *e.g.*, *EM Ltd.*, 695 F.3d at 207; *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1405 (5th Cir. 1993).

Rule 26(b)(1), in turn, provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Under this rule, "[a] judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located." *Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982). New York law similarly entitles judgment creditors to discover "all matter relevant to the satisfaction of [a] judgment," including all information calculated to lead to assets that might be subject to execution. N.Y. C.P.L.R. § 5223; *see also EM Ltd.*, 695 F.3d at 207 (same). Thus, under both the Federal Rules and New York law, Plaintiffs are entitled to discovery regarding Argentine assets in aid of execution on their judgments.

Argentina nonetheless contends that discovery into its assets and relationships with potential alter egos is not even "relevant" to the satisfaction of Plaintiffs' judgments. *E.g.*, Argentina Br. 35. According to Argentina, Plaintiffs will be unable to execute on any assets that they could identify through discovery, and thus the discovery itself should not be permitted. It is suspicious, to say the least, for a judgment debtor to resist discovery into its assets on the mere *ipse dixit* that those assets—unknown to the Court and parties—would not be subject to execution. For this reason, courts have recognized that post-judgment discovery requests

are "relevant and necessary" so long as they "pertain to [the judgment debtor's] assets and liabilities." *Libaire v. Kaplan*, 760 F. Supp. 2d 288, 294 (E.D.N.Y. 2011). "The fact that a judgment creditor may have difficulty reaching those assets is not determinative of relevance." *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, No. 90-cv-2370, 2000 WL 713057, at *5 (S.D.N.Y. June 2, 2000).

Indeed, this Court has *already* rejected the suggestion that a judgment debtor may refuse to disclose the existence of its assets simply because it unilaterally determines that those assets are not subject to attachment. In *EM Ltd.*, Argentina argued (as here) that discovery "must be 'relevant' to the satisfaction of the creditor's judgment," and that "[s]uch relevance cannot exist where the property targeted for such discovery as a matter of law is" not subject to attachment or execution. Argentina *EM Ltd.* Br. 33 (quoting Fed. R. Civ. P. 26(b)(1)). This Court disagreed, however, that immunity determinations should be made at the discovery stage under the guise of a "relevance" inquiry, holding that judgment creditors "need not satisfy the stringent requirements for attachment in order to simply receive information about Argentina's assets." 695 F.3d at 209. Here, each aspect of the discovery requests that Argentina claims would concern only irrelevant information is, in fact, calculated to lead to property subject to execution, which is all that Rule 26's very low threshold of "relevance" requires.

1. The Discovery Requests Relating To Entities That Argentina Characterizes As "Military" and "Diplomatic" Are Calculated To Lead To Executable Property.

As a backstop to its immunity-based argument under the Vienna Conventions, Argentina argues that discovery into purportedly "military" and "diplomatic" property is irrelevant because such property is categorically immune from attachment. This argument proceeds from a flawed premise and leads to untenable results.

As an initial matter, Argentina is simply wrong to assert that military and diplomatic property is categorically immune from attachment, or that discovery into such property could serve no legitimate purpose. As already explained, the Vienna Conventions immunize "diplomatic" property *only* if it is used for diplomatic purposes. *See supra* at 4, 31-34. Similarly, "military" property receives no heightened protections under the FSIA unless (1) "the property is, or is intended to be, used in connection with a military activity," *and* (2) the property is either "of a military character" or "under the control of a military authority or defense agency." 28 U.S.C. § 1611(b)(2); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S.

607, 614 (1992) ("[A] contract to buy army boots or even bullets is a 'commercial' activity.").[9]

The idea that so-called "military" or "diplomatic" property might be used for other purposes is no mere conceit; in many countries, the military controls large sectors of the domestic economy. *See*, *e.g.*, Transparency International UK, Defence and Security Programme, *Military-Owned Businesses: Corruption & Risk Reform* 9-12 (2012) (describing military businesses in China, Turkey, Pakistan, and Indonesia), *available at* http://www.scribd.com/doc/79511284/TI-UKDSP Militaryownedbusinesses. The military in Egypt is one particularly notable example: The military in that country "runs day care centers and beach resorts," and owns companies that "make television sets, jeeps, washing machines, wooden furniture and olive oil, as well as bottled water." David D. Kirkpatrick, *Egyptians Say Military Discourages an Open Economy*, N.Y. Times, Feb. 17, 2011, at A1, *available at* http://www.nytimes.com/2011/02/18/world/middleeast/18military.html ?pagewanted=all. The mere fact that Argentina holds its property through an

[9] The scope of the immunity provided by U.S. law is consistent with that provided by the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, SPA-109. Neither the United States nor Argentina is a party to that convention, but Argentina contends it should "reflec[t] customary international law." Argentina Br. 38. Even so, that convention permits the attachment of "diplomatic" or "military" property that is not "used or intended for use in the performance of" diplomatic or military functions. SPA-116, art. 21(a)-(b).

agency it labels as "military" or "diplomatic" thus does not render that property categorically immune from attachment and execution. And because property labelled as "military" or "diplomatic" *can* be subject to attachment, Argentina's creditors are plainly entitled to conduct discovery into such property.

Argentina's concerns that discovery will lead to "tangible harm," Argentina Br. 39—crescendoing to the fantastical specter of widespread, unwarranted attachment of military or diplomatic property, *see* Argentina Br. 39-40—are vastly overblown. Of course, Argentina's creditors do not need discovery to locate Argentina's embassies. But Argentina's creditors have no interest in attaching property that is obviously subject to immunity; doing so would be expensive, and ultimately would avail Plaintiffs nothing. Far from "flout[ing]" the law, *id.* at 38, Plaintiffs' previous efforts to attach military or diplomatic property involved close legal questions which often required the involvement of the highest courts in the nations where those efforts took place. For example, Argentina suggests that NML's attachment of the ARA Libertad was unjustifiable, but until the decision in Argentina's favor by the Ghanaian Supreme Court, the question whether Argentina's comprehensive waiver of immunity permitted attachment of a military asset was an open question under Ghanaian law. *See* JA-2106-07. NML's efforts to attach diplomatic property in Europe likewise turned on the scope of Argentina's

wavier of immunity. *See* JA-1537, 1561.[10] The fact that Argentina ultimately persuaded courts to vacate these attachments only illustrates that courts are fully able to protect Argentina from attachment and execution where the property is found to be immune. And to the extent the "tangible harm" about which Argentina complains is that it occasionally must endure the inconvenience of litigating an attachment motion, that would be far better remedied by Argentina paying the judgments it concededly owes and has the means to pay. Indeed, granting Plaintiffs the discovery they seek is far more likely to mitigate than exacerbate any inconvenience to Argentina because it will enable Argentina's creditors to identify the assets that are most likely subject to lawful attachment and execution, leading eventually to satisfaction of the judgments.

In contrast, as with Argentina's immunity-based arguments, there is a very real threat that Argentina's cramped understanding of relevance will render discovery practically useless. If Argentina were able to withhold information about property merely because Argentina had determined that the property was "military" or "diplomatic" in nature and, in Argentina's view, immune from attachment,

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[10] Similarly, NML's 2004 attachments of properties in Washington, DC, involved "difficult classification question[s]" concerning "mixed-use sovereign-owned property," *NML Capital, Ltd. v. Republic of Argentina*, No. 04-cv-197, 2005 U.S. Dist. LEXIS 47027, at *42, *43 (D.D.C. Aug. 3, 2005); *see id.* at *38-*53, as well as construction of Argentina's waiver, *see id.* at *17-*38.

then Argentina would inevitably determine that vast swaths of its property serve military or diplomatic purposes. No court would be able to review that determination, meaning Argentina would become the final arbiter of the scope of discovery in its own post-judgment proceedings. That is not, and cannot be, the law. Any concerns regarding the sensitivity of information concerning military or diplomatic property should be addressed through application of established privilege doctrines, which (unlike Argentina's untested assertion of immunity here) would involve judicial oversight and review. *See supra* at 30-31, 34-35.

2. Plaintiffs' Requests For Information About Purportedly Separate Entities Are Relevant And Authorized By Controlling Precedent.

Argentina also challenges discovery that Plaintiffs seek regarding entities that, in Argentina's view, are "separate legal entities" from the Argentine state. Argentina Br. 48. The district court, however, properly concluded that these requests are relevant and necessary given Argentina's history of holding its own assets in the name of purportedly separate entities. That conclusion is supported by controlling precedent, and was not an abuse of discretion.

a. Argentina contends that the Bank Subpoenas and Argentina Asset Requests sweep too broadly because they define "Argentina" to include ministries, political subdivisions, and other entities that Argentina claims are "separate" from the Argentine state. *See* Argentina Br. 41. Each of the entities included in the def-

inition of "Argentina" performs governmental functions, or is otherwise closely related to the Argentine state. Indeed, Argentina essentially concedes that 94 of these entities belong on the list. JA-4452-56. What is more, the definitions of "Argentina" used in the discovery requests here are quite similar to those found in the subpoenas upheld in *EM Ltd*. *See EM Ltd.*, 695 F.3d at 204 (explaining that "'Argentina' is broadly defined" by the subpoenas); *see also* JA-1820, 1841, 1848-56. And this Court there had no difficulty rejecting Argentina's overbreadth argument (*see* Argentina *EM Ltd.* Br. 36-37), emphasizing that "broad post-judgment discovery in aid of execution is the norm in federal and New York state courts." 695 F.3d at 207.

Yet even setting the *EM Ltd.* precedent aside, the scope of this discovery is amply justified by Argentina's conduct, because Argentina has undertaken elaborate steps to splinter the structure of its government in an effort to shield assets from its judgment creditors.

Argentina's objections to this aspect of the discovery are squarely foreclosed by Second Circuit precedent. To the extent that Argentina is complaining that Plaintiffs included within the definition of Argentina political subdivisions "beneath the central government" that perform governmental functions, such entities are not "separate" at all but rather part of the foreign state. *See Garb v. Republic of*

Poland, 440 F.3d 579, 596 (2d Cir. 2006). Including such entities is entirely appropriate.

Plaintiffs' discovery requests into Argentina's potential alter egos are equally supported by precedent. Argentina argues that Plaintiffs must make "a threshold showing that a particular entity is [an] alter ego" before obtaining discovery relating to that entity. Argentina Br. 44. But that contention is refuted squarely by this Court's decision in *Rafidain I*, where this Court *required* the district court to subject the judgment debtor to "full discovery" into a purportedly separate entity that might potentially be held liable for the judgment, even though the judgment creditor's evidence at that time was "insufficient to support an alter ego claim." 150 F.3d at 175.

Indeed, Argentina's argument proves too much. If any of these entities is truly separate from Argentina, then Argentina would not have standing to challenge bank subpoenas seeking information about such third parties. *Cf. Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975).[11] In any event, dis-

[11] This distinguishes the lower court authorities cited by Argentina that involved discovery directed to a separate entity that was challenged by that separate entity. *See, e.g., Trs. of N. Fla. Operating Eng'rs Health & Welfare Fund v. Lane Crane Serv., Inc.*, 148 F.R.D. 662, 664 (M.D. Fla. 1993); *Costamar Shipping Co. v. Kim-Sail, Ltd.*, No. 95 Civ. 3349 (KTD), 1995 WL 736907, at *3 (S.D.N.Y. Dec. 12, 1995); *Strick Corp. v. Thai Teak Prods. Co.*, 493 F. Supp. 1210, 1218 (E.D. Pa. 1980).

covery relating to these assertedly separate entities—whether directed to third-party banks or Argentina—is independently justified by the fact that these entities may be holding assets on the Republic's behalf, as this Court found when it upheld the seizure of assets held in trust by BNA. *EM Ltd. v. Republic of Argentina*, 389 F. App'x 38 (2d Cir. 2010); *see also Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ. 2715 (TPG), 2009 WL 755231 (S.D.N.Y. Mar. 12, 2009) (assets held by Argentine version of Social Security Administration), *rev'd on other grounds*, 584 F.3d 120 (2d Cir. 2009).

Argentina (at 43 n.11) highlights four entities in which Argentina purportedly "does not have any equity interest"—Polo Tecnológico Constituyentes, Aerohandling, DIOXITEK, and Nación Factoring—but they only exemplify the appropriateness of the discovery sought here because each of these entities has very close ties to the Argentine state.[12] Polo Tecnológico Constituyentes consists of several governmental entities, such as the Intituto Nacional de Tecnología Agropecuraria and the Servicio Geológico Minero Argentino, as well as the Universidad Nacional de General San Martín. *See Nuestros Socios*, Polo Tecnológico

[12] Argentina also objects to Plaintiffs' inclusion of BCRA in the definition of "Argentina." Argentina Br. 49; *see*, *e.g.*, JA-1259, 5367. As explained below, *see infra* at 49-51, the district court has previously found BCRA to be an alter ego of Argentina, at least as to certain funds, and accordingly there can be no doubt that discovery into BCRA's assets is proper.

Constituyentes, http://www.ptconstituyentes.com.ar/paginas/socios.htm (last visited May 8, 2014). Aerohandling is a "group company" of state-owned airline Aerolíneas Argentinas. *See Group Companies*, Aerolíneas Argentinas, http://www.aerolineas.com.ar/arg/main.asp?idSitio=AR&idPagina=9&idIdioma=en# (select "Aerohandling") (last visited May 8, 2014). DIOXITEK "was created by Argentina to ensure the input for the manufacture of fuel for its nuclear energy generating plants." *Paraguay Concerned with Argentine Plans To Move Nuclear Facilities to Border Area*, MercoPress (Feb. 11, 2014), http://en.mercopress.com/2014/02/11/paraguay-concerned-with-argentine-plans-to-move-nuclear-facilities-to-border-area. And Nación Factoring is part of state-owned BNA, which in turn held assets that NML was previously able to successfully attach. *Nacion Factoring*, BNA, http://www.bna.com.ar/pymes/py_factoring.asp (last visited May 8, 2014). Discovery regarding these entities thus is calculated to lead to the discovery of assets owned by Argentina.

b. Argentina also separately challenges the inclusion of the Argentine central bank, BCRA, in the Alter Ego Requests, which seek information (such as communications regarding these bond instruments) tailored to support a potential alter ego claim. *See* Argentina Br. 48. Argentina does not raise any specific objection to the other entities about which Plaintiffs seek alter ego discovery, and thus

any such challenge is waived. *See*, *e.g.*, *McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005).

Discovery regarding BCRA is fully supported by precedent. The plaintiffs in *Rafidain I* sought discovery from a sovereign judgment debtor regarding its relationship with the sovereign's central bank, and this Court held that "full discovery" was required. *See Rafidain I*, 150 F.3d at 177. The discovery regarding BCRA is thus *identical* to that affirmed in *Rafidain I*.[13]

Argentina claims that discovery regarding BCRA is unwarranted because this Court has declined to approve prior efforts to attach BCRA's assets, but in fact the history of decisions regarding BCRA supports Plaintiffs' discovery requests. The district court previously found BCRA to be an alter ego of Argentina, finding that "the Republic could draw on the resources of BCRA at will." *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273, 300 (S.D.N.Y. 2010). While this Court vacated that decision, it did so on the ground that property held in the name of a

[13] To the extent that Argentina's brief can be read to argue that NML must formally plead an alter ego claim before seeking alter ego discovery, courts have rejected any such obligation as unwieldy and unnecessary. *Trustees of North Florida*, for instance, explained that a party "can hardly be expected to make the prima facie showing required to implead" a potential alter ego "before having access to discovery which would allow [the plaintiff] to determine if such a showing can be made." 148 F.R.D. at 664; *see also Caisson Corp. v. Cnty. W. Bldg. Corp.*, 62 F.R.D. 331, 334 (1974) (explaining that, under Rule 69, "discovery may be had of the judgment debtor or third persons without separate suit").

central bank is immune from attachment—notwithstanding an alter ego claim—if it is "being used for central banking functions as such functions are normally understood." *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 194 (2d Cir. 2011). Since then, the district court, denying motions to dismiss NML's declaratory judgment action alleging the same alter ego relationship, found that NML had made a "very legitimate claim . . . that for certain purposes BCRA is the alter ego of the [R]epublic." DE 192, at 32:16-18, No. 1:06-cv-07792-TPG (S.D.N.Y. Sept. 25, 2013). If judgment is entered in NML's favor in that action, BCRA would be liable for Argentina's debts, and any property of BCRA that is *not* used for central banking functions would be subject to execution. Discovery regarding BCRA, to develop further NML's alter ego case and to locate assets potentially subject to execution, is entirely proper under this Court's decision in *Rafidain I*.[14]

[14] The other entities about which Plaintiffs seek alter ego discovery also have close ties to the Argentine state, and thus are also proper subjects of alter ego discovery. ENARSA, as NML explained to the district court, is an "Argentine-controlled entity that is involved in the acquisition and distribution of natural gas and . . . other products that are distributed in Argentina, and are acquired from suppliers around the world, including from suppliers in New York." JA-2230-31. YPF is "an international oil production company that recently was nationalized by Argentina." JA-2231. And while Plaintiffs also sought discovery concerning BNA, the district court *declined* to order Argentina to respond to those discovery requests.

3. Discovery Relating To Present And Former Argentine Officials Is Likewise Relevant.

Argentina's final relevance objection concerns the inclusion of current and former officials, including the Republic's President and Vice President, within the definition of "Argentina." Yet this discovery, too, is firmly supported by precedent: This Court upheld the subpoenas in *EM Ltd.* even though they also sought discovery concerning Argentina's "current and most recent former president." *EM Ltd.*, 695 F.3d at 205.[15]

Plaintiffs' requests are fully relevant to the satisfaction of their judgments. While Argentina contends that these officials are "separate" from the Argentine state, they are important officials in that state and may very well hold attachable property in their official capacities. Indeed, this Court has affirmed attachment of an account owned by a sub-unit of the Argentine Ministry of Science, Technology, and Productive Innovation, even though the account was held in the name of an Argentine official (the "*Secretaria de Programación Economica—Programa de*

[15] The cases that Argentina cites, in contrast, concern the immunity of particular state officials from judicial process—either from being subjected to suit, *Samantar v. Yousuf*, 560 U.S. 305, 312-326 (2010), or from being required to sit for a deposition, *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998). Those cases have no relevance here, as none of the discovery requests would subject the Argentine officials at issue to any form of judicial process. Argentina itself is properly subject to judicial process given its waiver of sovereign immunity. *See EM Ltd.*, 695 F.3d at 209; *see also supra* at 7-8, 37.

Modernizacion Tecnologia"). *See EM Ltd. v. Republic of Argentina*, No. 03-cv-2507-TPG, 2009 WL 3149601 (S.D.N.Y. Sept. 30, 2009), *aff'd in relevant part*, 680 F.3d 254, 256 (2d Cir. 2012); *see also* DE 328, at 1, No. 1:03-cv-02507-TPG (S.D.N.Y. Nov. 4, 2009). In addition, official corruption is an unfortunate but widespread reality in Argentina that Plaintiffs cannot afford to ignore. *See*, *e.g.*, *Argentina: Overview*, Transparency International, http://www.transparency.org/country#ARG_Overview (last visited May 1, 2014).[16] If Argentine officials have misappropriated state funds or property for their own use, those assets may be subject to execution. Between official corruption and Argentina's own efforts to conceal its assets, it is hardly unreasonable to believe that Argentine assets could be held in the names of state officials, and that those assets could be available to satisfy the judgments. Discovery to explore that possibility is a legitimate avenue of inquiry, and the district court did not abuse its discretion in refusing Argentina's demand that it be closed.

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[16] *See also Socialism for Foes*, *Capitalism for Friends*, The Economist, Feb. 25, 2010 ("Four of the president's private secretaries are being investigated for enriching themselves illegally. Two . . . recently resigned."), *available at* http://www.economist.com/node/15580245.

B. The District Court Did Not Abuse Its Discretion In Allowing Broad, Relevant Discovery.

Argentina further complains that the discovery here is "broad ranging." Argentina Br. 49. But this Court recognized in *EM Ltd.* that the scope of post-judgment discovery is *appropriately* "broad." 695 F.3d at 207. Particularly in the post-judgment discovery context, discovery *must* remain "very broad . . . if the procedure is to be of any value." 12 Wright & Miller, *Federal Practice & Procedure* § 3014 (2d ed. 2014); *see also EM Ltd.*, 695 F.3d at 207. Indeed, while Argentina asserts accusingly that the Schecks' discovery requests were modelled on "a form book for judgment collection proceedings," Argentina Br. 20, that ultimately serves to underscore exactly how *un*remarkable the discovery at issue truly is. And given the district court's finding—unchallenged by Argentina here—that broad discovery was necessary to "preven[t] the Republic from evading its discovery obligations," JA-2269, there is no basis to conclude that the district court abused its discretion in allowing discovery authorized by Rule 69.

The district court's exercise of its discretion here cannot be analyzed apart from the fact that Argentina is "a uniquely recalcitrant debtor," *EM Ltd.*, 695 F.3d at 247, that is not "act[ing] honestly and in good faith," *EM Ltd.*, 720 F. Supp. 2d at 301. For more than a decade, Argentina has engaged in a campaign of "persistent efforts to frustrate the collection of money judgments" by its creditors. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 262 (2d Cir. 2012). It has

spirited assets around the world in an effort to immunize them from attachment or execution. *See NML*, 652 F.3d at 178. It has exercised control over the finances of purportedly separate entities for its own benefit. *See EM Ltd.*, 389 F. App'x at 42 (trust assets); *EM Ltd.*, 720 F. Supp. 2d at 300 (central bank funds); *Aurelius Capital Partners*, 2009 WL 755231, at *5 (pension funds). And it has used "every possible device to avoid having property in the United States to get attached or executed on." JA-1880. All of this culminated in Argentina's candid but shocking statement to this Court that it "would not voluntarily obey" the Court's orders. *NML*, 727 F.3d at 238. The district court recognized that Plaintiffs' requests must be measured against "not facts of some other case, but the facts of this case," and that the broad discovery they seek "reasonably reflect[s] the facts of this case." JA-2251.

Nor can the district court's exercise of discretion be divorced from the comprehensive waiver of immunity that Argentina included in its bonds, in which it "consents" "to the giving of *any* relief or the issue of *any* process" in connection with litigation related to the bonds. JA-2043 (emphasis added); *see also* DE 35, 1:10-cv-05167-TPG, at 2 (S.D.N.Y. Sept. 1, 2011) (German bond waiver). Having consented to "any" judicial process, Argentina is uniquely ill-positioned to object that the particular process selected by the district court was too "broad."

Even still, despite Argentina's sordid history of defiance, and despite its consent to any process, the district court took care to narrow the discovery where Argentina had shown such narrowing was appropriate. Thus, when Argentina objected to Plaintiffs' inclusion of BNA within the definition of "Argentina" on the ground that the court previously concluded that BNA was not an alter ego of the Republic, the district court excluded BNA. JA-2269. But Argentina developed no other argument for narrowing the discovery requests at issue, preferring instead to rest on categorical objections. And it makes no such effort here. *See* Argentina Br. 43 ("[T]he remedy is not to prune but to vacate the discovery." (internal quotation marks omitted)). This is a tactical decision Argentina has made. And having eschewed arguments for narrowing the subpoenas, Argentina hardly can argue now that the district court abused its discretion in declining to do so. If the discovery requests were "overbroad," it was Argentina's burden—not Plaintiffs' and certainly not the district court's—to meaningfully meet and confer with Plaintiffs regarding the scope of discovery and offer suggestions as to how the discovery ought to be narrowed. Argentina's vague, non-specific objections that the requested discovery is "overbroad both in scope and timeframe" and "unduly burdensome," Argentina Br. 41, 42, are insufficient as a matter of law to justify reversing the district court's conclusion that the discovery was appropriate. *See*, *e.g.*, *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) ("[T]o

say that [interrogatories or production requests are] 'overly broad, burdensome, oppressive and irrelevant' [is] not adequate to voice a successful objection . . . ." (citation and some quotation marks omitted)).

In view of Argentina's pattern of conduct in this litigation, including its longstanding efforts to defy its creditors' attempts to collect the money that they indisputably are owed, the district court's exercise of its discretion to uphold the discovery at issue can hardly be termed an abuse of its discretion. Rather, the district court properly determined that this discovery was necessary to "preven[t] the Republic from evading its discovery obligations." JA-2269. Argentina has pointed to no basis to overturn that straightforward conclusion.[17]

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[17] Argentina's other miscellaneous objections to the scope of discovery are meritless. Argentina complains that the requests seek information about "any accounts," "any investment," or "all loans," Argentina Br. 42 n.10 (emphasis omitted), but a request for information regarding all of a judgment debtor's assets is a textbook example of a proper post-judgment inquiry. *See*, *e.g.*, 3A West's McKinney's Forms Civil Practice Law and Rules § 8:271; *see also* 12 Wright & Miller, *Federal Practice & Procedure* § 3014 (2d ed. 2014). And, while Argentina complains about the timeframe covered by the requests, the requests are generally limited to a period of a few years. *See* JA-1482, 2065, 2956, 2926. The Alter Ego Requests do seek information dating back as far as the year 2001, *see* Argentina Br. 15, but NML selected that timeframe because it corresponds with the time period during which Argentina has resisted Plaintiffs' collection efforts, which is therefore the time during which evidence supporting an alter ego theory is most likely to be found. Finally, while Argentina complains that the Alter Ego Requests seek information concerning "all communications" with the subject entities, Argentina Br. 42 n.10, in fact the request is limited to communications "concerning the bonds at issue in this lawsuit." JA-2064.

CONCLUSION

This Court should affirm the September 25, 2013 order of the district court.

Dated: May 8, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,489 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: May 8, 2014

/s/ Theodore B. Olson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of May 2014, a true and correct copy of the foregoing Response Brief was served on the following counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) & (2):

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