

No. _____

In the Supreme Court of the United States

MMA CONSULTANTS 1, INC.,
Petitioner,

v.

THE REPUBLIC OF PERU,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case where a foreign sovereign issued bearer bonds in New York, which required payment there, whether the Court of Appeals erred in applying the gravamen language in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), where the Plaintiff's claim is not based entirely outside of the United States, or at least some of the key elements of Plaintiff's claim occurred within the United States.

2. In a case where a foreign sovereign issued bearer bonds in New York, which required payment there, whether the Court of Appeals erred in applying *OBB*, a case involving tortious conduct and unrelated commercial activity, to deny jurisdiction under the first and third prongs of the "commercial activity" exception, over the application of this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), a case involving breach of contract and the issuance of bonds in the United States and payable there.

3. In a case where a foreign sovereign issued bearer bonds in New York, which required payment there, whether the Court of Appeals erred in applying *OBB*'s gravamen language to split Plaintiff's claim into a contractual right of action and the breach of that contract, and in doing so found no "direct effect" in the United States under the third prong of the commercial activity exception, and no commercial activity in the United States under the first prong.

4. In a case where a foreign sovereign issued bearer bonds in New York, which required payment there, whether the Court of Appeals erred when it held that the original place of performance in New York "disappeared" due to the unilateral conduct of the foreign sovereign issuer?

PARTIES TO THE PROCEEDINGS

Petitioner is MMA Consultants, Inc., Plaintiff-Appellant in the court below

Respondent is The Republic of Peru, the Defendant-Appellee in the court below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner MMA Consultants 1, Inc. states that it has no parent company and no publicly-held company holds 10% or more of its shares.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1-16) is not reported, but can be found at 2017 U.S. App. LEXIS 25540, 2017 WL 6463128. The District Court's opinion granting Defendant's Motion to Dismiss is reported at 245 F. Supp. 3d 486 (S.D.N.Y. March 24, 2017).

JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on December 19, 2017, and denied a Petition for Rehearing on February 7, 2018 (App. 82-83). The Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

28 U.S.C. § 1605(a)(2) provides in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1603(e) provides in pertinent part:

A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.

STATEMENT OF THE CASE

In 1875, Peru issued bonds pursuant to a contract with the Guano Consignment Company in the United States of America (“GCC”), in order to refinance its debt to GCC. These bonds – styled “\$1,000 Certificates of Indebtedness of Peru bearing seven per cent interest per annum, in gold,” – were issued on May 18, 1875, in New York City and signed there by Don Manuel Freyre, Envoy Extraordinaire and Minister Plenipotentiary of Peru. Each bond states: “Know all men by these presents, that I the undersigned Envoy Extraordinaire and Minister Plenipotentiary of Peru in Washington have been instructed and specially authorized to pledge, and do hereby pledge, the National Faith of Peru towards the faithful performance and observance of the conditions under which this Certificate has been issued as set forth above. ... In witness whereof I have hereunto affixed my seal of office and signature on behalf of the Government of Peru, in the City of New York, on this 1st day of May 1875.” Complaint ¶ 7 (Dkt. 1).

Peru issued 3,600 such bonds. Each bond provides, in pertinent part, that: “Now therefore the Government of Peru hereby acknowledges itself indebted unto ... Bearer in the sum of One Thousand Dollars in United States Gold coin, and promises to pay said sum of One Thousand Dollars to the holder of this Certificate ...

with interest accruing thereon semiannually at the rate of Seven per cent per annum, from and after the first day of May 1875” Each bond provides that the payment shall be made in New York, New York, and provides no other location for payment. Complaint ¶ 8 (Dkt. 1).

Petitioner holds Bonds Numbers 467, 477, 496, 607, 612, 1886, 1887, 1889, 1890, 1899, 1884, 1885, 1859 and 1835. Each Bond on its face is a bearer bond, entitling the bearer to redeem it for full payment, plus interest. Complaint ¶ 10 (Dkt. 1).

On May 26, June 11 and July 7, 2015, Plaintiff, by its attorney, sent letters via Federal Express Overnight Delivery, to The Minister of Economics and Finance, National Division of Public Debt, Republic of Peru, c/o The Embassy of Peru in America, in Washington, D.C., demanding payment from Peru on the fourteen (14) Bonds that it holds. The letter requested a response within fourteen (14) days. The third and final letter stated that, if a response was not received from Peru by 5 p.m. Central Time on July 15, 2015, then MMA1 would file a complaint for breach of contract for collection on the Bonds. No response from Peru was received. Thus, in response to Plaintiff’s repeated demands for payment of the fourteen (14) Bonds, Peru has failed to pay the principal and interest due on the Bonds. Complaint ¶¶ 11-14 (Dkt. 1).

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the District Court granted Peru’s motion to dismiss for lack of jurisdiction under 28 U.S.C. § 1605(a)(2), known as the commercial activity exception in the Foreign Sovereign Immunities Act (“FSIA”). (App. 17-79.) The District Court based its

decision on the finding that the original place of performance of New York, required by the bonds, had disappeared because the Financial Agent of Peru, Hobson Hurtado, which is mentioned only once on the face of the bonds, had gone out of business in 1881. (App. 60-61.) Furthermore, applying this Court's decision in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), the District Court held that the issuance of the bonds in New York was of no moment because the gravamen of Plaintiff's claim was Peru's decision not to pay – essentially separating the contractual right (the issuance of the bonds) from the breach of contract. (App. 48-52.) Finally, the District Court held that, since the place of performance was no longer the United States, and Peru's decision not to pay did not occur in the United States, jurisdiction under the first and third prongs of the commercial activity exception was lacking. (App. 60-61.)

The District Court based its decision on the first prong of the commercial activity exception not only on *OBB*, but also on *Atlantica Holdings, Inc. v. Sovereign Wealth Fund*, 813 F.3d 98 (2d Cir. 2016); and *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230 (2d Cir. 2002), all involving tortious conduct. (App. 48-52, 57, 60-62.) The court, on the other hand, did not follow *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), or *Shapiro v. Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991) (Winter, J.), cases involving a foreign sovereign's issuance of bonds in the United States.

Plaintiff timely appealed to the Circuit Court, which affirmed the District Court's dismissal on subject matter jurisdiction grounds. (App. 1-16.) The Circuit

Court endorsed the District Court's application of *OBB* to Plaintiff's claim, including separating the contractual right from the breach of the contract (App. 10-11), and also the finding that the original place of performance of New York had disappeared due to Hobson going out of business, which made it impossible to perform the bond as originally written. (App. 15-15.) The Circuit Court did not address Plaintiff's arguments that the alleged disappearance of New York as the original place of performance was due to Peru's conduct in failing to conduct the drawings per the language of the bonds, and that Peru could not benefit from its own failure to perform a contractual duty. Plaintiff-Appellant Brief, pp. 19-24. Moreover, neither the Circuit Court nor the District Court cited any law in support of their holding that performance of the bonds as originally stated had become impossible. (App. 15, 60.)

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for writ of certiorari because the Circuit Court's decision involves several recurring issues of exceptional importance: (1) whether the Supreme Court's decision in *OBB*,¹ a case involving tortious conduct under the first prong of the "commercial activity" exception, should be applied to contract cases, or whether this Court's decision in *Weltover*² continues to be the leading case applicable in contract cases, especially those involving the issuance of financial instruments in the U.S.; (2) in a case where a foreign sovereign issued bearer bonds in New York, which bonds required payment there when issued, whether the Court of Appeals erred in applying *OBB*'s gravamen language where the Plaintiff's claim is not based on conduct entirely outside of the United States, and where the conduct that occurred – the issuance of the bearer bonds in the United States and that the original and contractually obligated place of performance was New York – directly related to and was the foundation for Plaintiff's claim; (3) where a foreign sovereign issued bearer bonds in New York, which required payment in there when issued, whether the Court of Appeals erred in applying *OBB*'s gravamen language to split Plaintiff's claim into a contractual right of action and the breach of that contract, and in doing so found no "direct effect" in the United States under the third prong of the commercial activity exception and no commercial activity in the United States under the first prong; (4) whether the

¹ *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

² *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

issuance of highly negotiable financial instruments in the U.S., which instruments require payment in the U.S., standing alone, is sufficient for the exercise of jurisdiction over a foreign sovereign issuer; and (5) whether FSIA jurisdiction and well-settled principles of New York contract law can be defeated by the conduct of the foreign sovereign issuer where the foreign sovereign debt is issued in New York and required to be paid there.

A. The Court of Appeals Erred When It Applied *OBB* to Plaintiff's Claim Under the First and Third Prongs of the Commercial Activity Exception.

The Court of Appeals erred when it applied *OBB* to Plaintiff's claim under the first and third prongs of the commercial activity exception. First, it is unclear what the proper application of *OBB* is to (1) a contract claim under the first prong, and (2) a claim under the third prong. Second, the Court of Appeals applied *OBB* more broadly than this Court instructed and, in doing so, has deprived Plaintiff here of FSIA jurisdiction.

1. *OBB* Applies Only to the First Prong of the Commercial Activity Exception, and Only to Claims Based on Foreign Sovereign Conduct Where That Conduct Is the Basis for Plaintiff's Claim and Is Entirely Outside the United States.

This Court decided *OBB* in connection with a claim based on tortious conduct occurring entirely outside of the United States, under the first prong of the "commercial activity" exception. 136 S. Ct. at 394 fn. 1 ("As Sachs relies only on the first clause ..., we limit

our inquiry to that clause”). Specifically, this Court examined the meaning of the “based upon” language of Section 1605(a)(2), in connection with a claim based on plaintiff’s injury on a train platform in Austria. Section 1605(a)(2) sets forth all three prongs of the “commercial activity” exception:

... in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

While the “based upon” language theoretically applies to all three prongs of the “commercial activity” exception, its application in *OBB* was in connection with the first prong – the only prong that requires that plaintiff’s claim be based upon commercial activity of the foreign sovereign in the United States. The correct application of *OBB*’s interpretation of the “based upon” language cannot ignore the context that it was applied under the first prong.

In *OBB* and *Nelson*, which preceded and laid the foundation for *OBB*, this Court examined whether plaintiff’s underlying cause of action arose out of the foreign sovereign’s conduct in the United States. *OBB*, 136 S. Ct. at 395; *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1992). In both decisions, this Court found that the torts that formed the basis of plaintiff’s claim did not arise out of the foreign sovereign’s conduct in the

United States, and rather, arose out of the foreign sovereign's conduct outside the United States. *OBB*, 136 S. Ct. at 396; *Nelson*, 507 U.S. at 358. In a similar vein, the Court found that the foreign sovereign's conduct (commercial activity) in the United States – which related to the sale of a train ticket in *OBB* and the recruitment of plaintiff in *Nelson* – did not form the basis for each plaintiff's claims in tort. *OBB*, 136 S. Ct. at 396; *Nelson*, 507 U.S. at 358. Thus, this Court's interpretation and application of the “based upon” language was applied to the first prong of the commercial activity exception and no jurisdiction was found under the first prong because all of the foreign sovereign's conduct that formed the basis of plaintiff's claim occurred outside the United States.

As this Court stated in both *OBB* and *Nelson*, that is the proper limit of those decisions, including their interpretation and application of the “based upon” language. This Court in *OBB* stated that that decision was limited to cases where “the gravamen of each claim is found in the same place.” 136 S. Ct. at 397, fn. 2 (“we consider here only a case in which the gravamen of each claim is found in the same place.”). Under *OBB*'s facts, this means that the conduct that was the basis of plaintiff's personal injury claim occurred entirely outside the U.S. *Id.* (“Under this analysis, the conduct constituting the gravamen of Sachs's suit plainly occurred abroad.”). By contrast, here, because the conduct constituting the gravamen or basis of Plaintiff's contract claim did not occur entirely outside

the U.S., it does not fall within the scope of *Nelson* or *OBB*.³

Contrary to its application of *OBB* to Plaintiff's claim, the Circuit Court actually made findings that take Plaintiff's claim outside of the application of *OBB* or *Nelson*. The Circuit Court found that the initial place of performance for payment of the bonds was clearly New York. App. 15 ("the Bonds clearly indicate that the intended 'place of performance' is the United States"). The Circuit Court also did not take issue with the District Court's finding that the Bonds were issued ("executed") in New York. App. 47 ("The weight of the evidence thus indicates that the Bonds were executed in New York City"). The Circuit Court also held that "virtually all of Peru's alleged actions in this case – such as providing the Bonds to CCG in 1875, and refusing to pay MMA for the Bonds in 2015 – are 'commercial activities.'" App. 11. Based on those findings, *OBB*'s gravamen or basis language should not have been applied to Plaintiff's claim to find no commercial activity in the United States – as the Circuit Court already found that the basis for Plaintiff's claim was in the United States, and at worst, was not entirely outside the United States, as in *Nelson* and *OBB*. Finally, as seen below, the Circuit Court's and the District Court's findings should have been enough to establish jurisdiction under the first prong of the commercial activity exception.

³ The Circuit Court never addressed Plaintiff's argument that *OBB* is limited to situations in which the gravamen or basis of Plaintiffs' claim is found in the same place.

Moreover, the Circuit Court’s application of *OB**B* to Plaintiff’s claim demonstrates the error of the Circuit Court’s ways. Specifically, the Circuit Court appeared to force Plaintiff’s claim into *OB**B*’s language, all in the name of its “gravamen” language. For example, the Circuit Court held that it was required to ask only one question: “what action of the foreign state ‘actually injured’ the plaintiff?” App. 11 (citing *OB**B*, 136 S. Ct. at 395). However, this Court in *OB**B* did not frame the question as the Circuit Court did. Rather, this Court used the words “actually injured” when discussing its decision in *Nelson*, which focused on the Saudi sovereign acts that actually injured the plaintiff. *Id.* at 396. Furthermore, in *Nelson*, this Court found that all of the foreign sovereign acts that injured the plaintiff occurred in Saudi Arabia. 507 U.S. at 358.

Similarly in *OB**B*, this Court held that the foreign sovereign’s commercial activity in the United States was not related to plaintiff’s personal injury claim. 136 S. Ct. at 396. Thus, this Court held: “However Sachs frames her suit, the incident in Innsbruck remains at its foundation.” *Id.* This Court further reinforced that holding by stating that “the ‘essentials’ of her suit for purposes of §1605(a)(2) are found in Austria.” *Id.* at 397. Thus, the Circuit Court’s interpretation and application of *OB**B*’s “actually injured” language is incorrect, taken out of context, overly broad and not consistent with this Court’s limitations on *OB**B* and *Nelson*.⁴

⁴ Immediately after its last statement above, this Court inserted its footnote limiting the scope of *OB**B* and *Nelson*. *Id.* at 397 n. 2. See discussion, *supra*, at 9.

The Circuit Court's forced interpretation and application of *OBB* to Plaintiff's claim continued when it held that "[t]here was nothing [inherently] wrongful about Peru's initial issuance of the Bonds, see *id.* at 396." App. 11. However, it is a gross misinterpretation of *OBB* to equate the issuance of the Eurail Pass in the United States, with the issuance of the Bonds in New York here. This is clear from this Court's holding that the commercial activity alleged in the United States in *OBB* – the marketing and sale of the Eurail Pass – was unrelated to plaintiff's tort claims, and hence this Court said that there was nothing wrongful about the sale of the Eurail pass standing alone. Furthermore, prior to making that statement, this Court had described the result in *Nelson* as follows: "Under that analysis, we found that the commercial activities ... were not the particular conduct upon which their suit was based." *Id.* at 395. Finally, insofar as *OBB* and *Nelson* held that the commercial activity in the United States was not related to the tort claims there, it was improper for the Circuit Court to analogize the unrelated commercial activity in those decisions to the issuance of the Bonds in New York – that also required payment in New York – which is clearly the foundation for Plaintiff's breach of contract claim here.⁵

Finally, through its forced interpretation and application of *OBB* to Plaintiff's claim, the Circuit Court did exactly what this Court prohibited in *OBB* – it engaged in a single element analysis – oddly not because it was necessary to find jurisdiction in the absence of commercial activity in the United States on

⁵ Once again, the Circuit Court's improper analogy is inconsistent with the Court's footnote limiting the scope of *OBB* and *Nelson*.

which Plaintiff's claim was based – but rather in an attempt to isolate and ignore such palpable commercial activity in the United States – the issuance of negotiable bearer bonds in New York, which were required to be paid there. This Court cautioned in *OBB* that the analysis of the “based upon” language was not to focus on a single element of Plaintiff's claim. The focus was the particular conduct on which Plaintiff's claim is based. *Id.* at 395 (discussing *Nelson*). Thus, this Court stated:

our analysis in *Nelson* is flatly incompatible with a one-element approach. A one-element test necessarily requires a court to identify *all* the elements of each claim in a complaint before that court may reject those claims for falling outside §1605(a)(2). But we did not undertake such an exhaustive claim-by-claim, element-by-element analysis of the Nelsons' 16 causes of action

Rather than individually analyzing each of the Nelsons' causes of action, we zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them.

Id. at 396. By separating the issuance of the Bonds in New York in this case, from the conduct constituting the breach, especially when the face of the Bonds requires payment in New York, the Circuit Court improperly applied *OBB* in contravention of the prohibition against single element analysis.

Moreover, to support its holding, the Circuit Court further strained by using third-prong cases to conclude that the commercial activity was not carried on in the

United States. App. 12. The Circuit Court improperly relied on the decision in *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131 (2d Cir. 2012), to hold that a foreign sovereign's decision not to redeem a bond is an act that occurs in a foreign country. However, *Rogers* is distinguishable because (1) it dealt with the second and third prongs of the commercial activity exception (*id.* at 132), (2) it did not involve foreign sovereign debt issued in the United States (*id.* at 132-33), and (3) the place of performance was not mandated to be the United States (*id.* at 139-40). Moreover, prior to its improper reliance on *Rogers*, the Circuit Court invoked its improper interpretation of the "based upon" language to isolate Plaintiff's claim to a single element – Peru's decision not to pay the Bonds. App. 11.

In contrast to the inapposite decision in *Rogers*, under the first prong, the issuance of bonds in the United States that require payment there is sufficient to satisfy commercial activity by the foreign sovereign in the United States, without regard to where the foreign sovereign's "decision" not to pay the bonds was made. *See Shapiro*, 930 F.2d at 1018-20. The issuance of negotiable bonds in the United States, which were required to be paid only there, and the nonpayment of them, constitutes commercial activity having substantial contact with the United States under Section 1603(e). *Id.* at 1020. Therefore, in that situation, as here, a bondholder's claim is based upon commercial activity carried on by a foreign state in the United States. *Id.*

In *Shapiro*, the court held that the plaintiff's claim for nonpayment of the negotiable notes was based upon the issuance of the notes to an intermediary in the

United States. Thus, the court held: “Appellant’s claim is for payment on Note 12. Thus, the overall activity giving rise to this claim is the issuance of the Notes to IPVL.” *Id.* at 1018. The court held that the issuance of negotiable notes in the United States, standing alone, was sufficient to satisfy the substantial contact requirement of the case law and Section 1603(e). Thus, the court stated: “The very presence of such highly transferable instruments, whether or not the initial holder successfully discounts them in the country, suffices to satisfy the ‘substantial contact’ requirement of the statute.” *Id.* at 1019. Therefore, the mere “presence” of highly negotiable financial instruments – like the bearer bonds here – in the United States satisfied the substantial contact requirement.

That the notes “traveled” to the United States does not make *Shapiro* distinguishable from Plaintiff’s claim. *Id.* at 1019. Here, there is no dispute that the Bonds were issued in the United States – signed by a foreign minister of Peru who affixed his seal to each bond on May 8, 1875 in New York City. Thus, the Bonds either originated in New York, or they “traveled” from Peru to New York, where they were made negotiable by the signature and seal of Peru’s foreign minister. In either event, they are analogous to the notes in *Shapiro*.

Furthermore, the Circuit Court’s and the District Court’s finding that the Bonds were “executed” in New York further supports the application of *Shapiro*. By contrast, their findings that the Bonds were neither circulated nor held in the United States, does not distinguish them from the notes in *Shapiro*. All that

was necessary in *Shapiro* was that the notes were issued in the United States. Thus, Shapiro held:

Accordingly, we thus find that the appellees' placement of Note 12 with IPVL constituted a "commercial activity . . . having substantial contact with the United States." 28 U.S.C. § 1603(e). The instant action is therefore "based upon a commercial activity carried on in the United States by [a] foreign state," 28 U.S.C. § 1605(a)(2), over which the district court has subject matter jurisdiction.

Id. at 1020. Thus, the notes did not have to be circulated – in fact the notes in *Shapiro* were not initially circulated. *Id.* at 1018 (referring to "issuance of the Notes to IVPL," not issuance to the public); *Id.* at 1015. However, some of those notes, like some of the Bonds here, found their way into circulation – into the hands of someone other than the original note holder or bondholder. Thus, in all respects, *Shapiro* applies to the Bonds here and Plaintiff's claim satisfies the substantial contact requirement and its claim is based upon commercial activity carried on by Peru in the United States. It was error for the Circuit Court to find otherwise.⁶

Finally, Plaintiff has not found – and the Circuit Court did not cite – any case that applies the "based upon" language to a case involving the issuance of bonds (or other negotiable financial instruments) in the United States, and required to be paid only there, and

⁶ This Court in *Weltover* cited *Shapiro* approvingly. 504 U.S. at 615.

splits the plaintiff's breach of contract action for nonpayment of the bonds into two parts – the issuance of the bonds – establishing the basic contractual right (as opposed to the breach) – from the conduct constituting the breach – nonpayment. More importantly, Plaintiff has not found – and the Circuit Court did not cite – any case that denied jurisdiction under the first prong where the bonds were issued in the United States and were required to be paid only there.⁷

B. THE CIRCUIT COURT MISAPPLIED *OBB*, WHICH IS LIMITED TO TORTIOUS CONDUCT, AND, IN DOING SO, CREATED A CONFLICT WITH THIS COURT'S DECISION IN *WELTOVER*.

The Circuit Court misapplied this Court's decision in *OBB*, which was limited to tort claims and unrelated commercial activity, and, in doing so, created a conflict with this Court's decision in *Weltover*, which governs contract claims, like Plaintiff's here. Furthermore, the Circuit Court's misapplication of *OBB* threatens to create and perpetuate an incorrect precedent with respect to the proper application of this Court's decision in *OBB*.

The Circuit Court failed to address Plaintiff's argument that *OBB*, by its own language, is limited to tort claims and unrelated commercial activity, as opposed to *Weltover* governing contract cases. This

⁷ The District Court's finding that the Bonds were "executed" in New York, as opposed to "issued" there, is a distinction without a difference under the case law, as seen in *Shapiro* above.

Court expressly limited *OBB*’ to tort claims and unrelated commercial activity:

We cautioned in *Nelson* that the reach of our decision was limited, and similar caution is warranted here. Domestic conduct ***with respect to different types of commercial activity*** may play a more significant role in other suits under the first clause of §1605(a)(2).

OBB, 136 S. Ct. at 397, fn.2 (emphasis added). Thus, *OBB* does not apply to contract claims, including those involving the issuance of negotiable financial instruments, like the Bonds here.

Other decisions have pointed to *Weltover* as the chief precedent for determining whether there was jurisdiction under the commercial activity exception in contract cases:

Based on Weltover’s holding, courts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction so long as the United States is the place of performance for the breached duty. *See, e.g., Rogers*, 673 F.3d at 139-40; *Hanil Bank*, 148 F.3d at 132; *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); ...

Atlantica Holdings, 813 F.3d at 108-09 (emphasis added). In addition, courts have invoked *Weltover* in holding the commercial activity’s first prong satisfied in cases involving contract claims, including where a foreign sovereign issues bonds in New York. *See*

Turkmani v. The Republic of Bolivia, 193 F. Supp. 2d 165, 176 (D.D.C 2002). *Turkmani*, held:

In light of the fact that the defendant issued bonds in New York City, ... the defendant's activities constitute commercial activity carried on in the United States by a foreign state, thereby satisfying the first clause ... of the FSIA's commercial activity exception. *See Weltover*, 504 U.S. at 619-20.

Id. at 175-76 (footnote omitted). Similarly, *Shapiro* held that the issuance of negotiable promissory notes in the United States satisfied the first prong of the commercial activity exception. *Shapiro*, 930 F.2d at 1018 ("we find jurisdiction under the first clause of Section 1605(a)(2)"). Thus, the court held:

The activity in question thus introduced negotiable promissory notes into the United States for the purpose of raising capital. ... We know of no theory that would cause us to read the FSIA to allow a foreign state to issue bearer notes to an intermediary in the United States and then to deny that it was engaged in commercial activity as defined in the FSIA. The very presence of such highly transferable instruments, whether or not the initial holder successfully discounts them in the country, suffices to satisfy the "substantial contact" requirement of the statute.

Whether the Notes were ultimately discounted in the United States or found their way elsewhere does not, therefore, undermine the conclusion that Bolivia is subject to the

jurisdiction of United States courts for the purpose of enforcing the Notes.

Id. at 1019-20 (footnote omitted); *see also Guirlando v. T.C. Zirat Bankasi A.S.*, 602 F.3d 69, 81 (2d. Cir. 2010) (“the first clause of the commercial activity exception applied, the performance bonds ... having been negotiated in the United States”).

It is undisputed that the Bonds were issued (“executed”) in New York. The face of the bonds shows that they were signed by Peru’s foreign minister in New York, who affixed his seal to each bond. The Award held that the bonds were issued in New York: “The obligations of 1866 ... were issued in New York, which interest payable and capital redeemable in New York; The same holds for the 3,600 certificates issued from 1875.” (A-69) (A__ refers to the Appendix in the Court of Appeals.) Thus, as the bonds were issued in New York, *Shapiro* and the other courts following *Weltover* hold that there is jurisdiction under the first prong of the commercial activity exception.

Finally, if the Circuit Court’s decision is allowed to stand, it will represent a decision misapplying *OBB* to a contract claim, and more specifically a claim based on the issuance of bearer bonds, which courts have referred to as “highly negotiable financial instruments,” in New York. Such a result would be contrary to this Court’s decisions in *OBB* and *Weltover*, as well as decisions applying *Weltover* under the first prong of the commercial activity exception.

C. THE CIRCUIT COURT ERRED WHEN IT HELD THAT PERU'S NONPAYMENT OF THE BONDS, WHICH WERE REQUIRED TO BE PAID ONLY IN NEW YORK, DID NOT CONSTITUTE A "DIRECT EFFECT" IN THE UNITED STATES UNDER THE COMMERCIAL ACTIVITY'S THIRD PRONG.

The Circuit Court erred when it held that Peru's nonpayment of the Bonds did not constitute a "direct effect" in the United States. (App. 13-16) In addition, to the extent that the Circuit Court applied *OBB* incorrectly to reach that result, it has created a conflict between its application of *OBB* and this Court's decision in *Weltover*. See discussion, *supra*, at 7-17.

a. What Constitutes a Direct Effect

"[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity,'" *Weltover, Inc.*, 504 U.S. at 618 (quoting *Weltover, Inc. v. Republic of Arg.*, 941 F.2d 145, 152 (2d Cir. 1991)), and "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption," *Princz v. Fed. Republic of Ger.*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). There is no requirement that the effect be "substantial" or "foreseeable," but it cannot be "purely trivial." *Id.* (quoting *Weltover*, 504 U.S. at 618). A consequence is "immediate" where there is no "intervening element" "between the foreign state's commercial activity and the effect." *Guirlando*, 602 F.3d at 74-75 (quoting *Weltover*, 941 F.2d at 152)).

In determining whether an act had a direct effect in the United States, "[t]he question is, was the effect sufficiently 'direct' and sufficiently 'in the United

States' that Congress would have wanted an American court to hear the case?" *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir. 1985). Although place of payment is not a decisive factor on its own, *id. at 1112*, "a financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception to the FSIA," *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 897 (5th Cir. 1998);⁸ *see also Atlantica Holdings*, 813 F.3d at 112 ("SK Fund suggests that a financial loss to American investors cannot qualify as a direct effect for FSIA purposes. We reject this argument, which rests on a misreading of our direct-effect precedents. In contract cases, FSIA jurisdiction is often premised on a financial loss, *see, e.g., Weltover*, 504 U.S. at 619 ('Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming.').").

Under *Weltover* and its progeny, it is well established that the nonpayment of foreign sovereign debt issued in the United States, required to be paid there, constitutes a "direct effect" in the United States sufficient to establish jurisdiction under the commercial activity's third prong. *Weltover*, 504 U.S. at

⁸ In *Voest-Alpine*, Bank of China refused to pay a letter of credit owed to the plaintiff. *Id. at 890-91*. The court held that the plaintiff, an American company, "suffered a nontrivial financial loss in the United States in the form of funds not remitted to its account at a Texas bank" and that failure to be paid was an "immediate consequence" of the Bank of China's actions." *Id. at 896*. Therefore, the "direct effect" requirement was met. *Id. at 897*.

619 (“Because New York was thus the place of performance for Argentina’s ultimate contractual obligations, the rescheduling of those obligations necessarily had a ‘direct effect’ in the United States”); *Frank v. Commonwealth of Antigua*, 842 F.3d 362, 369 (5th Cir. 2016)(“A ‘direct effect’ may also exist when a contract with a foreign nation was to be performed and payment was to be made in the United States”)(citation omitted); *Atlantica Holdings*, 813 F.3d at 108-09 (“courts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction so long as the United States is the place of performance of the breached duty”); *see also Petersen Energia Inbersora, S.A.U. v. Argentine Republic*, 2016 U.S. Dist. LEXIS 122244, at *19-20 (S.D.N.Y. 2016)(same); *see also, DRLP LLC v. Republic of Venezuela*, 2017 U.S. App. LEXIS 16328 (6th Cir. 2017)(Venezuela’s assumption of debt sufficient to satisfy third prong).

Furthermore, numerous decisions establish that, where financial instruments are issued in the U.S., and required to be paid there, a foreign sovereign’s decision outside the United States not to pay or honor them gives rise to the requisite direct effect. *Guirlando*, 602 F.3d at 80 (“the breach of an agreement ‘to pay [money] ... in New York’ has the requisite direct effect in the United States”); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994)(“The failure of the Iraqi Banks to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under *Weltover*”). Moreover, contrary to the Circuit Court’s and the District Court’s holding, “the most legally significant act – the breach of contract – occurred in the United States when [Peru]

failed to make good on its financial obligation.” *Hanil Bank v. Pt. Bank Negara Indonesia*, 148 F.3d 127, 133 (2d Cir. 1998). Finally, the Circuit Court’s and the District Court’s singular focus on the place of performance has been rejected:

Weltover did not insist that the ‘place of performance’ be in the United States in order for a financial transaction to cause a direct effect in this country. Rather, it only requires an effect in the United States that follows as an immediate consequence of the defendant’s actions overseas. Further, it need not be the location where the *most* direct effect is felt, simply *a* direct effect. Such a direct effect was felt in the United States as a result of defendant’s breach. The failure of money to reach plaintiff’s New York bank account was an immediate consequence of defendant BNI’s actions in Indonesia.

Hanil Bank, 148 F.3d at 133 (emphasis added).

In the instant case, the effect caused by Peru’s failure to pay the Bonds was “direct” because it followed as an immediate consequence of the nonpayment. In addition, there was no intervening event between Peru’s failure to pay the Bonds and the effect. The only possible intervening event was Peru’s failure to conduct the drawings and, as Plaintiff amply demonstrated in its briefs before the Circuit Court, New York law prohibits Peru from benefitting from its own failure. Moreover, since the Bonds are bearer bonds issued in New York, as long as the Plaintiff holds the Bonds, there can be no intervening event that would make it difficult to establish a direct effect.

The Circuit Court and the District Court somehow believe that the fact that Plaintiff sent a demand letter to the Peruvian Embassy in Washington, D.C., seeking payment of the Bonds, meant that Plaintiff was not seeking payment of the Bonds in the United States or in New York, pursuant to the language of the Bonds. (App. 10-11.) That is not the case, nor is there any evidence that would justify such an inference or conclusion. The fair inference is that the Plaintiff, an Illinois corporation with an address in Illinois, would direct Peru to make payment to a bank account in the United States. If so, then Peru's failure to make a payment to Plaintiff's bank account in the United States clearly falls within the definition of "direct effect" even in the decisions cited by the Circuit Court and District Court.

Finally, the only way that the Circuit Court and the district court get around this well-established rule discussed above is by claiming that the initial place of performance in New York somehow disappeared if the firm of Hobson Hurtado went out of business. As seen below in Section D.2, their position is untenable on numerous additional grounds. Furthermore, the above holding would mean that Peru was not obligated to pay the Bonds at all when it failed to conduct the drawings. This cannot be the correct result – to relieve a creditor of its obligation to pay Bonds worth millions of dollars based on the creditor's own failure to fulfill a contractual duty.⁹

⁹ Perhaps this is why neither the Circuit Court nor the District Court cited any law – the New York law on frustration or impossibility of performance – because there is no basis in the law for such a holding or result. See discussion, *infra*, at 31-33. This

Moreover, there is simply no connection between whether the bonds were circulated and Peru's obligation to pay the bonds. Even if the bonds were not circulated between 1876 and 1880, Peru could have still paid the bonds pursuant to the drawings. There is no evidence supporting a contrary conclusion, only the District Court's supposition. Presumably GCC would have welcomed the drawings and payment of the bonds, just as presumably the only reason that GCC still held the bonds in 1901 is that they had not been paid. Therefore, because this holding is key to the Circuit Court's conclusion that the third clause was not met, and it is unsupported by any facts, the Circuit Court's decision that the third prong is not satisfied must be reversed.

may also be why the Circuit Court did not address Plaintiff's lengthy exposition of law showing that Peru cannot benefit by its own failure to fulfill its contractual duty. See discussion, *supra*, at 5. Finally, this may have been why the District felt it necessary – when it was not – to hold that the Bonds had been redeemed, contrary to the Award's express finding and Peru's own admission in the 1907 document that it submitted in this case. See discussion, *infra*, at 28-31.

D. THE CIRCUIT COURT ERRED WHEN IT HELD THAT LOWER COURT DID NOT COMMIT “CLEAR ERROR.”

The Circuit Court, like the District Court, overlooked admissible evidence, submitted by Peru that flatly contradicted the District Court’s key findings. Specifically, they failed to address no less than three (3) pieces of unambiguous admissible evidence: (a) the 1907 document, which showed that the bonds had not been paid; (b) the 1875 agreement, on which the Award relied, providing for full payment in New York;¹⁰ and (c) the face of the bond, providing not only that New York was the place of performance, but also referring to the “Financial Agents of Peru” numerous times and to Hobson Hurtado (“Hobson”) only once, while not defining Hobson to be the Financial Agents of Peru, or vice-versa. Finally, the Circuit Court and the District Court improperly ignored that the bonds are still in circulation, which supports that they have not been paid or redeemed.

The Circuit Court and the District Court cannot cherry pick admissible evidence, without addressing evidence favorable to Petitioner. In light of all of this evidence, it was clear error to hold that the bonds had been redeemed and the place of performance of New York “disappeared.” In light of all of this evidence, which the Circuit Court and the District Court inexplicably failed to address, this Court should be left

¹⁰ Article 6 of the 1875 Agreement provides in pertinent part: “The Company’s agents in New York will be the financial agents of Peru for the issuance and servicing of the certificates ***until their full payment.***” A-147 (emphasis added).

with a firm conviction that the District Court made a mistake when it made those factual findings, which formed the basis for its decision that jurisdiction was lacking under the FSIA.

1. The Circuit Court and the District Court Erred When They Found That The Bonds Had Been Redeemed.

The Circuit Court erred in holding that the District Court did not commit clear error when it found that the bonds were redeemed due to the ambiguous “simulated” servicing. (App. 6-7.) First, it was error to apply the “clear error” standard because the District Court’s determination was at least a mixed question of law and fact. Second, the Circuit Court erred because, even if its determination was purely a factual issue, the District Court (i) misread the Arbitral Award, and (ii) overlooked at least three (3) pieces of unambiguous evidence that established that the bonds had not been paid and were still outstanding, due and owing.

The District Court’s determination that the bonds were redeemed by the ambiguous “simulated” servicing was at least a mixed question of law and fact. However, neither the Circuit Court nor the District Court articulated a principle of law for their holding that the fact that GCC may have written down the bonds on its own books – the simulated servicing – constituted a redemption. This is important because that determination is not a pure factual question. Rather, the fact is the ambiguous “simulated” servicing. (It is also a fact that the bonds were not paid.) Based on the ambiguous “simulated” servicing, the District Court determined that the bonds had been redeemed and Peru’s debt on the bonds had

“disappeared.” App. 7, 46. This determination was a legal one; however, the District Court cited no authority for the conclusion that the ambiguous “simulated” servicing constituted a redemption.

Even if the District Court’s determination was purely a factual issue, it misread the Arbitral Award, and ignored at least three (3) pieces of unambiguous evidence that established that the bonds had not been paid and were still outstanding, due and owing. First, the Circuit Court and the District Court misread the Arbitral Award, which clearly held that the bonds had not been paid, which was “[t]he only question.”¹¹

Furthermore, the determination that the “simulating” servicing constituted a redemption is based on the faulty premise that the bonds and GCC’s debt could not exist simultaneously. The Award held exactly to the contrary, immediately after describing the “simulated” servicing:

These various circumstances clearly show that the Company ... no doubt, and rightly, considered this transaction to be a very successful deal

¹¹ The only question that therefore arises is whether the certificates are now paid

... the actual depreciation, which is to say provided from Peru’s funds or from the proceeds from the sale of guano, has not occurred, and that the Company has been unable to obtain its payment;

See A-83.

... on the one hand that the Parties had contemplated the eventuality where the Company would underwrite the certificates on its own account, and on the other hand, that the certificates were ... delivered to the Company ... in order to allow it to seek its payment ..., the original claim retaining its force as long as the certificates had not been “*actually depreciated*,” which means as long as payment of the certificates had not been obtained;

A-82-83. The Bonds were issued as a way for GCC to obtain its payment if the guano proceeds were insufficient to pay Peru's debt to GCC. With the Tribunal's finding that they had not been paid, the Bonds remained a way for GCC to obtain payment of a portion of its debt.

This was confirmed by the 1907 document, where Peru acknowledged that the Bonds had not been paid, its debt to GCC was more than \$7 million USD and it would pay the indebtedness in partial exchange for the Bonds' return:

- 1.- Pay [GCC] the public debt of one million four hundred seventy-seven thousand eighty-eight pounds
- 2.- Payment shall be made once the Company delivers the three thousand six hundred certificates to the Branch Directorate, each one valued at one thousand pesos gold, ...
- 3.- It is understood that the fact the Company is receiving [sic] the bonds completely terminates all matters between the government and the Company.

A-225. Plaintiff-Appellant Brief, p. 23. These statements were made long after the drawings were supposed to occur (from 1876-1880), and after the Arbitral Award in 1901. Thus, by Peru's own admission, as of 1907, the bonds were still outstanding, due and owing, and had not been redeemed.

Finally, the Circuit Court and the District Court interpreted the "simulated" servicing as a redemption without the assistance of any expert in the interpretation of debtor/creditor law, then or now, or any expert to assist in the interpretation of the Award, which contains some awkward and stilted language by today's standards, stemming from the fact that the 1901 Award was in French and translated and interpreted in 2016, by today's mores and usages.¹²

2. The Circuit Court and the District Court Erred When They Held That Hobson May Have Gone Out of Business and, As a Result, New York Was No Longer The Place of Performance.

Neither the Circuit Court nor the District Court articulated a principle of law for their holding that the fact that Hobson may have gone out of business meant that New York was no longer the place of performance. While the Circuit Court and the District Court used the word "impossible" in describing performance of

¹² At oral argument, the Circuit Court asked whether the Award, which was originally in French, would be admissible under the ancient documents exception. However, the translation was made in 2016 and would not come within the ancient documents exception. This distinction is important, given the aforementioned changes in language mores and usages.

payment of the bonds in New York, neither of them tied that word to a principle of law.¹³ (App. 15, 60.) However, they could not have meant the doctrine of frustration or impossibility because a bond is not the type of res to which the doctrine applies. *See e.g., Sokoloff v. National City Bank*, 204 N.Y.S. 69, 208 A.D. 627, 629-630, 1924 N.Y. App. Div. LEXIS 5105, at *4-8 (N.Y. App. 1924). Finally, that doctrine cannot be used to unjustly enrich a party – namely, Peru. *Id.*

The Circuit Court accepted the finding that Hobson went out of business and the determination that New York was no longer the place of performance, against Petitioner’s arguments, without even addressing them, that (i) it was not reasonable to assume that GCC bargained for that risk/result, (ii) a reasonable reading of the bonds was that Hobson was not the exclusive “Financial Agent of Peru,” which was referred to numerous times, while Hobson was referred to only once and not defined as the Financial Agent of Peru, (iii) the 1875 Agreement provided that there would be financial agents for the bonds “until their full payment” (see fn. 10, *supra*); and (iv) there is information that J.P. Morgan Chase is the successor to Hobson, including documents submitted by Peru that indicate that Morton Bliss & Co., to which J.P. Morgan Chase is clearly a successor, was the Financial Agents for Peru in New York and not Hobson, who were Peru’s trading agents. Plaintiff-Appellant Brief, pp. 54-55.

¹³ Once again, this determination presented at least a mixed question of law and fact – the fact being Hobson going out of business, and the law determining whether that fact changed the place of performance.

Finally, even if the place of performance could change as a matter of contract interpretation, the fallacy of New York disappearing as the place of performance is demonstrated by the fact that, if Peru had conducted the drawings when it was supposed to – starting in 1875 – Hobson would have still be in existence. There is no doubt that a substitute financial agent would have been appointed rather than to have the drawings cease, once commenced. Moreover, Peru failed to conduct the drawings; therefore, holding that New York was no longer the place of performance rewards Peru’s wrongdoing, which is not permitted under New York law. Plaintiff-Appellant Brief at 19-24. Neither the Circuit Court nor the District Court refuted this time-honored principle.

Based on the discussion above, the Circuit erred when it held that the District Court did not commit “clear error” in making key findings that were the basis for its determination that jurisdiction was lacking under the FSIA.

E. THE CIRCUIT COURT ERRED WHEN IT REJECTED PLAINTIFF’S “TWO PROCEDURAL OBJECTIONS,” WHICH DEPRIVED PLAINTIFF OF FAIR PROCESS IN PURSUIT OF ITS CLAIM.

The Circuit Court erred when it rejected Plaintiff’s “two procedural objections.” (App. 7-8.) First, the District Court *sua sponte* converted Peru’s positing that Hobson went out of business into a determination that New York was no longer the place of performance. This was not an argument raised by Peru. Thus, it was error to hold now that Petitioner did not demonstrate

a need for discovery or an evidentiary hearing when the District Court made the determination *sua sponte*.

If Plaintiff had known of the District Court's *sua sponte* determinations, it would have asked for discovery into (i) Hobson's supposed liquidation and whether there was a successor in interest, and (ii) Peru's archives regarding the intent of Peru and GCC as to the place of performance if Hobson no longer existed, to bolster the inference from the 1875 Agreement, pursuant to which the bonds were issued, that New York was the place of performance, without reference to Hobson, "until full payment." A-147, see also fn. 10, *supra*.

Furthermore, the Circuit Court's reliance on *Helmerich*¹⁴ is misplaced because that decision only holds that factual questions must be resolved if necessary to determine jurisdiction. (App. 8.) Moreover, when it cited *Helmerich*, the Circuit Court missed the clear contrast between *OBB*, where it was not necessary for this Court to find whether the plaintiff was injured on the train platform in Austria, and here, where the District Court held the bonds had been redeemed.¹⁵

Finally, this is a significant issue because the District Court's *sua sponte* conversion of a factual

¹⁴ *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017).

¹⁵ The Circuit Court erred when it held that it was Plaintiff's burden to prove the lack of immunity, *Robinson v. Gov't of Malay*, 269 F.3d 133 (2d Cir. 2001), and it was error for the District Court to make factual findings that overlapped with the merits.

assertion made by Peru into a legal holding that the contract (Bond) could no longer be performed in New York implicate procedural fairness and due process. A litigant should be not subject to a ruling by ambush by a district court (which here was predisposed against Plaintiff's claim),¹⁶ especially where the ruling is based on factual and legal findings for which a plaintiff had no notice and hence no opportunity to respond, including seeking discovery. To allow such a sua sponte judicial ruling deprives Plaintiff of fair process in pursuit of its claim.¹⁷

CONCLUSION

This case presents an important and recurring issue: what is the proper interpretation and application of this Court's decision in *OBB*. Clearly, the Circuit Court did not heed this Court's admonition that *OBB* and *Nelson* should be applied only in circumstances (1) where the commercial activity is not related or is tangential to a tort claim, and (2) where the elements of the plaintiff's cause of action are found in one place (outside the United States). In addition, this Court's guidance is sought on whether *OBB* applies at all to contract claims, as opposed to the application of its decision in *Weltover*. Finally, while it is possible that *OBB*'s discussion of the "based upon" language could be

¹⁶ The District Court demonstrated its predisposition when it made the gratuitous comment that Plaintiff may have purchased the Bonds as collectibles on eBay. App. 59.

¹⁷ The District Court also erred when, after it decided jurisdiction was lacking under the FSIA, it decided the other grounds for dismissal. *See Howe v. Romarm S.A.*, 2017 U.S. Dist. LEXIS 141633, at *15 (D.Vt. 2017).

applied to the commercial activity exception's second and third prongs, this Court should take this opportunity to clarify this point – not only whether it applies at all, but also, if it applies with the same force and effect as in first prong cases.

In addition, this case is important because it involves highly negotiable foreign sovereign debt issued in the United States, required to be paid there, and a decision by the Circuit Court that the foreign sovereign – Peru – is completely relieved of its obligation to pay the debt and the contractual place of performance based on its own misconduct, which holding also upsets expectations under settled New York contract law regarding the contractual place of performance and the doctrines of frustration and impossibility. For these reasons and those stated above, this Court should grant the petition for certiorari.

Respectfully submitted,

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