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Sent: Tuesday, August 5, 2025 1:39 PM
To: Chloe Clifford <Chloe.Clifford@fgsglobal.com>
Cc: Paul A Holmes <paul@fgsglobal.com>; Barney Gimbel <Barney.Gimbel@fgsglobal.com>
Subject: Argentina's Request for Pre-Motion Conference - Petersen District Court Action

Hello,

For your awareness, we wanted to share the attached pre-motion conference letter filed by the Argentine Republic in the Petersen district court action this afternoon asking the court to reconsider its order requiring the Republic to collect and produce communications and documents from the personal devices, personal email accounts, and personal messaging applications of certain senior current and former Republic officials.

The Republic is seeking reconsideration of the order on the basis that the court did not consider that "the Republic does not have possession, custody, or control of officials' personal devices and accounts, which therefore are not subject to discovery from the Republic under U.S. law."

Please let us know if you have any questions.

Best,
Chloe

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August 5, 2025

Via ECF

The Honorable Loretta A. Preska,
United States District Court for the Southern District of New York,
500 Pearl Street,
New York, NY 10007.

Re: *Petersen Energía Inversora S.A.U. v. Argentine Republic and YPF S.A.*, No. 15 Civ. 2739 (LAP); *Eton Park Cap. Mgmt. v. Argentine Republic and YPF S.A.*, No. 16 Civ. 8569 (LAP)

Dear Judge Preska:

On behalf of the Argentine Republic, I respectfully request a pre-motion conference on the Republic's anticipated motion, pursuant to Local Civil Rule 6.3, for reconsideration of the Court's July 29, 2025 order requiring the Republic to collect and produce communications and documents from personal devices, personal email accounts, and personal messaging applications of certain senior current and former Republic officials. (July 29, 2025 Conf. Tr. 52:9-53:23.)

Reconsideration is appropriate when "the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Twine v. Powers*, 2012 WL 3834082, at *1 (S.D.N.Y. Aug. 27, 2012) (Sweet, J.). Here, the Court overlooked the threshold question, necessary for any discovery under the Federal Rules of Civil Procedure, of whether personal devices and accounts are within the Republic's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). The Court instead analyzed the discoverability of those items as solely "governed by the principles of international comity." (July 29, 2025 Conf. Tr. 52:21-24.) Respectfully, we believe that analysis was incomplete. Although principles of international comity might foreclose discovery into devices and accounts that

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otherwise qualify as discoverable under the Federal Rules of Civil Procedure, the antecedent question is whether such materials are discoverable from the Republic in the first place. They are not: the Republic does not have possession, custody, or control of officials' personal devices and accounts, which therefore are not subject to discovery from the Republic *under U.S. law*.

A party requesting documents “bears the burden of establishing” that the documents are within the producing party’s “possession, custody, or control.” *Alexander Interactive, Inc. v. Adorama, Inc.*, 2014 WL 61472, at *3 (S.D.N.Y. Jan. 6, 2014) (Francis, J.); *see* Fed. R. Civ. P. 34(a)(1). It is undisputed that the Republic lacks possession or custody of the personal, non-governmental devices and accounts of current and former Republic officials: the only question is whether it has “control.” In the Second Circuit, control requires that “the party ha[s] the right, authority, or practical ability to obtain the documents at issue.” *Alexander Interactive*, 2014 WL 61472, at *3.¹ “[A] party is not obliged to produce, at the risk of sanctions, documents that it does not possess or cannot obtain.” *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007).

Here, the question of control requires consideration of Argentine law— not as a matter of international comity, but because Argentine law governs the relationship between the Republic and its current and former officials. Whether the Republic has the “right, authority, or practical ability” to obtain its current and former officials' personal devices and accounts as a matter of U.S. law turns on Argentine law.

The Second Circuit has recognized this basic rule. In *Shcherbakovskiy*, the court vacated sanctions imposed against the chairman of the board of a Russian corporation for failing to produce the corporation’s documents, holding that if “Russian law prevents his production of the documents, a finding of control cannot be sustained.” 490 F.3d at 138-39. Similarly, in *Owen v. Elastos Foundation*, the court held that a Singapore company could not be compelled to produce the personal emails of its China-based employee because plaintiffs did not meet their “burden” to establish “Singaporean or Chinese law as it bears on the ‘control’ question.” 2023

¹ The Second Circuit’s standard, which extends to practical ability, departs from the standard in other courts of appeals, which focus solely on legal ability. *See, e.g., Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 160 (3d Cir. 2004) (“In the Rule 34 context, control is defined as the legal right to obtain required documents on demand.”).

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WL 2537287, at *2-3 (S.D.N.Y. Mar. 16, 2023) (Moses, J.). The court was “not willing to assume that [the non-U.S. employer] ha[d] the same ‘practical ability’ to coerce compliance from [the employee] that a U.S. corporation would have with respect to” documents in the possession of its employees. *Id.* at *2.

Plaintiffs have not carried their burden to show that the Republic has the “right, authority, or practical ability” to access current Argentine government officials’ personal devices and accounts—let alone the personal devices and accounts of former officials. To the contrary, Argentine law makes clear that they “are the exclusive property of their owners,” *i.e.*, individual government officials, not the government as employer. (*See* Dkt. 660 ¶¶ 20, 23 (Ivanega Decl.).)² The Argentine Constitution (Articles 17-19) and its Supreme Court make such private property “inviolable” absent a judgment against an individual owner. (*Id.* ¶¶ 21-22, 29; *see also* Decree No. 780/2024 (public information “excludes by its very nature information that is in the private sphere of the official”).)³ Plaintiffs have made no showing that any Argentine employers, much less the Republic, have the practical ability to access their current and former employees’ personal devices and accounts. Tellingly, plaintiffs’ expert cited only resolutions addressing requests for emails from *official* government accounts, not personal accounts. (*See* Dkt. 677 at 3.)

To be clear, this threshold question of practical and legal *control* is distinct from the question of whether the Republic would be authorized to disclose such documents under Argentine law *if such documents came into its control*. (*See* Dkt. 658 at 7.) Principles of comity may govern a conflict between U.S. law requiring production and foreign law forbidding it. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). But as to the question of control, there is no conflict: U.S. law asks whether the Republic has legal or practical authority over the requested documents, a question that turns on Argentine law. The answer to that question here is no.

Because the Court did not resolve the critical antecedent question whether the Republic possesses practical, much less legal, control over its current and former officials’ personal devices and accounts within the meaning of Rule 34,

² Citations refer to the *Petersen* docket.

³ The Argentine Criminal Code (Articles 153 and 153 bis), makes it a crime for an employee of the Republic to access personal devices and accounts, including of its officials, or to collect their content. (Dkt. 660 ¶¶ 31-32 & n.16 (Ivanega Decl.).)

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the Republic respectfully requests reconsideration of the Court's July 29, 2025 ruling.

Respectfully,

/s/ Robert J. Giuffra, Jr.

Robert J. Giuffra, Jr.

cc: Counsel of Record (via ECF)