

|                                      |   |                               |
|--------------------------------------|---|-------------------------------|
| BLANCHARD AND COMPANY, INC.,         | ) |                               |
| HERBERT DAVIES, and JAMES F. HOLMES, | ) |                               |
|                                      | ) | Civil Action No. 02-3721      |
| Plaintiffs,                          | ) |                               |
|                                      | ) | Section "C"                   |
| v.                                   | ) |                               |
|                                      | ) | Chief Judge Helen G. Berrigan |
| BARRICK GOLD CORPORATION,            | ) |                               |
| J.P. MORGAN CHASE & COMPANY, and     | ) | Magistrate Judge Knowles      |
| ABC COMPANIES,                       | ) |                               |
|                                      | ) |                               |
| Defendants.                          | ) |                               |

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**MEMORANDUM IN SUPPORT OF MOTION OF  
DEFENDANT BARRICK GOLD CORPORATION TO DISMISS  
FOR FAILURE TO JOIN INDISPENSABLE PARTIES**

Defendant Barrick Gold Corporation (“Barrick”) respectfully submits this memorandum in support of its motion, pursuant to Fed. R. Civ. P. 12(b)(7) and 19(b), to dismiss the first four causes of action in the Second Supplemental and Amended Complaint (the “Complaint”) of plaintiffs Blanchard and Company, Inc., Herbert Davies, and James F. Holmes.

**PRELIMINARY STATEMENT**

Plaintiffs ask the Court to enter a drastic and sweeping injunction that, if granted, would substantially impact the rights of numerous entities around the world that plaintiffs failed to join in this suit. These entities include a vast number of foreign central banks, bullion banks other than defendant J.P. Morgan Chase & Company (“J.P. Morgan”), and gold producers other than Barrick – all of whom are parties to the transactions that plaintiffs seek to enjoin. The absence of these parties will not only impair the absent parties’ ability to protect their own interests, but will severely prejudice the currently named defendants. The central banks – as instrumentalities of foreign sovereigns – and perhaps some of the other absent parties cannot be joined. Because (1) the parties to the contracts that plaintiffs seek to enjoin are not present, (2) necessary parties are immune from suit, and (3) the prejudice to the named defendants and the absent parties outweighs any potential prejudice to plaintiffs from dismissal, the Court should, “in equity and good conscience,” dismiss the claims seeking injunctive relief.

**BACKGROUND**

Plaintiffs seek injunctive relief under the Clayton Act, 15 U.S.C. § 26, and the Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § 51:1405(A) (“LUTPA”) (Complaint ¶¶ 65-85), based on the allegation that defendants have harmed plaintiffs “by artificially depressing the price of gold.” (*Id.* ¶ 62.) The only mechanism by which

defendants are alleged to have depressed the price of gold is through the sale of **gold borrowed from central banks**:

- “Defendants . . . actively manipulate the price of gold through a process whereby millions of ounces of **gold** are **removed from central bank vaults** and physically sold into the spot market, repeatedly driving down the spot price or suppressing a rally in the spot price.” (*Id.* ¶ 6 (emphasis added).)
- “[P]roducers borrow gold from bullion banks, who in turn borrow that **gold from central bank reserves**. The producer (or the bullion bank acting for the producer) then sells the gold into the spot market. . . .” (*Id.* ¶ 16 (emphasis added).)
- “Barrick, and the bullion banks with which it operates in combination, can flood the market with **central bank gold**. . . .” (*Id.* ¶ 22 (emphasis added).)
- “the bullion banks . . . hold the keys to unlock vast quantities of **gold from central banks** – gold that, through coordination with Barrick, and be, and frequently is, dumped onto the spot market to drive down the price or stall a rally.” (*Id.* ¶ 24 (emphasis added).)
- “Barrick, in combination with J.P. Morgan and other bullion banks, can dump millions of ounces of tangible **central bank gold** into the spot market at any time. . . .” (*Id.* ¶ 36 (emphasis added).)
- “Barrick has suppressed the price by its combinations and contracts with J.P. Morgan and other bullion banks whereby significant amounts of additional **gold, once locked and stored in the vaults of central banks**, are physically sold into the marketplace.” (*Id.* ¶ 37 (emphasis added).)

According to plaintiffs’ own allegations, the central banks are directly involved in every step of the transactions to which plaintiffs object:

Because gold . . . is stored in vast quantities in **numerous central banks throughout the world**, it is possible for Barrick to leverage its gold reserves with **central bank gold** to generate income. . . . The process generally works as follows:

A. . . . [A] bullion bank, such as J.P. Morgan, borrows **gold from a central bank**, then sells the gold into the spot market. This step of the program involves the physical removal of **gold from the central bank** and the physical sale of such gold into the market. . . .



B. . . . The bullion bank pays *the central bank* a . . . “gold lease rate” for the borrowed gold. . . .

C. Barrick, for its part in the transaction, agrees to deliver gold to the bullion bank at some point in the future. When Barrick does deliver the gold . . . , the bullion bank in turn sends it to *the central bank* in satisfaction of the outstanding gold lease. . . .

(*Id.* ¶ 23 (emphasis added).)

The only relief requested in connection with plaintiffs’ antitrust and LUTPA claims is “[a]n injunction terminating all . . . contracts through which Defendants manipulate the market for gold as alleged herein, and enjoining Barrick, J.P. Morgan and [other bullion banks] from entering into such contracts in the future. . . .” (*Id.* ¶ 98(a).) Such an injunction would require, at a minimum, the termination of: (1) all gold leases between bullion banks and central banks<sup>1</sup> and (2) all forward sales contracts between gold producers and bullion banks.

Central banks are “institution[s] charged primarily with controlling a country’s money and banking system. . . .” *MIT Dictionary of Modern Economics* 59 (3d ed. 1986). Typical central bank responsibilities include, among other things, “custody and administration of the nation’s monetary reserves through the holding of gold, silver, domestic and foreign securities, [etc.].” Ernest T. Patrikas, *Foreign Central Bank Property: Immunity From Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 274 (1982). The “administration” of such reserves commonly involves investing them on behalf of the government: “Central banks having the custody of banks’ and the nation’s reserves will put those reserves to work.” *Id.*

One of the ways that central banks put a portion of their gold reserves “to work” is by lending them. According to one recent report, 89 countries, out of 118 countries surveyed, had more than 10 percent of their gold reserves on loan. Jessica Cross, *Gold Derivatives: The Market*

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<sup>1</sup> Although the Second Supplemental and Amended Complaint does not expressly identify the loan contracts between central banks and bullion banks as among those that it seeks to terminate, plaintiffs’ original Complaint in this action makes clear that such contracts fall within the scope of their requested relief. See Complaint for Injunctive Relief (Dec. 18, 2002) ¶ X(a), (seeking “[a]n injunction terminating . . . all . . . contracts whereby . . . bullion banks engage in conduct that “results in gold being borrowed from the central banks and sold into the market . . .”).

*Impact* 139 (Aug. 2000) (Exhibit 1). Recent estimates place the amount of gold on loan by central banks at around 4,600 *tons* – worth tens of billions of dollars. (*Id.* (estimating reserves lent as of December 1999 at 4,549 tons); Gold Fields Mineral Services Ltd., *Gold Survey 2002* (Exhibit 2) (estimating that central banks had 4,651 tons of gold on loan in 2001). The lending of gold by central banks has been the subject of international agreements. For example, in 1999, the central banks of fourteen countries, plus the European Community Bank, entered into the “Washington Agreement,” which provides, *inter alia*: “The signatories to this agreement have agreed not to expand their gold leaseings. . . .”<sup>2</sup> The signatories to the Washington Agreement include the central banks of Germany, France, Switzerland, Italy, the Netherlands, the United Kingdom, Portugal, Spain, Austria, Belgium, Sweden, Finland, Ireland and Luxemborg. (*Id.*) Plaintiffs have not joined *any* central banks in this action.

Numerous entities around the world act as bullion banks, which borrow gold from central banks and purchase gold from producers pursuant to forward contracts. The major bullion banks are identified in various public sources. For example, one report identifies the members of “the bullion trading community” to include, AIG International, Barclays Bank, Citibank, Commerzbank, Credit Suisse First Boston, Deutsche Bank, Dresdner Bank, Goldman Sachs/J Aron, HSBC/Republic, J.P. Morgan, MacQuarie Bank, Mitsubishi, Mitsui, Morgan Stanley, NM Rothschild, Phibro Bullion, Prudential-Bache, Rabobank, ScotiaMocatta, SocieteGenerale, Standard Bank, Sumitomo, UBS, and West LB. (Exhibit 1 at 150.) All of these institutions are listed as “Market-Making Members” or “Members” on the website of the London Bullion Market Association. (Exhibit 4). Nevertheless, plaintiffs name only one bullion bank, J.P. Morgan, as a defendant in this action. Although plaintiffs purport to assert claims against “[f]ictitious Defendants ABC Companies” (Complaint ¶ 5(c)), it is not clear when, if ever, any additional bullion banks will be joined.

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<sup>2</sup> See [www.Gold.org/value/official/Washington/WAGtext.html](http://www.Gold.org/value/official/Washington/WAGtext.html). (Exhibit 3).

Most of the world's leading gold mining companies hedge some portion of their anticipated production. Gold producers that reportedly engage in forward sales, "spot deferred" contracts, or other hedging transactions include:

- Americas:** Agnico-Eagle, Aurizon Mines, Barrick, Bema Gold, Black Hawk Mining, Buenaventura, Cambior, Cameco, Kyrgyzstan (Kumtor Gold), Canyon Resources, Claude Resources, Coeur, Crystallex Mining, CVRD, Echo Bay, Eldorado, Hecla Mining, High River Gold, Iamgold, Inmet Mining, Kenor, Kinross Gold, Lionore Mining, McWatters Mining, Soquem, Miramar Mining, Newmont Mining, Northgate Exploration, Penoles, Placer Dome, Rio Narcea, Royal Gold, Semafo, Teck Cominco, Thistle Mining, TVX Gold, Wheaton River
- Africa:** AngloGold, Ashanti Goldfields, Avgold, Harmony, Randgold Resources, Western Areas
- Australia:** Abelle, Auriongold, Avocet Mining, Beaconsfield Gold, Croesus Mining, Dalrymple Resources, Emperor Mines, Equigold, GRD, Gympie Gold, Kingsgate Consolidated, Lihir Gold, MIM, Newcrest Mining, Resolute, Rio Tinto, Selwyn Mines, Sino Gold, Sons of Gwalia, St. Barbara Mines, Triako Resources, Troy Resources, WMC

(Virtual Metals and Haliburton Mineral Services, *Gold Hedging Indicator 3d Qtr. 2002*, at 30-46 (Exhibit 5).) Of the 94,130,550 ounces of gold reportedly committed to hedge contracts by these producers as of September 2002, Barrick accounted for only 19,125,000 ounces – about 20 percent. (*Id.* at 23-27.) Yet, plaintiffs have not joined in this action any of the other gold producers, who collectively account for 80 percent of hedging activity.

## ARGUMENT

Rule 19(a) provides that a person "shall" be joined as a party in the action if:

(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Rule 19(b) provides that, if such a person cannot be made a party, the court may determine “in equity and good conscience” that the action “should be dismissed, the absent person being thus regarded as indispensable.” Fed. R. Civ. P. 19(b); *see Standard Energy Co. v. Damson Energy*, No. 90-1202, 1990 U.S. Dist. LEXIS 17072, at \*7 (E.D. La. Dec. 12, 1990) (Rule 19 requires a two-part inquiry: (1) “whether the absent party is a necessary party” and (2) “if a party is necessary and cannot be joined . . . whether the party is indispensable”). Plaintiffs’ failure – and, in many cases, inability – to join the central banks, the absent bullion banks, and the absent gold producers, requires dismissal under Rule 19(b).

**I. THE CENTRAL BANKS, THE ABSENT BULLION BANKS, AND THE ABSENT GOLD PRODUCERS ARE NECESSARY PARTIES**

Complete relief cannot be afforded among the parties without joinder of the central banks that lend gold, the bullion banks (other than J.P. Morgan) that borrow gold from central banks and sell such gold in the spot market, and gold producers (other than Barrick) who sell gold for future delivery. These absent parties will be unable to protect their substantial interests in the subject of this action. In addition, if the case proceeds without the absent parties, J.P. Morgan and other bullion banks that may be named as defendants will be subject to inconsistent obligations. These absent parties are therefore necessary to the action.

**A. Complete Relief Cannot Be Accorded Among The Existing Parties Without Joining The Central Banks, The Absent Bullion Banks, And The Absent Gold Producers**

The Court cannot grant the relief requested by plaintiffs – “[a]n injunction terminating all . . . contracts through which Defendants manipulate the market for gold as alleged [in the Complaint]” (Complaint ¶ 98(a)) – because many of the parties to the contracts at issue are not before the Court. If entered, the injunction would require termination of, at a minimum, all gold loans between central banks and bullion banks and all forward sales agreements between gold producers and bullion banks. All of the central banks, all but one of the bullion banks, and all

but one of the gold producers who are party to these contracts, however, are absent from this case.

All parties to a contract are necessary in an action to set aside the contract. 4 *Moore's Federal Practice* § 19.06[4] (Matthew Bender 3d ed. 1997); *Standard Energy*, 1990 U.S. Dist. LEXIS 17072, at \*7-\*8 (“when a suit arises from a contract, all parties to the contract are necessary parties who must be joined if feasible”) (citing *Harris Trust & Sav. Bank v. Energy Assets Int'l Corp.*, 124 F.R.D. 115, 116-17 (E.D. La. 1989)). In *Harris Trust*, the plaintiff sought a declaratory judgment that its rights to proceeds and products from certain oil and gas leases were superior to the rights of the defendants and certain other parties. 124 F.R.D. 115. The court found that the absent parties, obligors under the agreements at issue, were “necessary parties” under Rule 19 because the plaintiff sought an interpretation of the contract that would require the absent parties to “perform under these agreements.” *Harris Trust*, 124 F.R.D. at 117. In doing so, the court applied the “general rule that where rights sued upon arise from a contract, all parties to it must be joined.” *Id.* (quoting *Ward v. Deavers*, 203 F.2d 72, 75 (D.C. Cir. 1953)). In fact, “[t]he cases are virtually unanimous in holding that in suits between parties to a contract seeking rescission of that contract, all parties to the contract, and others having a substantial interest in it, are necessary parties.” *Delta Fin. Corp. v. Paul D. Comanduras & Assocs.*, 973 F.2d 301, 305 (4<sup>th</sup> Cir. 1992); see *Dewavendewa v. Salt River Project*, 276 F.3d 1150, 1156-57 (9<sup>th</sup> Cir. 2002) (absent tribe was necessary party because it was a party to the contract), *cert. denied*, 123 S. Ct. 98 (2002); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1044 (9<sup>th</sup> Cir. 1983) (“all parties who may be affected by a suit to set aside a contract must be present”); *Burger King Corp. v. Am. Nat'l Bank & Trust Co. of Chicago*, 119 F.R.D. 672, 675 (N.D. Ill. 1988) (“If the absent party . . . is a party to a contract at issue – he falls squarely within the terms of Rule 19(a)(2)”). Because the central banks, the absent bullion banks, and the absent gold producers are parties to the subject agreements and must therefore be joined in order for complete relief to be accorded, they are necessary parties.

**B. The Absent Parties Have Interests In This Action And Their  
Absence Will Impair Their Ability To Protect Those Interests**

The central banks, the absent bullion banks, and the absent gold producers each have significant interests in this action. As plaintiffs acknowledge, central banks have loaned “millions of ounces gold” to bullion banks. (*See* Complaint ¶ 6.) If the Court terminates those loan contracts, as plaintiffs demand, the central banks could lose the ability to recover their gold. Even termination of only the forward sales contracts would seriously jeopardize the central banks’ rights and ability to recover the gold currently on loan. Because such termination would deprive the bullion banks of the gold with which they expected to repay the central banks, the bullion banks could argue that performance of their obligations had become impossible, or “impracticab[le] because of extreme and unreasonable difficulty, expense, injury or loss involved.” *See, e.g., Lowenschuss v. Kane*, 520 F.2d 255, 265 (2d Cir. 1975) (tender offer contract had become impossible or at least “impracticable” as a result of preliminary injunction temporarily blocking consummation, citing Restatement of Contracts § 454 (1932)). *See also* Restatement (Second) of Contracts § 261 (1981) (“Where after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary”).<sup>3</sup> Moreover, even if the central banks were able to recover their gold, an injunction prohibiting all such gold loans in the future would deprive the central banks of the principal mechanism by which they can generate income from their national gold reserves.

Plaintiffs allege that the bullion banks, in effect, rely on gold producers’ commitments to deliver gold to the bullion banks pursuant to forward sales contracts in borrowing gold from central banks. (*Id.* ¶ 23.C.) An injunction terminating the contracts that give rise to these

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<sup>3</sup> In any action between the central banks and the bullion banks, the laws of one or more foreign countries may apply to provide the bullion banks with defenses to any action by the central banks.

commitments, or preventing producers from delivering gold pursuant to such contracts, would therefore place the absent bullion banks at risk.

Finally, as plaintiffs acknowledge, gold producers rely on forward sales contracts to “hedge” or manage their risks due to price volatility. (*See id.* ¶ 22.) The termination of all forward sales contracts would expose such producers to the risks that they legitimately contracted to avoid.

These absent parties’ interests compel the conclusion that they are necessary parties. In *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1311 (5<sup>th</sup> Cir. 1986), the Fifth Circuit affirmed this Court’s dismissal of plaintiff’s suit for failure to join indispensable parties, finding that the absent parties, beneficiaries to a trust at issue in the case, were necessary parties because a decision in their absence might impair their ability to protect their interests: “Rule 19 seeks to protect absentees . . . [who] may be harmed by not being joined.” *See also United States ex rel. Hall v. Tribal Dev. Corp.*, 165 F.R.D. 83 (E.D. Wis.) (absent tribe was necessary party because it may be affected by the determination of the action), *aff’d*, 100 F.3d 476 (7<sup>th</sup> Cir. 1996); *Columbia Gas Transmission Corp. v. Lauren Land Co.*, 180 F.R.D. 322 (E.D. Ky. 1998) (lessor was a necessary party to an action between owner and lessee because lessor’s ability to protect its interest could be impaired by court’s ruling); *Rojas v. Loewen Group Int’l, Inc.*, 178 F.R.D. 356 (D.P.R. 1998) (corporation was a necessary party where adjudication in favor of plaintiffs would be adverse to corporation’s interests). Because the failure to join the central banks, the absent bullion banks, and the absent gold producers will impair their ability to protect significant interests, they are necessary parties.

**C. J.P. Morgan And Any Named Bullion Bank Defendants Are In Jeopardy Of Incurring Inconsistent Obligations**

An injunction terminating the loan contracts between the central banks and the bullion banks could expose J.P. Morgan, and any bullion bank defendants that plaintiffs may eventually name, to inconsistent obligations. In particular, notwithstanding any injunction imposed by this Court, the central banks are certain to seek recovery, possibly through foreign proceedings

governed by foreign law, of the tens of billions of dollars worth of gold they have loaned to the bullion banks. The bullion banks could thus find themselves in the untenable position of having either to violate this Court's injunction by performing under a loan contract or to violate a foreign judgment requiring them to perform. Additionally, the bullion banks will be subject to inconsistent obligations in the sense that, if the bullion banks are required to repay the gold they borrowed from central banks, gold producers would be enjoined from delivering the gold with which the bullion banks intended to make such repayments. In light of these risks of inconsistent obligations, all of the bullion banks that borrow gold from central banks and buy gold from producers pursuant to forward contracts are necessary parties. *See, e.g., Crutcher v. Aetna Life Ins. Co.*, 746 F.2d 1076, 1080 (5<sup>th</sup> Cir. 1984) (in actions between lender and guarantor of loans, defaulting debtor's receiver was an indispensable party because "[i]f not present, our decree would not bind the receivers, thus running the risk of inconsistent obligations being imposed upon persons and property"); *Washington Int'l Ins. Co. v. Bd. of Supervisors*, No. 2:98-CV-67-B-B, 1999 U.S. Dist. LEXIS 886, at \*5 (N.D. Miss. Jan. 25, 1999) (in action to determine the rights and obligations of parties under a performance bond, absent architect and former contractor are "needed for just adjudication" because any determination by the court could potentially subject them to inconsistent obligations).

## **II. JOINDER OF ALL NECESSARY PARTIES IS IMPOSSIBLE**

Plaintiffs will be unable to join all necessary parties. At a minimum, the central banks' status as foreign sovereigns precludes joinder. Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601-1611 (2000), there is neither subject matter nor personal jurisdiction over foreign states or their agencies and instrumentalities unless certain exceptions, none of which apply here, are satisfied. 28 U.S.C. §§ 1330, 1604; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845-46 (5<sup>th</sup> Cir. 2000).<sup>4</sup>

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<sup>4</sup> An "agency or instrumentality" of a foreign state is a "foreign state" for purposes of the FSIA. 28 U.S.C. § 1603(a). The statute defines an "agency or instrumentality" as an entity that: (1) is a separate legal person, corporate or otherwise; (2) is an organ or political subdivision of a



As one authority has noted, “[m]ost foreign central banks undoubtedly would qualify as agents or instrumentalities of the foreign states for purposes of the general provisions of the FSIA.” Patrikis, 1982 U. Ill. L. Rev. at 272-73. Thus, courts have consistently treated central banks as “foreign states” under the FSIA. *See, e.g., Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5<sup>th</sup> Cir. 1998) (Bank of China); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1390 (5<sup>th</sup> Cir. 1985) (Nicaraguan central bank); *Weston Compagnie de Finance et D’Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106 (S.D.N.Y. 1993) (Ecuador central bank). *Cf. Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1106 (5<sup>th</sup> Cir. 1985) (nationalized bank was an “agency or instrumentality” of Mexican government). In fact, Congress expressly included in the FSIA a provision immunizing from attachment and execution “the property . . . of a foreign central bank” located in the United States. 28 U.S.C. § 1611(b)(1). The legislative history of this provision, “support[s] the view that courts should give a broad interpretation to the immunity of a foreign central bank.” Patrikis, 1982 U. Ill. L. Rev. at 282.

The specific activity at issue in this case – central bank gold loans – are clearly protected from judicial attack by the FSIA. As noted above, the “custody and administration” of a nation’s gold reserves, including the investment of such reserves, is one of the typical functions of a central bank. Patrikis, 1982 U. Ill. L. Rev. at 274. In fact, it has also been noted that “[n]o other activities of a sovereign are more inherently characteristic of sovereignty than the custody *and management* of a country’s financial reserves. . . .” Patrikis, 1982 U. Ill. L. Rev. at 286 (emphasis added). *See, e.g., Olympic Chartering S.A. v. Ministry of Industry & Trade of Jordan*, 134 F. Supp. 2d 528 (S.D.N.Y. 2001) (noting that “central banking functions” includes the investment of foreign currency reserves). The Swiss National Bank, for example, which serves as Switzerland’s central bank, lists among its official duties “investing [Switzerland’s] currency

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foreign state, or is owned primarily by the foreign state or political subdivision thereof; and (3) is not a U.S. citizen and is not created under the laws of a “third country” *i.e.*, one other than the country on whose behalf it acts. 28 U.S.C. § 1603(b).

reserves [including] gold, . . . [to] ensure confidence in the Swiss franc, serve to prevent and overcome crisis situations and may be utilized for interventions in foreign exchange markets.”<sup>5</sup>

In *De Sanchez*, the Fifth Circuit Court of Appeals held that the issuance of and refusal to honor a check by the central bank of Nicaragua was protected by the FSIA. 770 F.2d at 1395-96. In so holding, the Court held that even though private banks also issue and cancel checks, the acts at issue were immune because the central bank’s acts related to its regulation of foreign exchange; a sovereign function. *Id.* at 1394-96. As the Court held:

Banco Central’s purpose in selling dollars – namely to regulate Nicaragua’s foreign exchange reserves – was not ancillary to its conduct; instead, it defined the conduct’s nature. Banco Central was not merely engaging in the same activity as private banks with a different purpose; in a basic sense, it was engaging in a different activity. In was performing one of its intrinsically governmental functions as the Nicaraguan Central Bank. As such, it was wearing its sovereign rather than its commercial hat. ***If we were to hold that a central bank is subject to suit for its actions in regulating its foreign exchange reserves, we would interfere with this basic governmental function and would thereby touch sharply on “national nerves,” contrary to the policies underlying the FSIA.***

*De Sanchez*, 770 F.2d at 1393-94 (internal citations and footnote omitted) (emphasis added).

Similarly, when the central banks lend gold, they are performing “intrinsically governmental functions” and do so for a national purpose. To interfere with these activities would undoubtedly touch upon sensitive “national nerves,” in contravention of the FSIA.<sup>6</sup>

Furthermore, many of the absent bullion banks and gold producers are based outside the United States and may not be subject to the personal jurisdiction of this Court. It will therefore be impossible to join all necessary parties in this action.

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<sup>5</sup> See [www.snb.ch/e/snb/aufgaben\\_ziele/content\\_auf.html](http://www.snb.ch/e/snb/aufgaben_ziele/content_auf.html). (Exhibit 6).

<sup>6</sup> In addition to seeking recourse in the courts of their own countries or elsewhere, the central banks would also likely work through diplomatic channels to obtain redress. In adjudicating this case, the Court will have injected itself in the conduct of U.S. foreign policy, thereby encroaching on the powers of the executive and legislative branches. See Memorandum in Support of Motion of Defendant Barrick Gold Corporation to Dismiss for Failure to State a Claim, at 19 - 22 (discussing act of state doctrine), filed concurrently with this motion.

### **III. THE COURT SHOULD DISMISS THIS ACTION FOR FAILURE TO JOIN INDISPENSABLE PARTIES**

Once a party is found to be both “necessary” and unavailable, the court is to decide whether in “equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable.” Fed. R. Civ.

P. 19(b). Here, the action should be dismissed because the parties to the contracts that plaintiffs seek to enjoin are not present, necessary parties are immune from suit, and the prejudice to the named defendants and to the absent parties outweighs any potential prejudice to plaintiffs from dismissal.

*First*, each party to a contract that would be terminated or rescinded by the judgment is not only necessary, but indispensable. As one court has noted, “a contracting party is the paradigm of an indispensable party.” *Travelers Indem. Co. v. Household Int’l, Inc.*, 775 F. Supp. 518, 527 (D. Conn. 1991). *See also Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 788 (D.C. Cir. 1983) (“Numerous cases . . . hold that ‘an action seeking rescission of a contract must be dismissed unless all the parties to the contract, and others having a substantial interest in it, can be joined’”) (*quoting Action Co. v. Bachman Foods, Inc.*, 668 F.2d 76, 81-82 (1<sup>st</sup> Cir. 1982)); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9<sup>th</sup> Cir. 1975) (“No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination are indispensable”). As contracting parties, and as entities with a “substantial interest” in all of the contracts at issue, the central banks, the absent bullions banks, and the absent gold producers are clearly “indispensable” to this litigation.

*Second*, where a necessary party is immune, as are the central banks in this case, the resulting prejudice to the parties typically cannot be overcome. As the court stated in *Enterprise Management Consultants Inc. v. United States*, 883 F.2d 890, 894 (10<sup>th</sup> Cir. 1989), “[w]hen . . . a necessary party under Rule 19(a) is immune from suit, ‘there is very little room for balancing of the other factors’” because immunity “may be viewed as one of those interests compelling by

themselves.” (Quoting *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 n. 13 (D.C. Cir. 1986)). See *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9<sup>th</sup> Cir. 1991) (“when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor” for dismissal). This is because “the sovereign immunity barrier moots the potential of prejudice” *i.e.*, where a necessary defendant is not subject to suit, plaintiffs have no redress in the first place. *A.J. Kellos Constr. Co. v. Balboa Ins. Co.*, 495 F. Supp. 408, 414 (S.D. Ga. 1980), *rev’d on other grounds*, 661 F.2d 402 (5<sup>th</sup> Cir. 1981).

*Third*, balanced against plaintiffs’ dubious claims is the very real and extreme prejudice that the central banks, J.P. Morgan and the absent bullion banks, and Barrick and the absent gold producers would suffer if the case goes forward. As discussed above, an order by this Court terminating the contracts among the gold producers, the bullion banks and the central banks would impair the central banks’ ability to recover on their gold loans. It would expose the bullion banks to monumental financial losses, as well as the risk of inconsistent legal obligations. And it would expose the gold producers to price risk that they had legitimately contracted to mitigate. Under these circumstances, the prejudice to the parties before the Court that would flow from the award of the requested relief in the absence of the necessary parties renders those parties indispensable. See Fed. R. Civ. P. 19(b) (“The factors to be considered by the court include . . . to what extent a judgment rendered in a person’s absence might be prejudicial to the person or those already parties”); see also *Shelton v. Exxon Corp.*, 843 F.2d 212, 216 (5<sup>th</sup> Cir. 1988) (noting that the first factor delineated in Rule 19(b), whether any party will be prejudiced by the absence of the necessary parties, is the “most critical factor in [the court’s] Rule 19 analysis”); *Clinton v. Babbitt*, 180 F.3d 1081, 1090-91 (9<sup>th</sup> Cir. 1999) (“we affirm the district court’s judgment dismissing the action” in light of the fact that the “Hopi Tribe is an indispensable party” and “the Tribe will clearly suffer prejudice if the plaintiffs are successful in their action”); *Pit River Home & Agric. Coop. Ass’n v. United States*, 30 F.3d 1088, 1101 (9<sup>th</sup> Cir. 1994) (affirming district court’s dismissal after addressing each of the four factors in the

19(b) analysis and determining that “[t]he Council will clearly suffer prejudice . . .”); *Village of Hotvela Traditional Elders v. Indian Health Servs.*, 1 F. Supp. 2d 1022, 1029-30 (D. Ariz. 1997), *aff’d mem.*, 141 F.3d 1182 (9<sup>th</sup> Cir. 1998) (dismissing plaintiff’s suit after applying the four-part “Rule 19(b) indispensable party inquiry” and finding that the immune “Tribe would suffer prejudice”).

Nor is there any apparent way of shaping the relief requested in a manner that would prevent or even mitigate the prejudice. *See* Fed. R. Civ. P. 19(b) (“The factors to be considered by the court include . . . the extent to which . . . by the shaping of relief, or other measures, the prejudice can be lessened or avoided”). What plaintiffs seek is clear: an injunction that both terminates all existing contracts among gold producers, the bullion banks, and the central banks, and enjoins them from entering into such contracts in the future. The parties to those contracts are not present, some of those parties enjoy immunity, and no formulation of plaintiffs’ relief can lessen the prejudice to the named defendants or the absent parties.

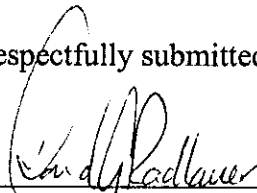
Termination of either (1) the forward sales contracts between Barrick and the other gold producers and the bullion banks or (2) the loan agreements between bullion banks and the central banks without addressing the rights of all parties would make it impossible to accord “complete relief” among the existing parties. Termination of the forward sales contracts would leave the bullion banks with not right to recover the promised gold from the gold producers; yet, they will remain obligated to repay the borrowed gold to the central banks. In order to satisfy their obligations to the central banks, the bullion banks would have to purchase gold on the spot market at prices that may be substantially higher than the price at which they sold the borrowed gold. Even if performance by the bullion banks under these circumstances were not literally impossible, such relief could impose tremendous unforeseen costs, and, therefore, should not be awarded. *See, e.g., International Ass’n. of Machinists & Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 553 (1<sup>st</sup> Cir. 1972) (courts of equity must take into account harm to defendants flowing from injunction and must “choose the course likely to cause the least injury”). *Cf. Hecht v. Bowles*, 321 U.S. 321, 329 (1943) (essence of equity jurisdiction is “to do

equity,” and “[t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between public interest and private needs . . .”). Because the transactions at issue in this case arose among the gold producers, the bullion banks, *and* the central banks, equitable relief cannot be provided without addressing the rights of each of these parties.

## CONCLUSION

For the reasons set forth herein, the Court should dismiss the first four causes of action in the Complaint.

Respectfully submitted,



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Dated: February 28, 2003

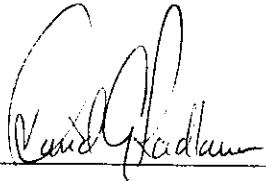
## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT BARRICK GOLD CORPORATION TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES was served by hand delivery or first class mail postage prepaid this 28<sup>th</sup> day of February, 2003, upon each of the parties listed below:

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