IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AZQUERRETA, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

Nos. 12-105-cv (L), 12-109-cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON), 12-943-cv (CON), 12-951-cv (CON), 12-968-cv (CON), 12-971-cv (CON)

ORAL ARGUMENT REQUESTED

MOTION BY NON-PARTY THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE, FOR LEAVE TO APPEAR AND TO SUBMIT BRIEFS AS AN APPELLANT ON THE MERITS OF THE DISTRICT COURT'S NOVEMBER 21, 2012 INJUNCTIVE ORDER AND OPINION

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Pursuant to Federal Rule of Appellate Procedure 27(a) and Local Rule 27.1(a), non-party The Bank of New York Mellon ("BNY Mellon"), as indenture trustee, respectfully submits this motion for leave to appear to challenge the merits of the injunctive order and opinion issued by the district court on November 21, 2012 (the "Amended Injunctions"), and to participate as an appellant in accordance with the briefing schedule this Court issued in its November 28, 2012 order.[1]

PRELIMINARY STATEMENT

On November 21, 2012, the district court issued Amended Injunctions applying specifically and directly to BNY Mellon. Under the Amended Injunctions, if the Republic of Argentina makes payments to certain of its bondholders (the "Exchange Holders") for whom BNY Mellon is indenture trustee under a trust indenture (the "Indenture"), without making "Ratable Payments" to the Plaintiffs (holders of different bonds for which BNY Mellon is *not* indenture trustee), BNY Mellon is prohibited from distributing funds received from Argentina to the Exchange Holders. That is so, even though BNY Mellon is not a party to the proceedings below and otherwise would be legally obligated to distribute those funds under the Indenture. The district court cited no case law supporting the extension of its contempt power to BNY Mellon and none exists.

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[1] Under the Court's November 28 briefing order, briefs are due on December 28 (appellant), January 4, 2013 (*amicus* and intervenor), January 25, 2013 (appellee), and February 1 (appellant reply). Dkt. No. 490.

The Amended Injunctions, as extended to BNY Mellon, are unlawful and should be vacated by this Court.

Courts cannot issue injunctions to enjoin a non-party's entirely lawful conduct for the purpose of remedying a party's purportedly unlawful conduct, especially where, as here, the non-party plays no role in the unlawful conduct and could not control or prevent it. Federal Rule of Civil Procedure 65(d) does not authorize such an expansive remedy, and fundamental due process limitations foreclose it. This is especially true where, as here, the court's injunction against non-parties is contrary to the evidence and based on little supportive reasoning.

As an aggrieved party expressly subject to the district court's unlawful Amended Injunctions, BNY Mellon should be heard in this appeal so it properly can challenge the injunctive order and related rulings below. BNY Mellon filed a timely notice of appeal of the Amended Injunctions on December 3, 2012. BNY Mellon respectfully requests that the Court grant it leave to appear as a non-party appellant, and give it the opportunity to submit briefs and to participate in oral argument on the merits of the Amended Injunctions, in accordance with this Court's November 28 briefing schedule.[2]

[2] As discussed below, because BNY Mellon plainly is aggrieved by the Amended Injunctions—which specifically name and restrain BNY Mellon and several of its affiliates—it has standing to appeal the Injunctions, and accordingly should be treated as an appellant in this Court and permitted to brief the merits of the Injunctions in that capacity. Alternately, if instead the Court deems BNY

RECENT FACTUAL BACKGROUND

In February 2012, the district court entered injunctions directing Argentina to make "Ratable" bond payments to the Plaintiffs concurrently with or in advance of any payments to the Exchange Holders. *NML Capital, Ltd. v. Republic of* Argentina, 699 F.3d 246, 254 (2d Cir. 2012). Argentina appealed.

In its October 26 decision affirming certain aspects of the district court's injunctive order, this Court concluded that Argentina breached its contractual obligation not to discriminate against the Plaintiffs' bonds in favor of the Exchange Holders' bonds, and upheld the district court's injunction as applied to Argentina. *Id.* at 250. But the Court found that the record was "unclear as to … how the injunctions apply to third parties" that were involved in the process of Argentina's bond payments, and expressed "concerns about the Injunctions' application" to those third parties. *Id.* at 250, 264. It therefore remanded with instructions that the district court "more precisely determine the third parties to which the Injunctions will apply" so that this Court then could "decide whether the Injunctions' application to" those third parties "is reasonable" and otherwise consider the "merits of the remedy…." *Id.* at 264-65.

Mellon to be an intervenor for purposes of briefing, BNY Mellon respectfully requests that the Court grant BNY Mellon leave to participate in this appeal as an intervenor and to brief the merits of the Injunctions in that capacity. By this Motion, however, BNY Mellon is not seeking to intervene in, or otherwise insert itself as a party to, the proceeding in the district court.

On November 9, the district court held a conference and ordered an accelerated briefing schedule, requiring Plaintiffs to file a brief on November 13, responding parties (including any interested non-parties) to file briefs by November 16, and Plaintiffs to file a reply brief on November 19. *See* Ex. A to the Declaration of Evan K. Farber, dated December 3, 2012 (Transcript of Nov. 9, 2012 Proceedings in District Court, pp. 4, 18-19, No. 08-cv-6978, *et al.* (TPG)). (All exhibits cited herein are attached to the Farber Declaration).

For its part, BNY Mellon argued that the injunctions could not apply to it under Rule 65(d) because it was not an "agent" of Argentina and, in executing its ministerial indenture trustee role by distributing Argentina's payments to the *Exchange Holders*, was not "aiding and abetting" Argentina's breach of its agreement with the *Plaintiffs*. *See* Ex. B (Br. of Non-Party BNY Mellon, filed Nov. 16, 2012, Dkt. No. 396, 08-cv-6978, *et al.* (TPG)). BNY Mellon also argued that enjoining it from distributing payments to the Exchange Holders could subject it to inconsistent claims, because the Indenture required it to distribute those payments. *Id.*, pp. 2-3, 15-16. BNY Mellon stated further that, if the injunctions were applied to it, the district court should give it guidance on how to reconcile its obligations under the Indenture and the injunctions. *Id.*, p. 17.

On Wednesday, November 21, the district court issued two opinions and an order imposing the Amended Injunctions on Argentina, BNY Mellon, and other

non-parties, and lifting the stay effective on December 15, 2012, the date of Argentina's scheduled payments to the Exchange Holders. *See* Exs. C (Order), D (Injunction Opinion). The court ordered that, whenever Argentina pays any amount to the Exchange Holders, it "shall concurrently or in advance make a 'Ratable Payment' to" the Plaintiffs. Ex. C, ¶ 1(c). The court made clear that the Republic was enjoined from violating this order. *Id.* ¶ 1(d).

The court further concluded that BNY Mellon and certain other non-parties—because of their ministerial role as participants in the "payment process of the Exchange Bonds" (Ex. C, ¶ 2(e))—were bound by the Amended Injunctions. It found that, in order to ensure enforcement of the Amended Injunctions ordering Argentina to make the required "Ratable Payments" to the Plaintiffs, it was "necessary that the process for making payments on the exchange bonds be covered by the Injunctions, and that the parties participating in that process be covered…." Ex. D, p. 9. Although the court acknowledged that "[i]t is probably true that these parties are not all agents of Argentina," it concluded—with little reasoning or evidence (other than the Indenture itself)—that "they surely are 'in active concert or participation' with Argentina in processing the payments from Argentina to the exchange bondholders." *Id.*, pp. 10-11.

With only minimal explanation, the district court rejected BNY Mellon's objection that the Amended Injunctions would interfere with the performance of its

duties under the Indenture. The court declared that if Argentina attempted to pay the Exchange Holders without making "Ratable Payments" to the Plaintiffs—in violation of the Amended Injunctions—"this would not involve the normal and proper situation dealt with by BNY under the indenture, and dealt with by others in the chain." Ex. D, pp. 11-12. It thus determined that BNY Mellon and other third parties in the "chain" of payment "should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps." *Id.*, p. 12.

The court also declined to provide BNY Mellon with the guidance it requested as to how, if the court extended the Amended Injunctions to BNY Mellon, BNY Mellon should reconcile its duties under the Amended Injunctions with its duties under the Indenture. BNY Mellon had explained that the Indenture contains a number of exculpatory provisions, including provisions that (1) protect BNY Mellon from any liability for any actions taken in good faith (and in the absence of gross negligence), (2) absolve BNY Mellon from taking any actions "illegal or contrary to applicable law or regulation[,]" and (3) give BNY Mellon "absolute and uncontrolled discretion as to the exercise of its functions[.]" Ex. B, pp. 16-17. And, it asked the court to "make clear" that, if it extended the Injunctions to BNY Mellon, "BNY Mellon is under no obligation under the Indenture or otherwise to expose itself to contempt sanctions by paying out any

funds delivered by Argentina in the event Argentina violates the Injunction[s]." *Id.*, p. 17. In response, the court provided no such clarity.

Pursuant to the procedure set forth in this Court's decision in October 2012, the mandate automatically returned to this Court upon the district court's issuance of the Amended Injunctions. *NML Capital*, 699 F.3d at 265. In its November 28 order, the Court issued a stay pending its review of the Amended Injunctions, and set forth a briefing schedule. Dkt. No. 490.[3]

ARGUMENT

I. BNY Mellon Has Standing In This Court To Challenge The Amended Injunctions As A Non-Party Appellant.

This Court long has recognized the standing of a non-party to challenge on appeal a district court's judgment where the non-party has "a plausible affected interest" in the judgment. *See, e.g.*, *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 77 (2d Cir. 2006) (holding non-party had standing on appeal). Consistent with this standard, this Court and its sister circuits permit non-parties in the district court to appeal injunctions and other equitable

[3] On November 30, Plaintiffs filed a motion in this Court asking that Argentina be required to post a bond and, if it fails to do so, that the stay be lifted *as to Argentina*. Dkt. No. 506-1. In doing so, Plaintiffs identified the distinct circumstances facing the interested non-parties, including BNY Mellon, noting: "Even if Argentina fails to post security and the stay is lifted as to Argentina, this Court's stay could remain in place as to any institutions that might be bound under Federal Rule of Civil Procedure 65(d)." *Id.* at 17 n.4.

decrees that apply explicitly and directly to those non-parties. *See, e.g., Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127-29 (2d Cir. 2009) (non-party Argentinian government body permitted to appeal orders "authorizing restraints and attachment of pension funds managed by" that body);[4] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 81-82 (2d Cir. 2002) (non-party Indonesia's Ministry of Finance permitted to appeal an order attaching Ministry's claimed funds); *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 335 (2d Cir. 1985) (holding that non-party states had "standing to challenge the injunction, since it imposes direct restrictions on their activities").[5]

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[4] In *Aurelius Capital Partners*, for example, this Court permitted the interested non-party—which, like BNY Mellon here, appeared as a non-party in the district court on a limited basis to argue against the entry of orders that specifically restrained it—to participate as an appellant and submit briefs accordingly. *See Aurelius Capital Partners*, 2009 WL 8174779 (non-party appellant's opening brief); 2009 WL 8174776 (non-party appellant's reply brief).

[5] *See also AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310 n.10 (11th Cir. 2004) ("Another instance in which a nonparty may be sufficiently bound by a judgment to qualify as a party for purposes of appeal is when the nonparty is purportedly bound by an injunction.") (citations omitted); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996) (finding standing for nonparty where injunction confronted nonparty "with the choice of either conforming its conduct to the dictates of the injunction or ignoring the injunction and risking contempt proceedings"); *Thompson v. Freeman*, 648 F.2d 1144, 1147 n.5 (8th Cir. 1981) (holding that non-party federal agency, purportedly bound by injunction under Rule 65(d), had standing to appeal) (citations omitted).

Under these precedents, BNY Mellon—a non-party below specifically named in, and restrained by, the Amended Injunctions—unquestionably has a "plausible affected interest" in the Injunctions sufficient to support its standing to challenge them in this Court as an appellant.

II. The Amended Injunctions, As Extended To Non-Party BNY Mellon, Are Legally Flawed And Set A Dangerous Precedent.

The district court's decision to extend its Amended Injunctions to BNY Mellon is based on a fundamentally flawed application of Federal Rule of Civil Procedure 65(d), a misapprehension of the law of trust indentures, and an unlawful expansion of the injunctive power to disrupt BNY Mellon's contractual relationships with the Exchange Holders under the Indenture. The merits of BNY Mellon's arguments should be resolved by briefing and argument in this appeal.

A. BNY Mellon Owes Only Those Duties Set Forth In The Indenture And Those Duties Run To the Exchange Holders, Not Argentina.

Unlike a regular trustee, which has common law duties beyond those set out in the trust agreement, the duties and conduct of an indenture trustee are governed exclusively by the terms of the indenture. Here, the Indenture is explicitly intended for the benefit of the Exchange Holders, and BNY Mellon's duties are owed directly to those Exchange Holders, not to Argentina.

"The trust indenture is a device by which a corporation or governmental entity borrows money from the general public or large institutional investors to

issue securities." Robert I. Landau and Romano I. Peluso, *Corporate Trust Administration and Management*, p. 35 (6th ed. 2008). The trust indenture is a contract among the issuer (here Argentina), the indenture trustee (here BNY Mellon), and the holders of the securities issued by the issuer (here the Exchange Holders). *Id.* at 42; *see also Greenwich Fin. Servs. Distressed Mortg. v. Countrywide Fin. Corp.*, 654 F. Supp. 2d 192, 196-97 (S.D.N.Y. 2009) (same).

In defining the scope of these relationships, this Court has emphasized the importance of limiting the duties of indenture trustees to those explicitly set out in the applicable indentures:

> An indenture trustee is not subject to the ordinary trustee's duty of undivided loyalty. Unlike the ordinary trustee, who has historic common-law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement.

Meckel v. Cont'l Res. Co., 758 F.2d 811, 816 (2d Cir. 1985) (citations omitted); *see also Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (It is "well-established under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture") (citations omitted). These limited duties follow from the "limited, 'ministerial' functions of indenture trustees…." *Racepoint Partners, LLC v. JPMorgan Chase Bank, N.A.*, 14 N.Y.3d 419, 425 (2010) (citation omitted).

The limited duties owed by an indenture trustee reflect the trustee's special role under an indenture. As this Court observed in *Meckel*, "[t]rust indentures are important mechanisms for servicing corporate debt and banks play an essential role in the process that brings corporate financings to the public market." *Meckel*, 758 F.2d at 815; *see also Elliott Assocs.*, 838 F.2d at 71 ("[I]t is no surprise that we have consistently rejected the imposition of additional duties on the trustee in light of the special relationship that the trustee already has with both the issuer and the debenture holders under the indenture.") (citations omitted).[6]

In this case, the Indenture makes clear that BNY Mellon acts independently of, and owes no duties to, Argentina. As indenture trustee, BNY Mellon acts "for the equal and proportionate benefit of the Holders…." Ex. E (Indenture, p. 1, attached as Exhibit A to the Declaration of Kevin F. Binnie, Dkt. No. 397, 08-cv-6978, *et al.* (TPG)). More specifically, BNY Mellon holds all monies paid to it under the Indenture "in trust" for itself and the Exchange Holders, *id.*, §§ 3.1,

[6] Congress recognized indenture trustees' important role in protecting and enforcing the rights of bondholders in its enactment of the Trust Indenture Act of 1939. *See* Trust Indenture Act ("TIA") § 302(a), 15 U.S.C. § 77bbb(a)(1) ("[T]he national public interest and the interest of investors in . . . bonds . . . which are offered to the public, are adversely affected . . . when the obligor fails to provide a trustee to protect and enforce the rights and to represent the interests of such investors"). Although the Indenture here is not subject to the TIA, the terms of the TIA "are broadly important since they also are adopted in the drafting of indentures that are not subject to the TIA." James Gadsden, *Introduction to the Annotated Trust Indenture Act*, 67 Bus. Law. 979, 982-93 (Aug. 2012).

3.5(a), 5.5, 11.2, and Argentina has "no interest whatsoever in such amounts," *id.*, § 3.5(a). *Accord EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012) (citations omitted). In addition, BNY Mellon alone has authority over any trustee paying agent as defined in the Indenture. Ex. G, § 3.5(a) ("[A]ny trustee paying agents appointed pursuant to this Indenture shall be agents solely of the Trustee, and the Republic shall have no authority over or any direct relationship with any such trustee paying agent or agents.").

In the event Argentina defaults on payments to the Exchange Holders, the Indenture provides for BNY Mellon to exercise remedies against Argentina and for the benefit of the Exchange Holders. This includes the right to:

- declare the entire indebtedness under the Notes immediately due and owing, *id.* § 4.4(a);
- institute proceedings "in its own name and as trustee of an express trust" for all amounts unpaid under the Notes and all costs of collection, *id.* at § 4.4(c), (d); and
- pursue any available remedy to collect amounts owed by Argentina, *id.* at § 4.6.

Pursuant to the Indenture, the Exchange Holders direct BNY Mellon with regard to the exercise of rights or remedies against Argentina. *Id.* at §§ 4.8.

To summarize, BNY Mellon, as indenture trustee, holds funds received from Argentina in trust for payment to the Exchange Holders. BNY Mellon is obligated to protect the interests of the Exchange Holders in accordance with the terms of the

Indenture. At the same time, the Indenture imposes no such duties on BNY Mellon for the benefit of Argentina. In its circumscribed role as indenture trustee, BNY Mellon plainly does not come within Rule 65's limited reach to non-parties. The district court's bare conclusion—unsupported by any authority—that BNY Mellon "surely [is] 'in active concert and participation' with Argentina['s]" violation of the Injunctions, Ex. D, p. 11, and thus subject to those Injunctions under Rule 65, is plain error.

B. The Amended Injunctions, As Extended To Non-Party BNY Mellon, Are Based On A Flawed Application Of Rule 65(d) To BNY Mellon's Lawful Conduct As Indenture Trustee.

1. There Is No Recognized Legal Authority For Enjoining Non-Party BNY Mellon From Carrying Out Its Trustee Duties.

The Supreme Court has made clear that there are "fundamental limitations on the remedial powers of the federal courts" which permit their exercise "only on the basis of a violation of the law…." *Gen. Bldg. Contractors Ass'n, Inc. v. Penn.*, 458 U.S. 375, 399 (1982) (quotations omitted). Thus, a non-party's lawful conduct that is "independent" of a party's wrongful conduct generally falls outside the scope of a federal court's injunctive power. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945) (injunctive power is not "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"); *Shakhnes v. Berlin*, 689 F.3d 244, 257 (2d Cir. 2012)

("[a]n injunction is overbroad when it restrains … legal conduct") (citation omitted).

Indeed, as Judge Learned Hand emphasized in one of this Court's seminal opinions on federal injunctive powers, courts may only exercise their injunctive powers over the independent conduct of a non-party when that conduct substantially aids the ***wrongful act*** of a party:

> [N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930).

Rule 65(d)'s extension of courts' injunctive power to "other persons who are in ***active*** concert or participation with" the parties or the parties' "officers, agents, servants, employees, and attorneys" is a codification of this long-standing principle. The district court concluded that BNY Mellon is in "active concert or participation" with Argentina. Ex. D, p. 11. Under the plain text of Rule 65 and the settled case law construing it, however, the district court is incorrect.

First, extension of an injunction to non-parties based on aiding and abetting is conditioned upon "active concert or participation" with the parties or their agents. It is well settled that aiding and abetting liability requires a showing of "substantial assistance" in committing the violation of the injunctive order. *See Alemite Mfg.*, 42 F.2d at 832. "Substantial assistance may only be found where the alleged aider and abettor 'affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.'" *In re Sharp Int'l Corp.*, 403 F.3d 43, 50 (2d Cir. 2005) (citations omitted).

Measured against this standard, there is no basis to find that BNY Mellon is aiding and abetting Argentina in its underlying decision to pay or not to pay Plaintiffs. The only evidence before the district court of BNY Mellon's role was the Indenture itself. But BNY Mellon's mere receipt of funds under the Indenture, on behalf of the *Exchange Holders*, is not active concert or participation in Argentina's failure to pay *Plaintiffs*. It is not an action taken to help, benefit, or assist Argentina, *Alemite Mfg.*, 42 F.2d at 833, nor can it rise to the level of "affirmative assistance" or "concealment" of Argentina's independent failure to pay Plaintiffs, *In re Sharp Int'l Corp.*, 403 F.3d at 50. In short, BNY Mellon's ministerial actions under the Indenture have nothing to do with whether Argentina complies with the Injunctions. In fact, BNY Mellon's performance of its c obligations under the Indenture is entirely lawful, and this Court repeatedly has

stressed that "[a]n injunction is overbroad when it restrains … legal conduct." *Shakhnes*, 689 F.3d at 257 (citation omitted).

Second, where a non-party has an independent interest in the subject property, it cannot be punished for acting in accordance with that interest. *Heyman v. Kline*, 444 F.2d 65, 65-66 (2d Cir. 1971) ("Rule 65(d) does not grant a court power so broad 'as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law'") (quoting *Regal Knitwear*, 324 U.S. at 13) (other citation omitted).

Measured against this standard, BNY Mellon indisputably is acting in furtherance of such an independent interest, as it has an independent contractual duty to the Exchange Holders to act in their best interests. *See, e.g.*, Ex. G, p. 1 and § 3.1 (Argentina is to make all payments to BNY Mellon, and BNY Mellon is to hold such payments in trust for itself and the Holders). At the same time, Argentina retains no control over any funds paid to BNY Mellon, *see, e.g.*, *EM Ltd.*, 865 F. Supp. 2d at 423 (citations omitted). BNY Mellon acts solely for itself and the Exchange Holders in the subsequent distribution of funds to the Exchange Holders, and payment to the Exchange Holders has nothing to do with whether Argentina makes a concurrent payment to Plaintiffs.

2. The District Court Provided No Supportable Rationale For Its Extension Of The Amended Injunctions To BNY Mellon And Its Decision Contravenes Controlling Law.

The district court's explanation for its extension of the Amended Injunctions to cover BNY Mellon is flawed on every level.

It began by stating that extension of the Amended Injunctions to BNY Mellon was based on the "need"—created by the court's own Injunction requiring Argentina to make "Ratable Payments" to Plaintiffs when it makes payments to the Exchange Holders—to enforce that very Injunction *against Argentina*. Ex. D, p. 9. But a court's self-created "need" to enforce its own injunction against a purported wrongdoing party is not a license to expand its equitable power to sweep innocent *non-parties* within that injunction's ambit. *Cf. Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) (reasoning that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it" and stating that "it would be quite remarkable to hold that speech by a law-abiding [person] can be suppressed in order to deter conduct by a non-law-abiding third party"). And, Rule 65 itself cannot support such an expansion, because the Rules Enabling Act prohibits courts from using the Federal Rules of Civil Procedure to abridge the "substantive rights" of others—here, the rights of non-party BNY Mellon to carry out its lawful duties under the Indenture free of the overbroad Amended Injunctions. *See* 28 U.S.C. § 2072(b).

The court then compounded its errors when it declared, unsupported by any authority, that "surely" BNY Mellon is "'in active concert or participation' with Argentina in processing the payments from Argentina to the exchange bondholders.'" Ex. D, p. 11. But this *ipse dixit* is not the kind of finding required to support a permanent injunction under this Court's precedents.

Finally, the court determined that BNY Mellon's arguments based on its duties as indenture trustee "miss[ed] the point" because if Argentina violates the Injunctions by making payments to the Exchange Holders without making "Ratable Payments" to the Plaintiffs, "this would not involve the normal and proper situation dealt with by BNY under the indenture…." *Id.* This is wrong. Distribution of payments from Argentina to the Exchange Holders is *precisely* the "normal and proper situation dealt with by BNY under the indenture." The district court seemingly believes that its Amended Injunctions against *Argentina* can alter the contractual relationship between *BNY Mellon and the Exchange Holders*, but that is not the case.

In the end, given BNY Mellon's detachment from any violation of the Amended Injunctions by Argentina, use of the contempt power to punish it for Argentina's violations would unhinge contempt from its constitutional moorings. Where the extraordinary contempt power is invoked against non-parties, due process concerns are addressed by the express limitations embodied in Rule

65(d)—the scope of an injunction must be carefully confined only to those legally identified with an enjoined defendant, or who actively aid and abet that defendant in the enjoined conduct. Extension of the Amended Injunctions to bind BNY Mellon's independent conduct on behalf of itself and the Exchange Holders would take the power of contempt where it does not belong and produce results that the contempt power should not engender.

C. The Amended Injunctions Constitute Far-Reaching Judicial Intrusion Into Indenture Trustee Relationships And Threaten Upheaval In The Capital Markets.

The Amended Injunctions also undermine the proper role of indenture trustees, which play a critical role in the efficient functioning of capital markets.

Both this Court and Congress have recognized the "essential role" of trust indentures in servicing corporate debt and protecting the "national public interest and the interest of investors" in bonds. *Meckel*, 758 F.2d at 815; Trust Indenture Act § 302(a), 15 U.S.C. § 77bbb(a)(1). An indenture trustee's payment of bondholders from funds received from the issuer is a fundamental "ministerial" duty under the typical indenture. *See Racepoint Partners*, 14 N.Y.3d at 425. If the performance of such ministerial duties can be impaired as a consequence of an issuer's unrelated obligations to unrelated third parties, however, trustees will be exposed to additional and unforeseeable risks and expenses, and markets will be exposed to increased uncertainty. *See Sharon Steel Corp. v. Chase Manhattan*

Bank, N.A., 691 F.2d 1039, 1048 (2d Cir. 1982) (cautioning against creating "uncertainties" in the context of indenture trusts which "would vastly increase the risks, and therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice"). And, moreover, the increased risks and expenses for trustees would substantially diminish the willingness of financial institutions to serve in an indenture trustee capacity. But this is precisely the effect the Amended Injunctions would have if they are not reversed.

CONCLUSION

For the foregoing reasons, non-party BNY respectfully requests leave to appear to challenge the merits of the Amended Injunctions and, in its capacity as an appellant, to submit briefing on the merits in accordance with the Court's November 28 briefing schedule.

Dated: December 3, 2012

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