IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NML Capital, LTD Plaintiff, v. THE REPUBLIC OF ARGENTINA Defendant.	08 Civ. 6978 (TPG) 08 Civ. 1707 (TPG) 08 Civ. 1708 (TPG) and related cases **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW OF EXCHANGE BONDHOLDER GROUP REGARDING ISSUES REMANDED BY THE SECOND CIRCUIT AND IN SUPPORT OF MOTION TO VACATE PURSUANT TO RULE 60(b)

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The interested non-parties listed in Appendix A (collectively, the "Exchange Bondholder Group" or "EBG") submit this Memorandum Regarding Issues Remanded by the Second Circuit and in Support of Motion to Vacate Pursuant to Rule 60(b). Together the EBG represents holdings of over $1 billion worth of exchange bonds.[1]

PRELIMINARY STATEMENT

The Plaintiffs' proposed revisions to the Court's February 23, 2012 Order (the "Injunction") seriously threaten the interests of numerous innocent third party creditors of the Republic of Argentina (the "Republic"), including the EBG, who have not had a proper opportunity to be heard. These creditors and their predecessors-in-interest have already suffered tens of billions of dollars in losses as a result of the Republic's 2001 debt default and subsequent exchange offers under which 92% of aggrieved bondholders accepted less than thirty cents on the dollar. Yet the Injunction threatens to magnify the losses of these guiltless third-parties by making it impossible for them to receive payments that ***everyone*** agrees are lawfully owed, solely in an effort to force the Republic to make payments to the Plaintiffs.

If the Republic continues to comply with its domestic legislation prohibiting any payment to Plaintiffs—and for numerous reasons the Court must assume that it will—§ 2(e) of the Injunction will make it impossible for the EBG and others to receive payments to which they are lawfully entitled. The Court should make every effort to avoid a situation in which the Plaintiffs' non-payment of approximately $1.3 billion snowballs into a $20 billion crisis for innocent third parties. It is far beyond the bounds of equity to seek to enforce the rights of one litigant by jeopardizing the rights of others.

Plaintiff's attempt to silence the EBG members (*see* NML 11.13.12 Brief, at 24-25) — who have never had formal notice or an opportunity to be heard even though Plaintiffs' proposed injunction terms were unlawfully seize EBG's property—is particularly unseemly. Plaintiffs

[1] Other entities are expected to join the EBG. *See* Declaration of James P. Taylor dated November 16, 2012 ("Taylor Dec.") ¶ 2.

have every incentive to understate the default risk to encourage the Court to enter an injunction that ignores third-party rights. Argentine press reports, however, indicate that ***Plaintiffs have been purchasing credit default swaps effectively betting that the Republic will default***. Declaration of Stephen Choi dated November 16, 2012 ("Choi Dec.") ¶ 18. With the Republic's senior officials stating publicly that they will not pay the Plaintiffs, and the Plaintiffs making $100 million bets that the Republic will default on its obligations to the EBG, it is inarguable that the Injunction gravely jeopardizes the rights of third parties.

Recognizing the potential for injustice, the Second Circuit has requested that this Court "more precisely determine the third parties to which the Injunction[] will apply before [the Circuit] can decide whether [its] application to them is reasonable." Second Circuit Order dated Oct. 26, 2012 (the "2d Cir. Op."). As demonstrated below, Plaintiffs' proposal is not only at odds with fundamental principles of equity, but threatens to deprive the EBG members of their Due Process rights, and would be a taking under the Fifth Amendment.

The EBG fully understands that, in entering the Injunction, the Court sought to secure the a remedy for the Plaintiffs. Respectfully, we ask the Court to accept the Second Circuit's invitation to consider the effect of the Injunction on the interests of third parties like the EBG, recognize the serious harm that Plaintiffs' proposal would impose on innocent bondholders, and take necessary steps to ensure that any remedy does not interfere with payment of the Republic's lawful obligations to those creditors.

FACTS

A. The FAA Bonds and the Republic's Default

The relevant background is well known. Between 1994 and 2001, the Republic issued debt securities in the aggregate amount of approximately $82 billion pursuant to a Fiscal Agency Agreement (the "FAA Bonds"). Ex. 1: 2d Cir. Op., at 4, 7. The Republic defaulted on the FAA

Bonds in 2001. Ex. 1:[2] 2d Cir. Op., at 3. In the eleven years since its default, the Republic has not made payments under the FAA Bonds. Moreover, in 2005 the Republic enacted Law 26,017 (the "Lock Law"), which expressly prohibited any further payments under the FAA Bonds.[3] Ex. 1: 2d Cir. Op., at 6. The Lock Law has prohibited the Republic's courts from enforcing numerous judgments entered in respect of the FAA Bonds, and the holders of the bonds have had difficulty attaching the Republic's foreign assets to satisfy such judgments. Ex. 1: 2d Cir. Op., at 9. As recently as this week, numerous government officials including the President, Cristina Fernández de Kirchner, have stated publicly that they have no intention of paying even "one dollar" to holders of the FAA Bonds including the Plaintiffs. Ex. 2.

B. The Exchange Offers

In 2005 and 2010, the Republic initiated exchange offers pursuant to which the holders of FAA Bonds, including the Plaintiffs, were permitted to replace them with new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar (the "Exchange Bonds"). Ex. 1: 2d Cir. Op., at 5-6. The vast majority of FAA Bond holders elected to participate in these exchange offers. Ex. 1: 2d Cir. Op., at 9. By the conclusion of the 2010 exchange offer, holders of over 91% of the par value of the original FAA Bonds had agreed to allow the Republic to restructure approximately $74.5 billion worth of debt, incurring discounts of over 70 cents on the dollar (the "Exchange Bond Holders" or "EBHs"). Ex. 1: 2d Cir. Op., at 6-8. To date, the Republic has fully honored its obligations under the Exchange Bonds. Ex. 1: 2d Cir. Op., at 8.

C. The Republic's Payment Mechanism

The mechanism the Republic uses to make payments on the Exchange Bonds is set forth in the Trust Indenture between the Republic and the Bank of New York as Trustee dated June 2, 2005 (the "Indenture"). Ex. 3, ¶ 3. The Trustee is a fiduciary of the EBHs and is ***not*** an agent of

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[2] All Exhibits cited are attached to the Declaration of Sean F. O'Shea dated November 16, 2012.

[3] The Lock Law was briefly suspended in 2010 to enable Argentina to make an exchange offer, but it has since been reinstated. Ex. 1: 2d Cir. Op., at 7.

the Republic.[4] Ex. 3, ¶ 4. Pursuant to the Indenture, the Republic makes principal and interest payments on the Exchange Bonds to the Trustee, which receives them ***in trust for the EBHs***. Ex. 4, § 3.1. Once money has been paid to the Trustee, ***it is the property of the EBHs***, "and the Republic shall have no interest whatsoever in such amounts." Ex. 4, § 3.5; *see also* Ex. 3, ¶ 4. The Republic has paid all amounts due under the Exchange Bonds to the Trustee outside the United States in Argentina. Ex. 3, ¶ 4.

D. Gramercy's Status as an EBH

Beginning with its launch in 1999, Gramercy Emerging Markets Fund has, at various times, held an interest in FAA Bonds. Declaration of Robert S. Koenigsberger dated November 16, 2012 ("Koenigsberger Dec.") ¶ 2. Gramercy organized the 2010 Argentine debt restructuring, and tendered approximately $2.7 billion in face value of debt in connect therewith. *Id*. ¶ 3. In agreeing to accept a significant discount on the face value of its FAA Bonds in 2010, Gramercy relied on the Republic's willingness and ability to make payments on its Exchange Bonds. *Id*. ¶ 4. Currently, various Gramercy entities hold significant interests in Exchange Bonds with par values exceeding $400 million. *Id*. ¶ 8-9.

E. Other EBHs

Other large EBHs are members of the EBG. MFS and its affiliates hold nearly $392 million in Exchange Bonds; Brevan Howard and its affiliates hold nearly $237 million in Exchange Bonds; and SW and its affiliates hold approximately $12 million in Exchange Bonds. *See* Declaration of Robin A. Stelmach dated November 16, 2012 ¶¶ 1-3; Taylor Dec. ¶ 3; Declaration of David C. Hinman dated November 16, 2012 ¶ 2. The EBHs comprise a wide swath of the investing public, including such diverse organizations as pension funds, charitable foundations, and endowments. Koenigsberger Dec. ¶ 7. The interests of the EBHs, amounting to over ***$20 billion***, are at risk if the Injunction is not modified or vacated. Consequently,

[4] The Trustee was originally The Bank of New York ("BNY"), later The Bank of New York Mellon ("BNYM"). Ex. 3, ¶ 3.

numerous EBHs have expressed an interest in joining the EBG on this brief, but time has not permitted them to do so. Taylor Dec., ¶ 2.

ARGUMENT[5]

I. THE COURT SHOULD MODIFY OR REMOVE § 2(e) OF PLAINTIFFS' PROPOSED INJUNCTION TO AVOID IMPOSING UNFAIR AND UNREASONABLE BURDENS ON EXCHANGE BONDHOLDERS.

The Second Circuit has ***not*** affirmed the portion of the Plaintiffs' requested injunction (§ 2(e)), which prohibits the BNYM from remitting the EBHs' property to them, but rather has directed this Court to consider the impact of the injunction on innocent non-parties:

> Our concerns about the Injunctions' application to third parties do not end [with intermediary banks]. Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged order will apply to ***third parties generally***. Consequently, ***we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable***. Accordingly, we remand . . . for such further proceedings as are necessary to address the Injunctions' application to ***third parties*** . . . .

Ex. 1: 2d Cir. Op., at 28 (emphasis added). In its conclusion, the Court directed further proceedings as necessary to address the impact of the injunction on "***third parties and*** intermediary banks."[\6]

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[5] Not for the first time, Plaintiffs' brief seeks to silence the EBHs and deprive the Court of their views. NML 11/13/12 Brief, at 24-26; Ex. 5; Ex. 6: 11/9/12 Hearing, T31:24-32:9. However, the Court has already ruled that it will consider the EBHs' arguments (Ex. 6: 11/9/12 Hearing, T24:18-20; T33:1-6), and the Second Circuit has clearly instructed this Court to consider the impact of the proposed injunction on "third parties generally" (Ex. 1: 2d Cir. Op., at 28). Thus, the Court is acting well within its discretion in considering the EBHs' views as interested non-parties. *See, e.g., Aurelius Capital Partners, LP v. Argentina*, 584 F.3d 120 (2d Cir. 2009) (approving submissions by interested non-party without intervention because "[t]he district court acted well within its discretion to consider arguments presented by the Administration to secure a full understanding of the jurisdictional issues"); *Krimstock v. Kelly*, 464 F.3d 246 (2d Cir. 2006) (district court allowed submissions by interested non-parties); *Granite Enterprises Ltd. v. Virgoz Oils & Fats Pte. Ltd.*, Nos. 09-cv-4534, 09-cv-4750, 09-cv-4751, 2011 WL 4072146 (S.D.N.Y. Sept. 13, 2011) (releasing funds frozen by court order on interested non-party's motion to vacate).

A. Plaintiffs' Proposed Injunction is Unreasonable in its Inevitable Effect on the EBHs' Property.

The Second Circuit's discomfort with the third party impact of the injunction is well-founded. The law prohibits injunctions that place an unreasonable burden on third parties. *See Cook Inc. v. Boston Sci. Corp.*, 333 F.3d 737, 743-44 (7th Cir. 2003) (modifying injunction in contract case to excise portion preventing defendant from using information at issue to seek regulatory approval on medical device because the language impermissibly affected non-parties; injunction "violate[d] the principle that in determining the appropriate scope of an injunction the judge must give due weight to the injunction's possible effect on third parties."); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1141-42, 1144 (D.C. Cir. 2009) (in context of RICO violation, vacating injunction causing "a potentially serious detriment to innocent persons not parties to or otherwise heard" where defendant's third party retailers would potentially lose substantial revenue: "Even though not explicitly bound by the terms of an injunction on pain of contempt, third parties may be so adversely affected by an injunction as to render it improper."); *United States v. Zang*, 703 F.2d 1186, 1195 (10th Cir. 1982) ("The untainted interests which may exist and the interests of innocent third parties should be protected") (in context of RICO violation, remanding order of forfeiture); *Cf. Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930) (L. Hand, J.) ("no court can make a decree which will bind any one 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.") (holding that injunction cannot bind third party who is not legally identified with enjoined party and does not seek to abet enjoined party in committing an act forbidden under injunction); *see also General Bldg. Contractors Assoc., Inc. v. Penn.*, 458 U.S. 375, 399-400 (1982) (invalidating injunction requiring co-defendants who were not found liable to incur expenses). As explained in greater detail below, the conscription

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[6] As the structure and language of its opinion makes clear, and contrary to Plaintiffs' suggestion that the injunction "inevitabl[y] bars payments to the EBHs" (NML 11/13/12 Brief, at 25), the Court of Appeals was drawing a distinction between intermediary banks and all other third parties affected by the Injunction.

of the EBHs' property into the service of collecting a civil contract judgment for entirely unrelated parties (the Plaintiffs), to whom the EBHs owe nothing and have done no harm, is an unsupported exercise of judicial power.

Plaintiffs' proposed modification to § 2(e) of the injunction is grossly unfair, unprecedented, and unreasonable in its application to EBHs.[7] There is no dispute that the EBHs are entitled to full and timely payments under the Exchange Bonds, or that those payments, once transferred from the Republic to BNYM in Argentina,[8] are the legal and exclusive property of the EBHs. *See* Facts, supra, Section C. It is further beyond serious dispute that the Republic is not going to pay the Plaintiffs. The Court (and the Second Circuit) has repeatedly and emphatically acknowledged as much,[9] and Plaintiffs' latest brief convincingly demonstrates that the Republic will never pay them. NML 11/13/12 Brief, at 1-2. This is unfortunate, but due in absolutely no part to the actions of the innocent EBHs. Given the Republic's position, there are only two realistic responses by the Republic to the injunction Plaintiffs seek.

The first scenario is that the Republic pays the amount due to the EBHs to the Trustee, but refuses to pay Plaintiffs. Under Plaintiffs' proposed order, the EBHs' funds – their ***undisputed property*** – will be then be frozen at BNYM indefinitely.[10] This result will obtain despite the fact that the EBHs – many of whom have investors that include the pension plans of public employees (including police officers and firefighters) and charitable foundations – (i) are

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[7] Plaintiffs cite no case granting an injunction comparable to what they seek.

[8] Plaintiffs dispute whether the EBHs are paid via transfers to BNYM Argentina as opposed to BNYM New York. NML 11/13/12 Brief, at 11 n.6. Although the EBHs understand this is wrong, it is irrelevant in any event. The salient point is that payments by the Republic to BNYM at *any* location are the property of the EBHs.

[9] *See* Ex. 6: 11/9/12 Hearing, T10-16; Ex. 7: 2/23/12 Hearing, T3-4, 15, 31, 48-49; Ex. 8: 2d Cir. Hearing, T13-14, 23, 26-27, 78-79.

[10] The genesis of § 2(e), according to Plaintiffs, was to prevent BNYM from "aiding and abetting" the Republic's ongoing violations. Of course, as the Court has already recognized, BNYM has a contractual and fiduciary duty to remit the EBHs' property to them, and doing so does not "aid and abet" anything other than the satisfaction of the Trustee's legal obligations as the EBHs' fiduciary (and certainly not the Republic's payment, which is already accomplished at the time BNYM receives the funds). Ex. 7: 2/23/12 Hearing, T7:13-8:5.

plainly without fault, (ii) owe no obligation of any kind to the Plaintiffs, and (iii) have already taken a massive discount on their original investment in order to facilitate the type of restructuring that has become critical to the global economy.

The only other plausible response to the injunction by the Republic is a refusal to pay BNYM the amount due to the EBHs. If that occurs, the injunction will have turned a relatively minor default into a *cataclysmic* default that will further unsettle the already fragile global economy, (*see* Choi Dec. ¶¶ 8-22) and unquestionably spur an avalanche of follow-on litigation involving the EBHs, multiple banks, and the Republic, which may be the intended consequence of Plaintiffs' motion.[11] Plaintiffs will therefore be successful in their efforts to goad this Court into "solving" a $1.3 billion problem affecting fewer than 0.92% of the original foreign denominated Bondholders (Ex. 7: 2/23/12 Hearing, T26:5-8), by creating a potential over $20 billion problem affecting 100% of the Republic's Bondholders (to say nothing of the collateral effects on the skittish and frail international markets).[12]

B. Plaintiffs' Proposed Injunction is Unreasonable Because It Attempts to Use the Property of the Innocent Non-Party EBHs to Collect a Judgment for Plaintiffs.

The Court's initial reaction to Plaintiffs' injunction request went beyond deep skepticism, to outright rejection:

> - THE COURT: Now, look, [the proposed injunction] would indeed be a mechanism for enforcement but it also presents a ***very serious problem***. So let me ask you this. Is there any legal authority, is there any legal basis for me to ***use the pari passu clause to interfere with the payment to the exchangers***? . . . Now, if I entered this order, this would impose an obligation on the banks and it might ***impose an impediment*** upon the banks ***with respect to the exchange offer people which does not exist now***. They get the

[11] As Plaintiffs are reportedly trading credit default swaps betting on an Argentine default (a bet that directly contradicts their representations to this Court that the injunction they requested would lead to payment by the Republic), they presumably welcome default. *See* Choi Dec. ¶ 18; Ex. 12. Whatever the chaos that would ensue, Plaintiffs are playing both sides of the litigation and stand to profit whatever the outcome.

[12] In a 2004 amicus brief filed in a related case before this Court, the Federal Reserve predicted that the Plaintiffs' holdout status would allow them to "terrorize" lawful sovereign restructurings. Ex. 10, at 13. With the current injunction, that prediction has now become the unfortunate reality.

> money and presumably they pay the exchangers. There is no condition, no impediment. ***This would obviously present an impediment, a condition. Is there any legal basis for doing that?*** Ex. 7: 2/23/12 Hearing, T7:2-6, T7:24-8:5 (emphasis added).

- THE COURT: ***[T]he exchange offers were lawful, people subscribed to them and have rights under them, the exchange offer provides for payments . . . .*** Ex. 7: 2/23/12 Hearing, T11:2-4 (emphasis added).

- THE COURT: ***I don't understand the pari passu clause or my order to mean that the Republic is forbidden to pay the exchange offers unless they pay NML***. Ex. 7: 2/23/12 Hearing, T11:25-12:2 (emphasis added).

- MR. OLSEN: So we are saying to Argentina you must, if you are going to pay the one, you have to pay the other, and we are telling you in an order from this court that you must do that and your agents and subordinates and people acting with you must not assist in evading that order.
  THE COURT: ***I really don't agree with that. The rights of the exchangers were not conditional on NML getting paid under the pari passu clause***. Ex. 7: 2/23/12 Hearing, T13:5-12 (emphasis added).

- THE COURT: If you had a normal law-abiding, asset-holding [debtor], that would be enforceable; ***you wouldn't have to interfere with the rights of the first people***. Ex. 7: 2/23/12 Hearing, T15:1-4 (emphasis added).

- THE COURT: ***I am sticking to my position. I think that I cannot interfere with the rights of the exchange offers by putting conditions on them or impediments on them.*** Ex. 7: 2/23/12 Hearing, T15:25-16:2 (emphasis added).

Nevertheless, the Court, although correct in its view that the Republic would not pay the Plaintiffs, brushed aside its concern for the EBHs' rights in favor of the Plaintiffs' interests as paramount in the hope that the injunction would finally force the Republic to pay the Plaintiffs:[13]

> THE COURT: - . . . The facts of life are this, that there is a pari passu clause in the documents. We do not have a normal situation. We don't have a situation where you have an honest debtor with assets available that can be subjected to the normal processes of the court. We don't have it. We have litigation that goes on and on.
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> What the plaintiffs here are trying to do is to see if there is yet another device which might get them their just payments and end the litigation. ***It has a lot of problems***, but Mr. Olson and his colleagues, they know their problems. They are not poor law students. But ***they are trying to do something which is intended to overcome the lawlessness of the Republic***.
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> ***I am going to sign this order. It's not the first time that a court has signed an order that may have problems***. But to me ***the bigger overriding problem is the lawlessness of the Republic***. When I say lawlessness I mean the deliberate, continued failure to honor the most clear-cut obligations in the debt instruments, the most clear-cut assurances in the

[13] Plaintiffs have falsely suggested that the EBHs can get the Plaintiffs paid simply by demanding it of the Republic. NML 11/13/12 Brief, at 26. The EBHs have ***no control whatsoever*** over this issue. Koenigsberger Dec., ¶ 6.

> debt instruments. Those have been turned into a dead letter by the Republic. Well, they were not a dead letter in this courtroom.
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> ***I fully recognize that there are problems with the order*** that the plaintiffs present and I am sure this will go very quickly to the Court of Appeals and ***there are problems on appeal. There are problems.*** . . . Ex. 7: 2/23/12 Hearing, T48:12-49:10 (emphasis added).

To be sure, a judicial mousetrap designed to secure a remedy for the Plaintiffs is entirely appropriate. But the EBHs' lawful and exclusive property cannot and should not be used as the cheese.[14] Even before the instant appeal, the Second Circuit recognized the EBHs' rights, and it directed this Court to "take care to craft attachment orders so as to avoid interrupting Argentina's regular payments to [exchange] bondholders." *Capital Ventures Int'l v. Republic of Argentina*, 282 Fed. Appx. 41, 42 (2d Cir. 2008). Yet Plaintiffs' proposed injunction ignores this clear admonition, which may well be why the Second Circuit remanded expressly for consideration of non-parties' rights before ruling on whether the injunction's application to them is "reasonable." Ex. 1: 2d Cir. Op., at 28.

While this litigation has been extraordinary and caused the Court justifiable frustration, Plaintiffs, at base, are ordinary civil litigants with an ordinary judgment on an ordinary contract. Ex. 1: 2d Cir. Op., at 16. Their debtor happens to be a sovereign nation (a fact obviously known when Plaintiffs acquired their bonds), and that status has frustrated their efforts to pursue successfully the usual methods of collection. Consequently, like thousands of others civil litigants, they have a judgment that has not been and may never be satisfied. That is unfortunate, but it is also the hard reality of our legal system. *See FG Hemisphere Assocs., LLC v. Democratic Rep. of* Congo, 637 F.3d 373, 377 (D.C. Cir. 2011) ("a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment;" and absent property subject to FSIA immunity exceptions, "a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment."). The proper

[14] Even Plaintiffs' counsel has admitted that the injunction engrafts a "condition" on the EBHs' ability to enjoy their own property that otherwise does not exist. Ex. 7: 2/23/12 Hearing, T5:12-17.

solution is not to allow the disappointed minority of unimpaired FAA Bondholders to shift the consequences of that reality onto the vast majority of heavily discounted EBHs. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.") (Holmes, J.). Rather, the correct approach is the one the Court cogently understood and expressed at the outset – vigilantly and aggressively pursue all remedies available to Plaintiffs ***without compromising the property rights of innocent non-parties***. Indeed, at the November 9th hearing, the Court repeatedly admonished the Republic that the Court has ample means available to enforce its judgments. Ex. 6: 11/9/12 Hearing, T18:3-14. Plaintiffs should pursue those remedies, but they cannot do so at the expense of the innocent EBHs.[15] Accordingly, the Court should reject Plaintiffs' proposed injunction and strike § 2(e).[16]

II. THE SECOND CIRCUIT'S OPINION PRECLUDES ANY DIVISION OR DIVERSION OF PAYMENTS MADE BY THE REPUBLIC TO BNYM.

At the November 9 hearing, certain of the Court's comments suggested that it might take some action to apportion sums paid by the Republic to the EBH Trustee, and divert them to Plaintiffs. Ex. 6: 11/9/12 Hearing, T30:20-22. Such an action, however contravenes the Second Circuit's opinion. Specifically, in rejecting the Republic's argument that the injunction violates New York trust or attachment law because it "execute[s] upon" funds that do not belong to the Republic, the Court of Appeals found that "[n]othing in the Injunctions suggests that plaintiffs would 'execute upon' any funds, ***much less those held in trust for the exchange bondholders***." Ex. 1: 2d Cir. Op. at 25 n.14 (emphasis added). Apart from the impropriety of seizing the EBHs' property and giving it to the Plaintiffs, any such action would be exceedingly improvident, as it

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[15] Plaintiffs' brief suggests that the EBHs are somehow in league with the Republic in seeking to ensure that Plaintiffs do not get paid. NML 11/13/12 Brief, at 8. That is false. (Koenigsberger Dec., ¶ 5.) The EBHs simply believe that their property cannot be used as leverage to achieve any objective of the Plaintiffs.

[16] Plaintiffs may argue that such a modification makes the Injunction ineffective, but that only serves to underscore their use of improper "leverage" at the expense of the EBHs.

could trigger an immediate and much wider default, as well as litigation by the EBHs against the Republic.

III. ENTRY OF § 2(e) OF PLAINTIFFS' PROPOSED INJUNCTION WOULD DENY DUE PROCESS AND EFFECT AN UNLAWFUL TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

A. Plaintiffs' Proposed Injunction Violates the Due Process Clause.

As demonstrated in Point I, *supra*, the effect of Plaintiffs' Proposed injunction is to use the private property of the non-party EBHs for the private benefit of the Plaintiffs. It thus violates the Due Process Clause of the Fifth Amendment. "[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). *See also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand . . . scrutiny . . . .; it would serve no legitimate purpose of government and would thus be void"). Indeed, Supreme Court authority holds that State action which places any significant imposition on the private property of one for the private use of another is a core violation of fundamental due process rights.[17] *See Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76-80 (1937) (striking down state administrative order requiring majority of private gas producers to curtail desired production and purchase shortfall from minority of private gas producers with no available market); *Chicago, St. Paul, Minn. & Omaha Railway Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (order requiring railroad to build underground pass for private benefit of private landowners violated due process); *Missouri Pac. Ry. Co. v. Nebraska Bd. of Trans.*, 164 U.S. 403, 417 (1896) (order requiring private railroad to allow private party to construct elevator on its property for private use violated due process).[18]

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[17] The market's reaction proves that the EBHs' property is encumbered by the injunction – Exchange Bond prices have plummeted in the wake of the Second Circuit's decision. Choi Dec., ¶¶ 15-18

[18] The Supreme Court cited both *Thompson* and *Missouri* in *Kelo*, a 2005 decision, *see* 545 U.S. at 500, and thus both cases remain good law.

See also United States v. Ambrosio, 575 F. Supp. 546, 551-52 (E.D.N.Y. 1983) (assets of defendant corporation not accused of RICO violations could not be restrained even though 30% interest was owned by co-defendant facing RICO charges; restraint would unconstitutionally deprive corporation of property rights under due process principles).

Further, judicial orders can (and often do) qualify as "state action" for purposes of Constitutional provisions limiting governmental power. *See, e.g., Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, 130 S. Ct. 2592, 2601-02 (2010) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary."); *Shelly v. Kraemer*, 334 U.S. 1, 18 (1948) ("[F]rom the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials…[I]t has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch of the state government."); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) ("It is doubtless true that a State may act through different agencies, – either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (court enforcement of promissory estoppel principles was state action for purposes of Fourteenth Amendment); *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968) ("There can now be no doubt that the application by the judiciary of the state's common law, even in a lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government.") (Skelly Wright, J).

As Justice Kennedy recognized in *Stop the Beach*, a judicial intrusion on a private party's property violates their due process rights:

> If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. . . . It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights
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> When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision. "Given that the constitutionality" of a judicial decision altering property rights "appears to turn on the legitimacy" of whether the court's judgment eliminates or changes established property rights . . . the more appropriate constitutional analysis arises under general due process principles
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> ****
>
> The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause.

130 S. Ct. at 2614-15 (citations omitted).

This Court recognized the inevitable impact of its order on the property rights of the EBHs, and the lack of legal authority for it (see Point I, *supra*), but nevertheless (perhaps out of sheer frustration) entered an injunction that would use the EBHs' property as a fulcrum in attempting to collect an ordinary contract judgment for the Plaintiffs. But this would constitute a State seizure of private property for private, not public, purposes – a result forbidden by the law. As noted above, it would constitute an "arbitrary and irrational" deprivation of private property under long-standing due process principles.

B. Plaintiffs' Proposed Injunction Would Constitute an Unlawful Taking.

In *Stop the Beach*, a plurality of the Supreme Court expressly recognized a cause of action for a "judicial taking." 130 S. Ct. at 2601-02. The remaining Justices either expressed a preference for a Due Process Clause remedy, or did not reach the issue, but none rejected the concept outright. *Id*. at 2614-15, 2618-19. As noted in Point I, *supra*, although the EBHs'

property is not being seized outright by the government, the practical outcome of the proposed injunction will inevitably be, at a minimum, a "significant restriction … placed upon [the EBHs'] use of [their] property," *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) – clearly a "taking." *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions . . . affect and limit [property] use to such an extent that a taking occurs."); *Amchem Products, Inc. v. Costle*, 481 F. Supp. 195, 199 (S.D.N.Y. 1979) (disclosure of company's research data mandated by federal statute stated claim for taking that was "not absolute but consist[ed] instead of a severe diminution of the value of plaintiff's property").

And the possibility that the EBHs may lose their property rights indefinitely also does not change the fact that the property is being taken by the injunction. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987) (even "'temporary' takings . . . are not different in kind from permanent takings . . . ."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (government's wartime year-to-year use of laundry business constituted compensable temporary taking of, *inter alia*, laundry's "opportunity to profit from its trade routes," since "[t]here was nothing [laundry] could do, therefore, but wait"); *Cienega Gardens v. United States*, 331 F.3d 1319, 1353 (Fed. Cir. 2003) (owners of low-income apartments stated compensable takings claim where federal statute indefinitely suspended their contractual right to prepay their mortgages; "a taking need not be permanent to be compensable"). *See also Century Exploration New Orleans, Inc. v. United States*, 103 Fed. Cl. 70, 76 (2012) (noting that temporary interference with contractual right can be a taking).[19] The proposed injunction thus results in a taking that violates the Fifth Amendment, and should be vacated.

[19] If the Court were to order outright that the EBHs' money be given to the Plaintiffs, as it suggested at the November 9th hearing might occur (Ex. 6: 11/9/12 Hearing, T30:20-22), that would be a "taking" in the most prototypical sense of the concept.

IV. THE INJUNCTION MUST BE VACATED UNDER FED. R. CIV. P. 60(b)(4) FOR FAILURE TO PROVIDE MOVANTS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE IT WAS ENTERED.

Pursuant to Fed. R. of Civ. P. 60(b)(4), a judgment is void "if the court that rendered it … acted in a manner inconsistent with due process of law." *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 193 (2d Cir. 2006) (internal quotations and citations omitted) (granting Rule 60(b)(4) motion brought by nonparty). Nonparties may bring a motion under Rule 60(b)(4) where their interests are adversely affected. *Id.* at 188. Procedural due process requires that parties with an interest in the proceedings be provided with adequate notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Here, although the Court recognized the EBHs' rights were at stake (see Point I, *supra*), no steps were taken to give the EBHs notice prior to an opportunity to be heard at the February 23, 2012 hearing; rather, the Proposed Order drafted by Plaintiffs was signed, unaltered, on the same day as the hearing. Even if the EBHs had actual notice of the Plaintiffs' motion for injunctive relief, the absence of formal service invalidates the order. *See Orix Financial Services v. Phipps*, No. 91-CV-2523, 2009 WL 2486012, at *3 (S.D.N.Y. Aug. 14, 2009) (granting 60(b)(4) motion, in part, because "[t]he Second Circuit has rejected the argument that 'actual notice' is sufficient to cure improper service") (citation omitted); *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385-86 (S.D.N.Y. 1986) (granting Rule 60(b)(4) motion and vacating default judgment where defendants were not properly served, notwithstanding any constructive or actual notice defendants had); *In re Metzger*, 346 B.R. 806, 818 (Bankr. N.D. Cal. 2006) (applying Rule 60(b)(4) to void fourteen-year-old sale order for defective notice even though creditor had actual notice of bankruptcy proceedings; creditor had no duty to investigate and inject himself into the proceedings).

The absence of notice and an opportunity to be heard renders the injunction void. *See Dial Corp. v. Skinner & Assocs.*, 180 Fed. Appx. 661, 664, 2006 WL 1307892, at **3 (9th Cir. May 12, 2006) (judgment based on defendant's indemnification claim against co-defendant who was earlier released from action which was only mentioned "near the end of trial and without any

prior notice" was void under Rule 60(b)(4)); *In re Aztec Supply Corp.*, 399 B.R. 480, 492-494 (Bankr. N.D. Ill. 2009) (granting Rule 60(b)(4) motion where party affected by bankruptcy proceedings was not given notice); *Nature's First Inc. v. Nature's First Law, Inc.*, 436 F. Supp. 2d 368, 374-77 (D. Conn. 2006) (granting Rule 60(b)(4) motion and vacating default and permanent injunction where defendant had not been served);[20] *Local 78 v. Termon Constr., Inc.*, No. 01-CV-5589 (JGK), 2003 WL 22052872, at *5 (S.D.N.Y. Sept. 2, 2003) (granting motion to vacate default judgment pursuant to Rule 60(b)(4) where valid service of process was not effected on defendant). As in *Dial*, the possibility of an injunction restraining the funds of the EBHs and their trustee was not addressed until the February 23, 2012 hearing, whereas the litigation prior to that time concerned only the contractual rights between Plaintiffs and the Republic.

Given these due process issues, the Court should revisit the injunction in its entirety and afford the EBHs an adequate opportunity to be heard, including a reasonable briefing schedule and evidentiary hearings as appropriate. *See Fengler v. Numismatic Am., Inc.*, 832 F.2d 745, 747-48 (2d Cir. 1987) (parties bound by injunctions are entitled to evidentiary hearing). The three days granted the EBHs to reply to Plaintiffs' November 13, 2012 brief is insufficient for this purpose.[21] Plaintiffs' proposed injunction directly affects billions of dollars legally owed to the EBHs. The Second Circuit directed "such further proceedings as are necessary to address the Injunctions' application to third parties … including intermediary banks …" Ex. 1: 2d Cir. Op., at 28. The Court of Appeals did not order expedition. Nor did it direct a resolution prior to the scheduled December payments to the EBHs. Indeed, implicit in its directive is ***careful and***

[20] As the court noted in *Nature's Promise*, a heightened standard of due process applies for a permanent injunction. 436 F. Supp. 2d at 375 ("Given the Second Circuit's preference for resolution of suits on the merits and the prejudice resulting to defendants if the default judgment and permanent injunction are not vacated, the procedural posture is of paramount importance.").

[21] *See In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) (granting Rule 60(b)(4) motion where one day's notice of hearing to junior secured party in bankruptcy proceeding did not satisfy due process).

deliberate consideration. While it may be *Plaintiffs'* goal to rush these issues past the Court so as to seize the EBHs' property for their private purposes, a highly compacted schedule frustrates the Second Circuit's objective in remanding on the issue of third party impact. It will also be impossible for many other EBHs that wish to be heard to appear within the short timeframe allowed. Taylor Dec., ¶ 2. With EBHs (and the third-parties) having three days to respond to Plaintiffs' brief, no hearings, and little opportunity to present fact and expert testimony, there is a grave risk that the remanded issue of impact on third parties cannot be given full and deliberate consideration as the Court of Appeals must have contemplated.[22]

V. THE INJUNCTION MUST BE VACATED FOR FAILURE TO JOIN THE EXCHANGE BONDHOLDERS AS NECESSARY PARTIES.

The EBHs are necessary parties to this action due to the injunction's confiscatory impact on their right to payment under the Exchange Bonds, and their absence at the time the injunction was entered requires modification of the order as it applies to them. Under Federal Rule of Civil Procedure 19, a party is "necessary" if

> . . . (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 . . . .

Fed R. Civ. P. 19(a)(1)(B). Even without expressly invoking Rule 19, courts have denied or vacated injunctions directed "against [non-parties] who are innocent of misconduct and are strangers to the district court." *Doctor's Assocs., Inc. v. Reinert & Dupree, P.C,* 191 F.3d 297, 306 (2d Cir. 1999) (partially vacating injunction barring nonparty franchisees from commencing separate state court actions against franchisor); *see also Pediatric Specialty Care, Inc. v.*

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[22] Moreover, there is no reason why the EBHs' rights should be trampled upon in order to push through the final form of an injunction in this case, which has been ongoing for over a decade. That is particularly so because, as this Court has found, the Republic has sufficient assets to pay both the Plaintiffs and the EBHs. Ex. 7: 2/23/12 Hearing, T32:12-33:5. Furthermore, the December payments to the EBHs do not represent a final payment. In fact, those income streams run out as far as 25 years into the future. Ex. 1: 2d Cir. Op., at 4.

Arkansas Dep't. of Human Servs., 364 F.3d 925, 933 (8th Cir. 2004) (reversing injunction as to federal agency that "was not a party to the underlying action and did not actively participate" in proposed budget cutbacks that plaintiffs were suing to enjoin); *Leblanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1249 (S.D.N.Y. 1991) (denying plaintiffs' application to enjoin local election where officials managing election were not named defendants and stating that "[a] party to be enjoined must be before the court").

Under the foregoing standards, a party is necessary under Rule 19(a) when its contractual or property rights would otherwise be adjudicated in the party's absence, especially where those interests are being threatened with an injunction. *See, e.g.*, *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-701 (2d Cir. 1980) (necessary to join third party where defendant's counterclaims sought to enjoin third party's merger agreement with plaintiff); *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1013 (3d Cir. 1987) (factory owner was indispensable party where industry association moved to enjoin owner from closing factory, as "preservation of such a *status quo* would obviously defeat any prospects that [owner] might have to develop the property … [Plaintiff] as a part of its relief, seeks to restrict, limit, and affect [owner's] rights and/or interests in the property"); *Freedom N.Y., Inc. v. United States*, No. 86-CV-1363, 1986 WL 6163, at *1 (S.D.N.Y. May 27, 1986) (winning bidder for government contract was necessary party in losing bidder's action to enjoin government's performance under contract, because injunction would have "as a practical matter an equally decisive impact on [winning bidder's] interests").

In the present case, as shown in Point I, the proposed injunction substantially impacts the EBHs' right to payment under the Exchange Bonds, a property right that indisputably belongs solely to them. Further, the proposed injunction would effectively leave the EBHs with no remedy. If the Republic chooses to pay only the EBHs, then their payments will be frozen at BNYM indefinitely. If the Republic chooses not to pay BNYM, the EBHs will, from a practical standpoint, have no recourse other than to "stand in line" with the Plaintiffs. Simply put, this is a classic situation where two wrongs (the Republic's refusal to pay Plaintiffs and an injunction that

almost certainly will lead to failure to pay the EBHs) do not make a right; rather, they make a bad situation worse.

Given the Court's recognition at the February hearing that the proposed injunction could affect the rights of absent parties (see Point I, *supra*), the necessity of joining them should have been considered. *See Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543, 548 (S.D.N.Y. 2008) ("Although neither party has moved for joinder, courts frequently do—***and indeed should***—consider the issue *sua sponte* because a primary purpose of Rule 19 is to protect the rights of an absentee party.") (emphasis added). "An injunction entered in the absence of an indispensable party should be vacated." *Edward G. Bashian & Sons v. Am. Nat'l. Bank & Trust Co. of Chicago*, No. 96-CV- 6021, 1997 WL 337434, at *6 (N.D. Ill. June 16, 1997) (partially vacating injunction for failure to join bank as necessary party at time injunction was entered, because bank held interest in subject matter of lawsuit); *see also Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234-35 (9th Cir. 1975) *overruled on other grounds by Stahl v. Gibralter Fin. Corp.*, 967 F.2d 335 (9th Cir. 1922) (vacating preliminary injunction restraining voting of defendant corporation's stock entered before corporation was party to suit, because corporation "clearly was an indispensable party" under Rule 19 standard). Accordingly, the injunction here should be dissolved, and a reasonable schedule for presentation of evidence, hearings, and briefing.

VI. PLAINTIFFS ARE NOT ENTITLED TO PREFERENTIAL TREATMENT AT THE EXPENSE OF EXCHANGE BONDHOLDERS.

A. The Injunction Inequitably Fails to Account for the Losses Already Suffered by the Innocent EBHs as a Result of the Republic's Default.

The Court of Appeals ordered remand "to address the operation of the payment formula." Ex. 1: 2d Cir. Opp., at 28-29. Accordingly, if the Court were to find that the injunction was properly entered, the "operation of the payment formula" still must be addressed. Basic considerations of fairness and equity require rejecting Plaintiffs' proposal to enter an equitable remedy that requires the Republic immediately to pay 100% of the face value of Plaintiffs FAA Bonds, plus significant amounts of interest totaling more than the full face value, before it can

make payment due to the EBHs under the Exchange Bonds. NML 11/13/12 Brief, at 12. *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) ("in deciding whether to grant injunctive relief a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts"). Plaintiffs' formula is inequitable because it completely ignores that the EBHs hold securities derived from FAA Bonds that have already incurred discounts of over 70 cents on the dollar. *See* Facts, Section B, *supra*. These discounts—which were granted by the holders of 92% of all FAA Bonds and provided tens of billions of dollars in debt relief to the Republic — are a major reason the Republic has sufficient foreign currency reserves to honor its obligations to anyone — including Plaintiffs.[23] Moreover, a significant fraction of the EBHs are not only successors in interest to the FAA Bondholders, but individually participated in the 2005 and 2010 exchange offers and incurred large discounts. *See* Facts, Section C, *supra*. While Plaintiffs were within their rights in refusing to accept discounts on the FAA Bonds, it would stand equity on its head to have the Republic reallocate the sacrifices made by the EBHs (and their predecessors in interest) so that the most aggressive and litigious holdouts can receive over 200 cents on the dollar.

Accordingly, equity and fairness require that, the Ratable Payment formula should recognize that the EBHs have already suffered losses as a result of the Republic's default. The adjustment should ensure that if Plaintiffs receive Ratable Payments on their FAA Bonds, they do not profit from debt relief provided by the EBHs (or their predecessors in interest) or receive more preferable treatment than the EBHs, but rather receive payments in proportion to Plaintiffs' holdings as a fraction of the Republic's total defaulted debt. Thus, if Plaintiffs hold FAA Bonds with a face value of $428 million, and the Republic defaulted approximately $46.6 billion were FAA Bonds subject to a *pari passu* clause, the Court should require a Ratable Payment to Plaintiffs of no more than 0.92% ($428 million / $46.6 billion) of the amount of any given

[23] Indeed, Argentina's total reserves of foreign exchange and gold amounted to just $46.35 billion in December 2011. *See* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2188rank.html. So tens of millions of dollars was a material contribution.

payment to the EBHs. Proceeding in this manner will accord with basic principles of equity and ensure fair treatment for Plaintiffs and the EBHs.

B. At a Minimum, the Injunction Should Be Modified to Provide for More Equitable Treatment of the EBHs.

Alternatively, the Court should at a minimum address basic principles of fairness in interpreting the formula as currently drafted. The Injunction provides, in relevant part: "Whenever the Republic pays any amount due under terms of the bonds or other obligations issued pursuant to the Republic's 2005 or 2010 Exchange Offers … the Republic shall … make a 'Ratable Payment' … to NML." Ex. 9: Feb. 23 Order at 3-4. "Ratable Payment" is defined as "an amount equal to the 'Payment Percentage' … multiplied by the total amount currently due to NML in respect of the bonds at issue … including pre-judgment interest …." Ex. 9: Feb. 23 Order at 4. "Payment Percentage" is defined as "the fraction calculated by dividing the amount actually paid … under the terms of the Exchange Bonds by the total amount then due under the terms of the Exchange Bonds." As the Second Circuit noted, the definition of "Payment Percentage" leaves it ambiguous whether "the total amount then due under the terms of the Exchange Bonds" refers to the amount due at that particular moment in time, or total principal and interest outstanding. Ex. 1: 2d Cir. Op., at 11.

The phrase should be interpreted to mean total principal and interest outstanding. Doing so will ensure the EBHs are treated equitably and their rights to incremental payments from the Republic are not made conditional on the full satisfaction of all obligations due to Plaintiffs under the FAA Bonds. Contrary to Plaintiffs' assertion (*see* NML 11/13/12 Brief, at 15), enjoining the payment of $3.3 billion due to the EBHs under the Exchange Bonds unless the Republic pays Plaintiffs $1.43 billion is not "wholly consistent with the equities." The EBHs represent 92% of the victims of Argentina's default, and have already lost tens of billions of

dollars. Plaintiffs hold FAA Bonds that account for less than 1% of the debt on which the Republic defaulted in 2001.[24]

VII. PLAINTIFFS HAVE FAILED TO SHOW ANY BASIS TO CHANGE THE STAY ALREADY ENTERED BY THE COURT, AND RELIED UPON BY THE SECOND CIRCUIT.

Plaintiffs misleadingly urge the Court to "[d]ecline to [e]xtend" the stay of the Proposed Injunction it entered on March 5, 2012 (the "Stay"). NML 11/13/12 Brief, at 20; Ex. 11: Stay. In fact, there is no need for an "exten[sion]" because the Stay's express terms already provide that it applies "until the … Second Circuit has issued its ***mandate disposing of the Republic's appeal*** of the [Proposed Injunction]." Ex. 11: Stay ¶ 1 (emphasis added). The Second Circuit has issued no "mandate," much less one "disposing" of the appeal. Instead, the Court of Appeals entered an "Order" directing supplemental proceedings under United States *v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), with the express aim of "further consider[ing] … the merits of the remedy"—in particular as it affects third parties. *See* Docket Entry 387 (the referenced document is marked merely as a "Certified Copy" of the Opinion, and is not stamped as a "Mandate"). By proceeding in this manner, the Court of Appeals retained jurisdiction over this case. *Jacobson*, 15 F.3d at 22 (noting the Second Circuit's authority to "seek supplementation of the record while retaining jurisdiction, ***without a mandate issuing*** or the need for a new notice of appeal").[25] Plaintiffs' invitation to tamper with the Stay entered by this Court would do violence

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[24] It is the EBG's understanding that Plaintiffs have not offered any formula to support their interest calculations, which total nearly $1 billion. If the Court elects to proceed with requiring a ratable payment from the Republic, further proceedings will be necessary to verify Plaintiffs' calculations.

[25] The Second Circuit also stated that, "[o]nce the district court has conducted [supplemental] proceedings[,] the mandate should automatically return to [the Court of Appeals] … without need for a new notice of appeal." Ex. 1: 2d Cir. Op., at 28-29. This is consistent with an alternative procedure set forth in *Jacobson*, under which the Second Circuit may "direct that a mandate issue forthwith and that [it] state the conditions that will restore jurisdiction to [the Court of Appeals]." *Jacobson*, 15 F.3d at 22. Whichever procedure the Second Circuit intended to follow, there is in fact no applicable "Mandate" in the Second Circuit case file, as there would have to be if a mandate had actually issued. And the Court of Appeals' opinion is crystal clear that it has not yet spoken its last word on the Injunction. This Court's intent in issuing the stay

to the Second Circuit's direction that this Court should supplement the record before the Court of Appeals further evaluates the Injunction.[26]

The consequences of vacating the Stay cannot be exaggerated—if it is lifted, and the Republic defaults as the market expects, the Second Circuit's review of the merits of the Proposed Injunction will be rendered moot.[27] Choi Dec. ¶¶ 8-22. In effect, Plaintiffs will have succeeded in performing an end run around the Second Circuit and rushing this case to its conclusion while trampling the very third-party interests about which the Court of Appeals expressed "concerns." Ex. 1: 2d Cir. Op., at 28. There is no reason the process needs to be hurried in a way that could ultimately frustrate the further appellate review that the Second Circuit expressly contemplates. The Second Circuit did not indicate any need for expedition, or any particular concern about the Republic's scheduled December payments to the EBHs. The Exchange Bonds do not mature for many years,[28] and Plaintiffs will have ample opportunity to recover money owed to them regardless of whether the Second Circuit deems it necessary to take additional steps to protect the interests of the EBHs. Ex. 1: 2d Cir. Op., at 4. Moreover, if the stay were lifted and Plaintiffs were paid billions of dollars, there is no assurance that they would be able to repay the money if, for example, an appeal finally determines that the FSIA bars enforcement § 2(e) of the Injunction. If Plaintiffs were paid, because they are investment funds they will no doubt distribute that recovery immediately to their shareholders; the Plaintiff funds also could dissolve themselves; in either case obtaining repayment of the money would be difficult or impossible if this Court is later reversed. This is true irreparable injury, and it would

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seems clearly to have been that the stay would remain in effect until the appeal was finally "dispos[ed] of."

[26] Because the Stay has already been entered, Plaintiffs' lengthy explication of reasons why it should not be ***re***-entered is irrelevant. *See* NML 11/13/12 Brief, at 21-24.

[27] Lifting the stay would be particularly problematic if, notwithstanding the Second Circuit's Opinion, this Court were to modify the proposed injunction to enable Plaintiffs to execute their judgment using funds paid to the EBHs Trustee. Ex. 1: 2d Cir. Op., at 5; Point II, *supra*.

[28] The relevant maturity dates are 2017, 2033, 2035, and 2038. Koenigsberger Dec. ¶ 10.

be suffered by the EBHs (or the Republic). Accordingly, the Stay should remain in effect, as this Court provided, until the Court of Appeals has "issued its mandate disposing of the Republic's appeal[.]"

CONCLUSION

For the foregoing reasons, the Court should vacate § 2(e)the Injunction, reject Plaintiffs' proposed injunction (particularly with respect to proposed § 2(e)) and schedule further proceedings consistent with the EBHs' Due Process rights.

Dated: November 16, 2012
New York, New York

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