UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD.,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

08 Civ. 6978 (TPG)
09 Civ. 1707 (TPG)
09 Civ. 1708 (TPG)

AURELIUS CAPITAL MASTER, LTD. and ACP MASTER, LTD.,

Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

09 Civ. 8757 (TPG)
09 Civ. 10620 (TPG)

(captions continue on following pages)

REPLY BRIEF OF PLAINTIFFS IN RESPONSE TO THE REMAND FROM THE COURT OF APPEALS

----------x

AURELIUS OPPORTUNITIES FUND II, LLC and AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

10 Civ. 1602 (TPG)
10 Civ. 3507 (TPG)

----------x

----------x

AURELIUS CAPITAL MASTER, LTD. and AURELIUS OPPORTUNITIES FUND II, LLC,

Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

10 Civ. 3970 (TPG)
10 Civ. 8339 (TPG)

----------x

----------x

BLUE ANGEL CAPITAL I LLC,

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

10 Civ. 4101 (TPG)
10 Civ. 4782 (TPG)

----------x

(captions continue on following page)

----------x

PABLO ALBERTO VARELA, et al., 10 Civ. 5338 (TPG)

Plaintiffs,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

----------x

----------x

OLIFANT FUND, LTD., 10 Civ. 9587 (TPG)

Plaintiff,

v.

THE REPUBLIC OF ARGENTINA,

Defendant.

----------x

GIBSON, DUNN & CRUTCHER LLP
Theodore B. Olson
Matthew D. McGill
Jason J. Mendro
Misha Tseytlin
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

DECHERT LLP
Robert A. Cohen
Eric C. Kirsch
1095 Avenue of the Americas
New York, N.Y. 10036-6796
(212) 698-3500

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Kevin S. Reed
51 Madison Avenue, 22nd Floor
New York, N.Y. 10010
(212) 849-7000[1]

Attorneys for Plaintiff NML Capital, Ltd.

[1] Mr. Reed is appearing for Plaintiff NML Capital, Ltd. to the extent that its positions are adverse to those of non-parties The Bank of New York Mellon, Depository Trust Company, and Cede & Co.

SIMON LESSER, P.C.
Leonard F. Lesser
420 Lexington Avenue
New York, New York 10170
(212) 599-5455

Attorneys for Plaintiff Olifant Fund, Ltd.

FRIEDMAN KAPLAN SEILER & ADELMAN LLP
Edward A. Friedman
Daniel B. Rapport
7 Times Square
New York, N.Y. 10036
(212) 833-1100

Attorneys for Plaintiffs Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC

MILBERG LLP
Michael C. Spencer
One Pennsylvania Plaza
New York, N.Y. 10119
(212) 594-5300

Attorney for Plaintiffs Pablo Alberto Varela, et al.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 3

A. This Court Has Jurisdiction Over The Remand Because The Second Circuit Issued Its Mandate Under The *United States v. Jacobson* Procedure 3

B. Argentina's Attacks On The Plaintiffs' Proposed Orders Lack Merit 5

1. Argentina Fails To Address The Second Circuit's Remand Instructions Regarding The Ratable Payment Formula 5

2. Under Rule 65(d)(2), The February 23 Orders Bind Any Party With Actual Notice Who Actively Participates With Argentina Or Its Agents Or Attorneys In Making the Exchange Bond Payments 10

a) Rule 65(d)(2) Extends All Injunctions To All Non-Parties Acting In Concert With Enjoined Parties, Regardless Of Whether They Are Named In The Injunction 10

b) BNY Is, And Must Be, Bound By The Orders 12

c) DTC And Cede & Co. Are, And Must Be, Bound By The Orders 15

d) The Federal Reserve Bank Of New York Acknowledges That The Orders Should Restrain Argentina And Those In Privity With It; The Orders Do Not Implicate The Additional Concerns That FRBNY Has Raised. 17

e) The Orders Do Not Implicate the Concerns the Clearing House Associations Raises 21

f) This Court's Orders Are Clear 22

C. Argentina Is Not Entitled To Extension Of The Stay Pending Appeal 23

1. The Unclean Hands Doctrine Bars Argentina's Stay Request Because Argentina's Brief In Response Makes Clear That It Intends To Evade The February 23 Orders 23

2. Argentina Is Unable To Satisfy Any Of The Stay Factors 27

a) Argentina Has No Possibility Of Success On The Merits 27

TABLE OF CONTENTS *(continued)*

Page

b) A Stay Would Substantially Injure The Plaintiffs 28

c) Argentina Will Not Suffer Substantial Injury If The February 23 Orders Come Into Effect 29

d) The Public Interest Weighs Strongly Against A Stay..... 30

3. If The Stay Is Maintained, This Court Should Require Argentina To Post A Bond..... 31

D. The Arguments Raised By Non-Party Bondholders Are Jurisdictionally Barred, Untimely And Meritless..... 33

1. The Relief Belatedly Sought By The Non-Party Bondholders Would Violate The Mandate Rule 33

2. The Non-Party Bondholders' Arguments Are Meritless 35

III. CONCLUSION..... 38

TABLE OF AUTHORITIES

Page(s)

Cases

Alemite Mfg. Corp. v. Staff,
42 F.2d 832 (2d Cir. 1930) 10

Bd. of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 37

Berger v. Iron Workers Reinforced Rodmen Local 201,
843 F.2d 1395 (D.C. Cir. 1988) 8

Eli Lilly & Co. v. Gottstein,
617 F.3d 186 (2d Cir. 2010) 11, 13

Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.,
414 F.3d 325 (2d Cir. 2005) 7

Fox Industries, Inc. v. Gurovich,
323 F. Supp. 2d 386 (E.D.N.Y. 2004) 25

Hermes Int'l v. Lederer de Paris Fifth Ave.,
219 F.3d 104 (2d Cir. 2000) 23

Higgins v. Cal. Prune & Apricot Growers, Inc.,
282 F. 550 (2d Cir. 1922) 9

Hilton v. Braunskill,
481 U.S. 770 (1987) 27

Huntleigh USA Corp. v. United States,
525 F.3d 1370 (Fed. Cir. 2008) 36

Int'l Union, United Gov't Security Officers of Am. v. Clark,
2012 WL 2930670 (D.D.C. July 19, 2012) 37

Leighton v. Paramount Pictures Corp.,
340 F.2d 859 (2d Cir.1965) 31

Motorola Credit Corp. v. Uzan,
561 F.3d 123 (2d Cir. 2009) 23

NAACP v. New York,
413 U.S. 345 (1973) 35

TABLE OF AUTHORITIES *(continued)*

Page(s)

Nken v. Holder,
556 U.S. 418 (2009) 27

Oneida Indian Nation of New York v. Madison County,
665 F.3d 408 (2d Cir. 2011) 32

Patsy's Italian Rest., Inc. v. Banas,
658 F.3d 254 (2d Cir. 2011) 11

Precision Instrument Mfg. Co. v. Auto. Maint. Mach.,
324 U.S. 806 (1945) 3

Reliance Ins. Co. v. Mast Constr. Co.,
84 F. 3d 372 (10th Cir. 1996) 11

Reynolds v. Int'l Amateur Athletic Fed'n,
505 U.S. 1301 (1992) 30

Sales v. U.S. Underwriters Ins. Co.,
No. 93-Civ.-7580-CSH, 1995 WL 14478 (S.D.N.Y. Apr. 3, 1995) 33

Shipping Corp. of India, Ltd. v. Jaldhi Overseas PTE Ltd.,
585 F.3d 58 (2d Cir. 2009) 19

Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection,
130 S.Ct. 2592 (2010) 37

United States v. Ben Zvi,
242 F.3d 89 (2d Cir. 2001) 34

United States v. DiLapi,
651 F.2d 140 (2d Cir. 1981) 4

United States v. Jacobson,
15 F.3d 192 (2d Cir. 1994) 4

United States v. Ross,
302 F.2d 831 (2d Cir. 1962) 9

United States v. Salameh,
84 F.3d 47 (2d Cir. 1996) 5

Statutes

12 C.F.R. § 210.25 20

TABLE OF AUTHORITIES *(continued)*

Page(s)

Fed. R. Civ. P. 65 ..... 1, 10, 13, 15, 33, 35

N.Y. U.C.C. § 4A-102 cmt 19

N.Y. U.C.C. § 4A-502 18

N.Y. UCC § 4A-503 19

Other Authorities

Oxford English Dictionary (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989) 4

I. INTRODUCTION

The Second Circuit remanded these cases to this Court to clarify two narrow aspects of the February 23 Orders: (1) how this Court intended the Ratable Payment formula to operate; and (2) how those orders will operate to bind third parties who knowingly assist Argentina in violating the injunctions.

As to the first issue, there is no genuine dispute: The Court intended the Ratable Payment formula to operate precisely as the plaintiffs have described in their proposed orders. Argentina complains that this is an inequitable remedy, but that is not responsive to the Second Circuit's inquiry. In any event, there is nothing at all inequitable about requiring Argentina to pay the amount that is due to the plaintiffs at the same time it pays to others the amounts due to them when it admits it has "the capacity to make the payments. We have the funds available to do so." Declaration of Kevin S. Reed, Ex. L (Nov. 19, 2012) ("Reed Decl.").

The second issue is no more complicated. No one disputes that, under Federal Rule of Civil Procedure 65(d)(2), ***any person*** with notice of an injunction must not "act in concert or participate with" an enjoined person to violate the injunction. That principle has been clear since before Rule 65 was enacted. And the Second Circuit never suggested that the February 23 Orders should have a scope narrower than Rule 65 prescribes, nor could it. Rule 65 states that this is the scope of "every injunction."

Because it cannot change Rule 65, Argentina brashly argues that, if it violates the orders, the entities that assist it in processing payments under the Exchange Bonds can continue to do so, even after the Court lifts the stay of its February 23 Orders. But Argentina's position is nonsensical. This Court has decreed—and the Second Circuit has affirmed—that Argentina may not make a payment under the Exchange Bonds without concurrently making a Ratable Payment to the plaintiffs. Feb. 23 Order ¶ 2(d), Declaration of Robert A. Cohen, Ex. L (Nov. 13, 2012)

("Cohen Decl."). If Argentina attempted to make such a payment without making a Ratable Payment to the plaintiffs, that indisputably would be a violation of this Court's orders. And any entity that assisted Argentina in so doing despite knowing that Argentina had not satisfied its Ratable Payment obligation would have aided and abetted that violation. That certainly includes the entities identified in the Exchange Bond documents themselves, and those are the only entities named in Plaintiffs' Proposed Amending Orders. The Proposed Orders do not name, and should not implicate, the activities of conduits in the wire transfer system. The concerns raised in this regard by the Federal Reserve Bank of New York ("FRBNY") and the Clearing House Association (the "Clearing House") simply are not implicated here.

The plaintiffs have carefully crafted their Proposed Amended Orders to respond to the Second Circuit's remand instructions. Nevertheless, it is important to recall that concerns about the application of the Court's orders to third parties would arise only if Argentina willfully attempts to violate those orders, even though it indisputably has the means to comply. That Argentina has so brazenly boasted its intention not to comply should not make it easier for those who would assist in those violations to do so. To the contrary, those entities should be all the more mindful of their obligation not to assist Argentina in those violations. The entities that do not actually aid Argentina or its agents, but instead form only part of the financial infrastructure utilized in all payment transactions, have nothing to fear.

Once the issues remanded by the Second Circuit are resolved, there is no basis for continuing the stay pending appeal. On November 9, the Court advised Argentina to "seriously reconsider[]" its stated intention to disregard this Court's orders. Hr'g Tr. 17:18 (Nov. 9, 2012), Cohen Decl., Ex. R ("Nov. 9 Tr."). Far from reconsidering, Argentina's leaders instead have doubled down on their proclamations that they will "pay every debt payment religiously on every

bond that came out of the swaps of 2005 and 2010" but "will not pay one peso" to the plaintiffs. Reed Decl., Ex. A. Just this past Sunday, November 18, Argentina's Minister of Economy stated in a lengthy interview that he reaffirmed Argentina's position that it would not pay the plaintiffs even "one dollar," but would "comply with all the commitments" under the Exchange Bonds. Reed Decl., Ex. L. But a stay pending appeal is a remedy granted in ***equity***. A litigant cannot in one breath pronounce that it will disregard any ruling of the court it deems unfavorable and be heard in the next to demand equitable relief. Bad faith conduct—and Argentina's advance directive of noncompliance cannot be construed otherwise—"closes the doors of a court of equity." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach.*, 324 U.S. 806, 814 (1945). Particularly given that it already has lost the merits of its appeal, there is no basis for continuing a stay pending appeal. But any extension of the stay should be granted only upon Argentina's posting of a bond to secure its compliance, which would eliminate ***any*** concern about application of the Orders to third parties. Argentina's persistent promises to violate this Court's orders demand at least that much.

Finally, the submissions of certain non-party holders of Exchange Bonds should be stricken on the grounds that their contentions have nothing to do with the narrow issues remanded by the Second Circuit. Indeed, they are wholly precluded by that court's decision.

II. ARGUMENT

A. This Court Has Jurisdiction Over The Remand Because The Second Circuit Issued Its Mandate Under The *United States v. Jacobson* Procedure

Argentina asserts that "the Court of Appeals has not yet issued its mandate in connection with the Decision" and that, therefore, this Court lacks jurisdiction to resolve the issues remanded to it by the Second Circuit. Mem. of Law of the Republic of Argentina in Response to Pls.' Br. on Remand 9-10 ("Argentina Br."). Argentina's counsel, of course, never suggested that ju-

risdiction was lacking when it sent a letter to the Court on November 5 asking for an extended briefing schedule, nor when they appeared in court on November 9. That is because the contention that this Court lacks jurisdiction is frivolous—yet another contrivance designed to procure delay—and plainly refuted by the Second Circuit's opinion and judgment.

At the end of that opinion, the Second Circuit "remanded to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)," for clarification of two issues. *NML Capital Ltd. v. Republic of Argentina*, No. 12-105, Slip Op. at 28-29 (2d Cir. Oct. 26, 2012), Cohen Decl., Ex. F ("Op."). The Court of Appeals also specified that "[o]nce the district court has conducted such proceedings the mandate should automatically *return* to" the appellate court. *Id.* at 29 (emphasis added). In both its dictation of the mandate's journey and in its observance of the *Jacobson* procedure, the Second Circuit clearly stated that the mandate had issued to the district court and thereby vested that court with jurisdiction to resolve the remanded issues.

The phrase "return" means "[t]he act of coming back to . . . a place." 13 *Oxford English Dictionary* 802 (J.A. Simpson & E.S.C. Weiner, eds. 2d ed. 1989). For the mandate to "return" to the appeals court, it would have to first leave for the district court.

As *Jacobson* explains, when a case is remanded under the procedure here invoked by the Second Circuit, that is exactly what happens. In a *Jacobson* remand, "the mandate issue[s] forthwith." 15 F.3d at 22. This "terminate[s] th[e Second Circuit]'s jurisdiction" and vests jurisdiction in the district court. *United States v. DiLapi*, 651 F.2d 140, 144 (2d Cir. 1981). Importantly, "[t]he filing of a petition for rehearing d[oes] not revest jurisdiction in th[e Second Circuit]." *Id.* Only once the "conditions" set forth in the remand are satisfied, "jurisdiction [is] automatically restored to the appellate panel." *Jacobson*, 15 F.3d at 22. Once a case is remanded under *Jacobson*, a party seeking "to restore jurisdiction" in the appellate court must move to

"recall[] the mandate." *See United States v. Salameh*, 84 F.3d 47, 50-51 (2d Cir. 1996). Argentina has not done so, and the mandate thus remains with this Court.

Argentina's citations date from the time of the Second Circuit's "prior practice" for clarifying remands, when it would state that it "retained jurisdiction" and "not issue a mandate." *Salameh*, 84 F.3d at 50. The problem with this prior practice, *Jacobson* explained, is that it left "the power of the district court to act . . . subject to doubt." 15 F.3d at 22. *Jacobson*'s solution, which the Second Circuit here adopted, ***"ensures that the district court will have the power to do what we order"*** while simultaneously serving the "purpose" of "expedition." *Id.* The use of the *Jacobson* "procedure ***eliminates any question as to the district court's jurisdiction***." *Salameh*, 84 F.3d at 50 (emphasis added). Argentina thus is wrong that the proceedings before this Court are a "nullity." Argentina Br. 9, 10.

B. Argentina's Attacks On The Plaintiffs' Proposed Orders Lack Merit

1. Argentina Fails To Address The Second Circuit's Remand Instructions Regarding The Ratable Payment Formula

The vast majority of the arguments urged by Argentina and its *amici* should be rejected as irrelevant to the two narrow issues on remand. The Second Circuit affirmed this Court's conclusion that Argentina must "make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt." Op. 28. The only question on remand regarding this formula is how this Court "intended [that formula] to operate." *Id.* at 11.

On that question, Argentina makes clear that there is no dispute: the formula requires Argentina to pay the same percentage of the amounts that are currently due and owing to the plaintiffs as the percentage it opts to pay on what is currently due and owing under the Exchange Bonds at the time of any payment. Thus, as Argentina itself has explained in opposing the for-

mula, if Argentina pays 100% of what is currently due and owing on any date under the Exchange Bonds, it must pay 100% of what it currently owes to the plaintiffs as well. *See* Argentina Br. 7 (conceding that the plaintiffs' Proposed Amending Orders use the "***same*** Ratable Payment remedy" that this Court previously adopted (emphasis in original)). Indeed, before the Second Circuit, the United States also clearly understood that "[t]he February 23 Orders in turn require that Argentina pay the full amount due to [the plaintiffs] whenever Argentina makes a payment under the terms of the exchange bonds." Br. of the United States as *Amicus Curiae* 3, Reed Decl., Ex. B.

Instead of attempting to clarify any ambiguity about the operation of the formula, the Republic argues that the Second Circuit authorized this Court to "reassess" the Ratable Payment formula it already affirmed (Argentina Br. 7), and claims that the Second Circuit "questioned" that formula (*id.* at 12). Argentina's argument contradicts the Second Circuit's unambiguous direction for this Court to clarify how the formula is "intended to function," not to consider anew whether some other formula might be more equitable. Op. 4; *see also id.* at 28-29. Since all the parties agree that formula was "intended to operate" as described in the plaintiffs' Proposed Amending Orders, the Court should enter those Orders.

Even if this Court were to reconsider the Ratable Payment formula, no change to that formula would be warranted. As the plaintiffs explained in their remand brief, that formula is consistent with the Equal Treatment Provision's promise that "payment obligations" under the plaintiffs' bonds would "rank at least equally" with payment obligations under any subsequently issued bonds. Br. of Pls. in Response to the Remand from the Court of Appeals 14 ("Pls.' Br."). These "payment obligations" are the amounts ***currently due and owing to a creditor***, and thus the most equitable way to rank these obligations equally is to require that if Argentina honors its

obligations under the Exchange Bonds when currently due and owing, it must also honor its obligations to the plaintiffs in full. *Id.* at 14-15. Argentina offers no response to this analysis. Instead, Argentina without even specifying an alternative payment formula, contends that this Court should reconsider the Ratable Payment formula for three "equitable" reasons. Argentina's arguments are easily refuted.

First, Argentina argues that this Court's Ratable Payment formula is not equitable because requiring Argentina to pay to the plaintiffs everything they are owed while the holders of Exchange Bonds receive their currently due payment would be unfair to these bondholders. Argentina Br. 1. But Argentina ignores the fact that it ***already owes the plaintiffs 100% of their principal and interest***. There is nothing inequitable about the plaintiffs being paid what they are owed, nor would they enjoy "a better position than their contractual entitlements warrant" (*id.*) simply by receiving the amount to which they are currently entitled. Assuming that the Republic upholds its obligations, the beneficial holders of Exchange Bonds will continue to have their "payment obligations" honored in full, just they have been for more than six years. That the holders of Exchange Bonds will not receive an immediate advance on all of the payments that will eventually come due under their Bonds is not inequitable. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005). Nor is it inequitable that the Ratable Payment formula does not subject the plaintiffs to the same haircut accepted by the participants in Argentina's Exchange Offers. Those parties made a business judgment to accept assurances of prompt payment rather than being forced to litigate against the Republic around the world, as the plaintiffs have been forced to do at tremendous expense. *See* Op. 15 n.26.

Argentina's persistent failure to propose any alternative formula that complies with the Second Circuit's decision weighs heavily in favor of reaffirming the Ratable Payment formula

this Court adopted in the February 23 Orders. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1440 (D.C. Cir. 1988) (party's failure to "offer an alternative" remedy suggests that the remedy adopted was within the district court's discretion). Although Argentina mentions in passing the hypothetical formula the Second Circuit noted, which could require payment of "a percentage of the full amount of principal and interest owed by the Republic" (Argentina Br. 14), Argentina does not advocate that formula. And with good reason, because that formula would be difficult to administer in any event.

For example, in December 2012, the lions' share of the payments due on the Exchange Bonds comes in the form of so-called GDP warrants, which pay out based upon Argentina's GDP in any particular year. These payments are not amenable to a calculation based upon a percentage of the full amount of principal and interest that will be due on those Bonds at maturity. And, of course, Argentina does not even defend this formula as appropriate, equitable or workable, much less suggest that it would be willing to comply with the February 23 Orders if they were amended to include this alternative formula. *Id.*

To the extent the Republic has proposed any formula, it is that the plaintiffs get 0% of what they are owed when the Republic pays 100% of what is currently due and owing on the Exchange Bonds, as punishment for the plaintiffs "reject[ing] the Republic's offers to resolve their claims" in the 2005 and 2010 exchanges. *Id.* at 2. This argument cannot be reconciled with the Second Circuit's affirmance of this Court's Orders requiring "Argentina to make 'ratable payments' to plaintiffs ***concurrent with or in advance*** of its payments to holders of the 2005 and 2010 restructured debt are affirmed." Op. 28 (emphasis added). As this Court observed, the plaintiffs "are entitled to money, and they are going to get something." Nov. 9 Tr. 29:25-30:2.

Second, Argentina argues that the "[p]laintiffs' proposed remedy must also be rejected by the Court because it would harm third parties, including the exchange bondholders." Argentina Br. 2. But as this Court and the Second Circuit found, Argentina has sufficient financial resources to honor all of its payment obligations under both the plaintiffs' bonds and the Exchange Bonds. Indeed, just this past Sunday, November 18, Argentina's Minister Lorenzino confirmed that Argentina has "has ample ability to make the required payments. We have the funds available to do so." Reed Decl., Ex. L. No harm could possibly come to the holders of the Exchange Bonds if Argentina either complies with the February 23 Orders and its other legal obligations ***or*** posts a bond securing compliance. Argentina's real argument appears to be a veiled threat to disobey this Court's Orders unless the Court reduces the Ratable Payment formula down to 0%. *See infra* part II.C.1. Such threats are not legitimate bases to decline to enter the Proposed Amending Orders. *See Higgins v. Cal. Prune & Apricot Growers, Inc.*, 282 F. 550, 559 (2d Cir. 1922) ("We cannot assume that the order of the court will be disregarded. On the contrary, we assume it will be obeyed."); *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962).

Finally, Argentina argues that the Ratable Payment formula is inequitable because the funds it would use to comply are "foreign currency reserves." Argentina Br. 15. This is just an attempt to relitigate issues already decided against the Republic. The Second Circuit has affirmed this Court's conclusion that the $45 billion that Argentina has at the Bank of International Settlements, and which it regularly taps to pay the obligations it chooses to honor, demonstrates Argentina's ability to comply with the February 23 Orders. *See* Op. 26. That conclusion is law-of-the-case not subject to reconsideration on remand. And, in any event, Argentina has vast resources beyond its foreign currency reserves to honor its bond obligations.

2. Under Rule 65(d)(2), The February 23 Orders Bind Any Party With Actual Notice Who Actively Participates With Argentina Or Its Agents Or Attorneys In Making the Exchange Bond Payments

This Court has held, and the Second Circuit has affirmed, that Argentina can be enjoined from making payments on the Exchange Bonds in violation of its obligations under the Equal Treatment Provision. This is true whether Argentina does so by paying under the Exchange Bonds directly, or whether non-parties agree to assist Argentina in processing payments to beneficial holders of those Bonds. Any such non-parties that do so with the knowledge of the Orders, however, are subject to those same Orders and are bound not to assist in their violation. While the plaintiffs hope, of course, that Argentina simply does what it is obligated and able to do—pay what is currently due and owing under the Exchange Bonds and the plaintiffs' bonds—that Argentina forecasts its own noncompliance would not be an excuse for non-parties to fail to comply with their obligations under well-settled law.

Rule 65(d)(2) mandates that those who are in "active concert or participation" with an enjoined party are bound by the injunction, and cannot assist in a breach of the injunction. There is no doubt that each of the entities specified in the Proposed Amending Orders is in active concert or participation with Argentina because each of them agreed to participate in the process of Argentina making payments on the Exchange Bonds. Although certain non-parties have expressed generalized fears about the scope of the Proposed Amending Orders or the burdens they might impose, these fears are not implicated by the Proposed Amending Orders.

a) Rule 65(d)(2) Extends All Injunctions To All Non-Parties Acting In Concert With Enjoined Parties, Regardless Of Whether They Are Named In The Injunction

"[A] person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt. This is well established law." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930). Accordingly, Rule 65(d)(2)—which governs the

"Contents and Scope of Every Injunction and Restraining Order"—requires that an injunction apply to three separate groups of people: (1) "the parties"; (2) "the parties' officers, agents, servants, employees, and attorneys"; and (3) other persons in "active concert or participation" with "the parties" or "the parties' officers, agents, servants, employees, and attorneys."

Thus, the notion that a person must be an "agent" of an enjoined party to be bound by an injunction is disproven by the plain language of Rule 65(d)(2), which distinguishes "parties" and "agents" from those in "active concert or participation" with the parties or their agents. Courts thus have held parties to be in active concert or participation with an enjoined party—and bound by an injunction—in a wide variety of circumstances. *See*, *e.g.*, *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 275 (2d Cir. 2011) (applying injunction against trademark infringement to entities using marks through franchise agreements); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F. 3d 372, 377 (10th Cir. 1996) (enforcing injunction against bank claiming to be "merely . . . carrying out its own independent contractual obligation to allow a depositor's withdraw upon request"). This test is "directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 193 (2d Cir. 2010). For these reasons, courts generally do not specifically identify the third parties bound under Rule 65(d)(2). It is only because Argentina continues to proclaim that it will disregard its legal obligations that this Court would now need to consider the potential consequences of Argentina's decision to violate the Orders.

b) BNY Is, And Must Be, Bound By The Orders[2]

Although BNY emphasizes its functions and duties as an indenture trustee, it fails to account for its pivotal role as a "Paying Agent" processing payments on the Exchange Bonds—functions upon which Argentina completely relies for payments to reach the beneficial holders of the Exchange Bonds. BNY itself acknowledges the distinction between acting as an indenture trustee and merely processing payments. In its submission, BNY defines itself both as "Trustee" and "Paying Agent" (Decl. of Kevin F. Binnie ¶¶ 3, 7 (Nov. 16, 2012) ("Binnie Decl."), and describes the payment process through DTC as follows:

> Step One: The Republic transfers funds to a US Dollar deposit account in the name of the Trustee at [BCRA].
>
> Step Two: The funds in the Trustee's account at [BCRA] are transferred to an account at [BNY] in New York, New York, in the name of the Paying Agent [BNY].
>
> Step Three: The Paying Agent [BNY] transfers the funds to DTC for distribution to its participants, who distribute the funds to beneficial holders.

Binnie Decl. ¶ 12. BNY thus has acknowledged both that when it is holding Argentina's payments in New York, it is acting (to use BNY's term) as a Paying Agent, and that payments will not reach the beneficial holders of the Exchange Bonds without BNY's help in that capacity. Indeed, discovery produced by BNY demonstrates that Argentina even relies upon BNY to calculate the precise amount due to the beneficial holders of the Exchange Bonds.

Nor is BNY's role as Paying Agent free of directions from Argentina, as BNY suggests. The Indenture expressly provides that when Argentina sends money to BNY, it must be accompanied by an instruction:

---

[2] As respects this section of the plaintiffs' brief, Plaintiff NML Capital is represented solely by Quinn Emanuel Urquhart & Sullivan, LLP.

> directing the Trustee to hold these funds in trust for the Trustee and the beneficial owners of the Securities in accordance with their respective interests and to make a wire transfer of such amount to [DTC's nominee] Cede & Co., as the registered owner of the Securities, which will receive the funds in trust for distribution to the beneficial owners of the Securities.

Indenture at Ex. D.2 at R-2, Cohen Decl., Ex. X.[3] Moreover, Argentina's obligation to pay the Exchange Bonds is not satisfied until BNY forwards this payment on to DTC. Cohen Decl., Ex. Y ¶ 2(a). And discovery obtained from BNY demonstrates that BNY actively communicates with Argentina approximately one month prior to Argentina's scheduled payments on the Exchange Bonds. *See, e.g.*, Cohen Decl., Exs. S-W. Therefore, even under BNY's interpretation of Rule 65, the Indenture itself demonstrates that BNY is without a modicum of doubt in active concert and participation with Argentina and bound by the February 23 Orders.

BNY is wrong to suggest that an agency relationship, or even instructions from Argentina, are required for BNY to be bound by an injunction because, under well-settled law, BNY merely needs to be acting in concert with Argentina, regardless of its motivation for doing so. *See* Fed. R. Civ. P. 65(d)(2) (separately binding agents and those acting in concert with a party); *Eli Lilly & Co.*, 617 F.3d at 193 (holding that the issue turns on "the actuality of concert or participation"). BNY also is wrong to suggest that it is not acting in concert with Argentina because it cannot control Argentina. Even if BNY cannot prevent Argentina from tendering a payment that violates this Court's Orders, such a payment cannot reach the beneficial holders of the Exchange Bonds unless BNY accepts and processes it. If BNY does so, pursuant to its ongoing

[3] BNY cannot rely on these duties to establish an "independent interest" in payments (BNY Br. at 13) because, as BNY's authorities hold, such an interest must be acted upon "independently." *Id.* Here, BNY's "interests" were established in a contract with Argentina, and are exercised following a direction from Argentina—belying any notion that BNY is not acting in concert and participating with Argentina.

contract with Argentina and Argentina's direction to do so, it is acting in concert and clearly participating with the Republic—and it is absurd for BNY to claim otherwise.

Finally, there is no merit to BNY's argument that it might have conflicting duties[4] or potential liabilities. BNY's unsupportable fears appear to be based on the assumption that Argentina is a scofflaw that will disobey this Court's Orders. However, this Court's Orders are directed in the first instance to Argentina,[5] and if Argentina obeys—as it agreed to do when it irrevocably submitted to the jurisdiction of this Court—there cannot be a conflict or potential liability for BNY at all. Even if Argentina defies this Court's Orders, because BNY must obey a lawful order of this Court, it has no potential liabilities or conflicting duties arising out of its compliance with such an order. Indeed, BNY's brief admits that section 5.2(xx) of the Indenture expressly states that "no provision of this Indenture shall require" BNY "to do anything which may . . . be illegal or contrary to applicable law or regulation." Br. of Non-Party Bank of New York Mellon 17 ("BNY Br.").[6] And there is no indication that compliance will be overly burdensome. In addition, if BNY must bear some modest administrative burden because Argentina is as contumacious as BNY apparently expects, that simply is the price BNY must pay for voluntarily placing

---

[4] BNY is not a fiduciary of the beneficial holders of the Exchange Bonds; instead, as BNY asserts in its brief, its duties arise out of the terms of the Indenture. BNY Br. at 3-5.

[5] BNY erroneously suggest that the plaintiffs lack standing to pursue any relief under the Equal Treatment Provision. BNY Br. at 7 n.7. Even if this argument had merit—and it has none—this Court and the Second Circuit have already recognized the plaintiffs' entitlement to injunctive relief based on the Equal Treatment Provision. The only remaining question is the extent to which it will bind third parties who assist Argentina in fulfilling its obligations under the Exchange Bonds.

[6] Complying with the Orders also would not result in liability for BNY because the Indenture provides that BNY "shall not be liable for any error of judgment made in good faith by a Responsible Officer or Responsible Officers of the Trustee, unless it shall be proved that the Trustee was grossly negligent in ascertaining the pertinent facts." Indenture ¶ 5.1(c).

itself at the heart of the schemes of a scofflaw.[7] *Cf.* Hr'g Tr. 44:9-15 (Aug. 30, 2011), Reed Decl., Ex. E. ("If there is a way to narrow the subpoenas . . . I certainly would like to do that. But the general idea, who do you think is causing the trouble here? These plaintiffs are owed a lot of money on their judgments legally obtained in this court. . . . If there is a problem, talk to the Republic. Talk to Cleary Gottlieb primarily. They are the cause of this."). And, in any event, a party may not escape the mandatory requirements of Rule 65(d)(2) by claiming that complying with the law is overly burdensome.

c) DTC And Cede & Co. Are, And Must Be, Bound By The Orders[8]

Like BNY, the Depository Trust Company and its nominee, Cede & Co. which serves Depository Trust Company's nominee as the formal "holder" of the Exchange Bonds (and together with Depository Trust Company "DTC") are bound by the February 23 Orders because they plainly act in "active concert or participation with" Argentina or its "officers, agents, servants, employees or attorneys" in making payments on the Exchange Bonds. Fed. R. Civ. P. 65(d)(2). DTC agreed to serve as depositary[9] for the Exchange Bonds, and to distribute payments to beneficial interest holders in that capacity. *See*, *e.g.*, Cohen Decl. Ex. Y (Form of Security) ¶ 2 (directing that on the payment date, DTC, as registered owner of a global security, will

---

[7] Indeed, BNY volunteered to serve in numerous vital roles with respect the Exchange Bonds: it is the Indenture Trustee; it serves as the "Registrar" of the Exchange Bonds, which requires it to record changes in the registered owners, Indenture ¶ 2.6(a); its affiliates in Europe and New York also serve as "trustee paying agents" capable of accepting funds from Argentina and forwarding the funds to the registered owner, Cohen Decl., Ex. Y; Cohen Decl., Ex. Z; Cohen Decl., Ex. AA.

[8] As respects this and the remainder of Section B.2 of the plaintiffs' brief, Plaintiff NML Capital is represented only by Dechert LLP and Quinn Emanuel Urquhart & Sullivan, LLP.

[9] There is no distinction between a "depository" and a "depositary." The Indenture refers to a "depositary," Indenture at 2, and the plaintiffs have chosen that spelling for consistency.

receive funds to distribute to the beneficial owners of the global security). And, although DTC downplays its role because its system is "largely automated," *see* Reed Decl., Ex. F at 4 ("DTC Ltr."), automated assistance is still assistance. Thus, like BNY, DTC is acting in concert with Argentina when it processes Argentina's payments, regardless of whether DTC is instructed by Argentina—and Rule 65(d)(2) binds DTC, regardless of whether DTC is specifically named in the Proposed Amending Order.

DTC's remaining objections relate to purported burdens placed on it, and are unfounded under the plain terms of the Proposed Amending Orders and the facts of this case. DTC is not required to judge whether the "ratable payments formula has been met"—just to ascertain whether Argentina has submitted a certification that complies with this Court's orders. Feb. 23 Order ¶ 2(f); Proposed Amending Order at ¶ 2(j). Provided that DTC acts in good faith and has no reason to believe that Argentina has transmitted a false certification (for example, if notified by the Plaintiffs that Argentina has not made its Ratable Payment), it will have complied with its obligations.[10] If Argentina fails to make a certification to the Court, or if Plaintiffs have objected, then DTC can comply with the Court's Orders as easily as BNY can.

DTC admits in its letter that its payment processing systems require that all payments include the CUSIP number[11] of the security on which a payment being made. This allows DTC to know exactly which security is being paid, and to identify the persons to whom the payment

[10] DTC will have sufficient notice of non-compliance because any violation by Argentina will have occurred the day ***before*** DTC receives funds from BNY. Under the terms of the Exchange Bonds, Argentina is required to send funds to BNY on the date prior to relevant payment's due date; BNY then forwards the payment to DTC on the payment's due date. *See, e.g.*, Cohen Decl., Ex. Y ¶ 2(a).

[11] A CUSIP number is a unique identifier for a security. *See* http://www.sec.gov/answers/cusip.htm.

should be distributed. *See* DTC Ltr. at 2 ("DTC will receive a transfer of funds identified with a single, particular CUSIP number. This process would be repeated for each individual bond, identified to DTC in each case only by its CUSIP number. Compliance with these instructions is a largely ministerial, automated task."). There are only three CUSIP numbers for the Exchange Bonds paid through DTC, and BNY has identified all of them in its submission.[12] *See* Binnie Decl. ¶¶ 5, 9. Should Argentina fail to comply with this Court's orders, DTC only needs to block the payments—a total of five per year, which occur on fixed dates—associated with these three CUSIP numbers. Nothing in DTC's submission suggests that this is more than a trivial inconvenience, let alone technically difficult to implement.

d) The Federal Reserve Bank Of New York Acknowledges That The Orders Should Restrain Argentina And Those In Privity With It; The Orders Do Not Implicate The Additional Concerns That FRBNY Has Raised.

The Federal Reserve Bank of New York (the "FRBNY") does not challenge the validity of this Court's orders as they relate to Argentina, including the Court's ruling that Argentina continues to violate the Equal Treatment Provision, or the Ratable Payment formula set forth in this Court's orders and confirmed in the Proposed Amending Orders. Indeed, the FRBNY agrees that the Court's orders should apply to Argentina and those in privity with it. Reed Decl., Ex. H at 1-2 ("FRBNY Ltr."). Instead, it raises concerns relating to Article 4A of the Uniform Commercial Code ("UCC") and to its assessments of the potential impact of the Proposed Amending Order on payment systems generally. The well-established facts of this case—indeed, the submissions of the very parties who are bound by the February 23 Orders and the Proposed Amending Order—make clear that these concerns are misplaced.

[12] The clearing systems for the other Exchange Bonds are Euroclear and Clearstream. *See* Binnie Decl. ¶¶ 5, 6, 8. All arguments pertaining to DTC apply to these institutions equally.

The FRBNY expresses concerns about the effect of the Proposed Amending Orders on the "Fedwire" and "CHIPS" funds transfer systems. At the outset, it bears repeating that the Proposed Orders would have no effect on any third party if Argentina complies or posts a bond securing such compliance. The Proposed Amending Orders also simply do not extend to the Fedwire or CHIPS system; they are not identified in the order and no one has suggested that they function as agents or servants of Argentina, or that their operation of wire transfer facilities would constitute action in concert or participating with Argentina in its payments under the Exchange Bonds. Fedwire and CHIPS are electronic highways for the movement of money. The drivers of the getaway car are participants in the violation; the entities that maintain the highway are not. To be clear, however, this clarification applies only to the Fedwire and CHIPS systems, and not parties otherwise bound by the Proposed Amended Order that use these systems. The FRBNY's concerns are therefore misplaced.[13]

The FRBNY also raises concerns that the Proposed Amending Orders violate UCC Article 4A. It points to U.C.C. Article 4A-502, which applies to any "levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account." If the orders effected an attachment, FRBNY would raise an appropriate question. As the Second Circuit unambiguously held, however, the February 23 Orders do not attach any property, rendering Section 4A-502 completely irrelevant. *See* Op. 25-26 & n.14 ("For similar reasons, we see no merit to Argentina's argument that the Injunctions violate New York trust or attachment law on the theory that they "execute upon" funds that do

[13] To the extent the FRBNY and the Clearing House require further clarification of their duties not to assist Argentina in violating the Court's injunction, Plaintiffs' Proposed Orders provide a means for them to obtain such clarification. *See* Proposed Amending Orders ¶ 2(h).

not belong to Argentina.").[14] It is the next section of the UCC—Section 4A-503—that governs injunctions, and it provides:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

N.Y. U.C.C. § 4A-503. While the FRBNY is correct that attachments (and similar process) can be served only on a beneficiary's bank by a beneficiary's creditors, and on an originator's bank by an originator's creditors, nothing in Section 4A-503 imposes a similar restriction on injunctions. Nor does any other portion of Section 4A-503 bar the February 23 Orders or the Proposed Amending Orders. The FRBNY implicitly acknowledges this by arguing only that Section 4A-503 "do[es] not permit process to restrain a funds transfer at an intermediary bank." This argument is moot because intermediary banks are expressly carved out from the Proposed Amending Orders, consistent with Section 4A-503.[15] And, because Article 4A purports only to govern funds transfers, these provisions do not affect in any way this Court's ability to regulate the conduct of BNY in its role as Indenture Trustee or Paying Agent. *See* N.Y. U.C.C. § 4A-102 cmt.

Nor will the Proposed Amending Orders violate any portion of Regulation J. The FRBNY does not cite any particular provision of Regulation J. The only part that arguably is appli-

[14] *Shipping Corp. of India, Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009) is inapposite for the same reason: It deals with attachments.

[15] The concerns that FRBNY raises regarding the "money-back guarantee" will similarly not be implicated by the Orders. As the FRBNY notes, the guarantee applies when a funds transfer in not completed. Because the Proposed Amending Orders do not affect intermediary banks—just originators' banks, which initiate funds transfers, and beneficiaries' banks, which by definition receive completed funds transfers—the money-back guarantee is irrelevant.

cable is Regulation J's incorporation of Article 4A of the UCC (12 C.F.R. § 210.25(b)(1))—meaning that Regulation J permits the Proposed Amending Orders for the same reasons that Article 4A does.

FRBNY also expresses concerns that beneficiaries' banks or clearing systems might have difficulty complying with the Proposed Amending Orders because they might lack sufficient information to do so without slowing down the entire U.S. payment system. The submissions of BNY and DTC—two entities that are bound by the Proposed Amending Orders—demonstrate that these concerns also are misplaced.[16] According to BNY, with respect to payments that flow through DTC, there are only two beneficiaries in the entire payment process[17] because there are only two funds transfers in the process: one in which Argentina is the originator, and BNY (or a trustee paying agent appointed by BNY) is the beneficiary, and another in which BNY is the originator, and DTC is the beneficiary.[18] *See* Indenture ¶ 3.5(a).

In both cases, BNY and DTC are fully aware, at all times, that the relevant funds transfers relate to payments on Argentina's bonds. DTC states that it cannot process a payment unless the payment includes a CUSIP number—meaning that DTC can easily identify the five relevant funds transfers each year. Moreover, because BNY is required to receive the payment funds from Argentina on the date prior to the scheduled Exchange Bond payment, hold them in trust, and then transfer them (with the relevant CUSIP number) to DTC, there can be no doubt that

[16] And, although neither Clearstream Banking S.A. nor Euroclear Bank S.A./N.V. submitted briefs to the Court, this analysis applies to them with equal force.

[17] The Proposed Amending Orders cannot and should not be limited to these specified entities because it is necessary to bind any entities that replace BNY and DTC, and because it is possible that Argentina will attempt to interpose additional or different parties in the payment process.

[18] DTC confirmed that it distributes funds through a "netting" process, rather than a funds transfer. DTC Letter at 2.

BNY also can identify the relevant funds transfers. BNY and DTC have said nothing to suggest that they are incapable of doing this, or even that doing so would have a meaningful effect on their operations. Thus, the FRBNY's concerns simply are not implicated under the facts of this case.[19]

Other clearing systems involved in making payments on the Exchange Bonds, including Clearstream Banking S.A., Euroclear Bank S.A./N.V., and the Euroclear System similarly have the ability easily to comply with the Court's orders. These clearing systems, like DTC, are expressly named in the Exchange Bonds' offering documents as entities assisting in the payment of the Exchange Bonds, and therefore plainly fall within the scope of entities enjoined under Rule 65(d)(2). *See, e.g.*, Reed Decl., Ex. T at S-110 ("The U.S.-European trustee will make payments to the common depositary for Euroclear or Clearstream, Luxembourg, or its nominee, as the registered owner of the New Securities, which will receive the funds for distribution to the holders of such New Securities."). Like DTC, these other clearing systems may comply with the Court's orders, in the event that Argentina fails to certify that it has made Ratable Payments to the plaintiffs, simply by blocking the payments associated with the few CUSIP numbers associated with the Exchange Bonds.

e) The Orders Do Not Implicate the Concerns the Clearing House Associations Raises

Like FRBNY, the Clearing House Association ("Clearing House") does not challenge that Argentina has violated the equal treatment provision; nor does it contest that injunctive relief is a proper remedy. Instead, the Clearing House asserts that the injunctions "should be crafted

[19] Should Argentina violate the February 23 Orders and forward payments to BNY without making its Ratable Payment to the plaintiffs, the funds would not "be frozen at [BNY] indefinitely." EBG Br. 7. BNY can simply refuse to accept any payment by Argentina unless it receives the proper certification.

not to apply to beneficiary's banks, funds-transfer systems, or other parties in a funds transfer," claiming that "[b]eneficiary's banks would . . . be significantly burdened, and legitimate payments would inevitably be disrupted, if beneficiary's banks are included in the scope of the injunction." Cohen Decl. Ex. G at 2-3 (Clearing House Ltr.).

The Clearing House erects a straw man, asking the Court to imagine confusion resulting from "a payment order that simply lists an originator . . . , an originator's bank, a beneficiary, and. . . a beneficiary's bank," which would supposedly force a beneficiary bank to "make inquiries of their senders to find out whether the transfer was in payment of amounts owing on the Exchange Bonds." *Id.* at 3. This scenario is a fiction. First, according to BNY, with respect to payments that flow through DTC, there are only two beneficiaries in the entire payment process, BNY and DTC. Second, as DTC's letter confirms, all payments on Exchange Bonds are identified by CUSIP number. Cohen Decl. Ex. F at 2. There would be no need for "inquiries" into whether a transfer was made in connection with an Exchange Bond—that information would be immediately identifiable.[20]

The Clearing House also questions whether the Court's orders will apply to the "CHIPS" funds transfer systems. As detailed above, the plaintiffs did not intend for, and do not believe that, the Proposed Amending Orders extend to the Fedwire or CHIPS systems themselves.

f) This Court's Orders Are Clear

BNY has suggested that this Court should provide additional clarification about BNY's duties if Argentina breaches its obligations under the February 23 Orders. However, the February 23 Orders and the Proposed Amending Orders are clear: BNY (and other non-parties in con-

[20] The Clearing House also questions whether the Court's orders will apply to the "CHIPS" funds transfer systems. As detailed above, the plaintiffs did not intend for, and do not believe that, the Proposed Amending Orders extend to the Fedwire or CHIPS systems themselves.

cert or participation with Argentina) cannot take any action to process a payment from Argentina, or otherwise assist Argentina in making a payment, if Argentina has breached its obligations.[21] This is a simple, straightforward command, and this Court should not allow non-parties to further delay the plaintiffs' right to be paid by feigning ignorance of what the Court means—particularly given the late hour at which the non-parties have sought to intervene, after knowing about the February 23 Orders for many months. *See infra* section D.

C. Argentina Is Not Entitled To Extension Of The Stay Pending Appeal

1. The Unclean Hands Doctrine Bars Argentina's Stay Request Because Argentina's Brief In Response Makes Clear That It Intends To Evade The February 23 Orders

A stay is equitable relief and it is well-established that "he who comes into equity must come with clean hands." *Hermes Int'l v. Lederer de Paris Fifth Ave.*, 219 F.3d 104, 107 (2d Cir. 2000) (citation omitted). The Second Circuit has held that when a party "time and again deploy[s] their lawyers to raise legal roadblocks to the enforcement of the judgment against them[,] persistently endeavor[s] to evade the lawful jurisdiction of the District Court and undermine its careful and determined work," "refus[es] to comply with the District Court's lawful orders," and "decline[s] the proffered alternative of posting a bond," that party has unclean hands and is therefore not entitled to equitable relief, such as a stay. *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127-29 (2d Cir. 2009) (quotation omitted). Argentina has unclean hands and thus cannot be entitled a stay because, among other things: (1) it has failed to dispute the promises of its highest officials to violate this Court's February 23 Orders; (2) its officials have repeated and boasted about those same promises even after this Court's stern warnings, and even after the Republic

[21] With respect to BNY, this means it cannot provide its "Paying Agent" services—or any other services, *see supra* note 7—to Argentina. Should Argentina tender a payment in violation of the orders, BNY can simply hold the payment and seek directions from the Court.

filed its brief on Friday, November 16; and (3) Argentina's boilerplate declaration is unresponsive to this Court's directives.

At the November 9 hearing, this Court questioned Argentina's counsel about widely reported statements by Argentina's President Cristina Kirchner and Minister of Economy Hernán Lorenzino that the Republic intends to evade the February 23 Orders. *E.g.*, Nov. 9 Tr. 9:10-13:9. This Court then warned that if these statements were correctly reported, Argentina should "seriously reconsider[]" its intentions to defy the February 23 Orders. Nov. 9 Tr. 17:18. The Court also required the Republic to produce an declaration affirming that it has complied with the March 5 Order's requirement that it not "take any action to evade the directives of the February 23 Orders," "render them ineffective," or "diminish the Court's ability to supervise compliance with" them. Cohen Decl., Ex. P ¶ 2. In their remand brief, the plaintiffs provided for the Court numerous additional statements by Argentina's highest officials promising to violate the February 23 Orders "despite any ruling that could come out of any jurisdiction, in this case New York" (Cohen Decl., Ex. JJ at 2), as well as news reports explaining that Argentina has already violated the March 5 Order by actively planning to attempt to change its payment mechanisms on the Exchange Bonds (Cohen Decl., Exs. FF, HH, KK, PP, SS).

Argentina's failure to respond to the Court's questions and the overwhelming evidence that it plans to violate the February 23 Orders demonstrate beyond doubt that Argentina will take any steps it possibly can to violate those Orders. Argentina does not deny that its President and highest officials have repeatedly declared their intent to defy the Orders. *Id.* And while Argentina derides the plaintiffs' citations to sources such as *The Wall Street Journal*, *Bloomberg News* and Argentina's leading newspapers as "newspaper gossip," it does not deny the veracity of reports that it is actively planning to attempt to evade the February 23 Orders. This silence can

only be taken as an admission that those reports accurately describe Argentina's intent to violate the Orders, if it is able to contrive a mechanism by which to do so. *See Fox Industries, Inc. v. Gurovich*, 323 F. Supp. 2d 386, 389 (E.D.N.Y. 2004) (when the defendant was accused of "contumacious conduct," his lawyer's claim that the evidence of misconduct was fabricated was irrelevant because the defendant's "silence [on the substance of the accusations] speaks volumes"). Indeed, far from denying that its officials have promised to violate the February 23 Orders, Argentina's brief declares that "[n]o court can substitute for the political will and self-determination that includes the use of a country's reserves." Argentina Br. 16. The unmistakable implication is that Argentina will not comply with the Orders as an exercise of its "political will and self-determination."

Argentina's refusal to disavow its highest officials' promises to defy the February 23 Orders is unsurprising given that even since the plaintiffs filed their brief less than one week ago, the Republic's high ministers have continued to make the same threats. On Wednesday, November 14, a leading Argentina newspaper reported that Argentina's Minister of Economy "Lorenzino recently comment[ed] that [Judge] Griesa has taken an extremely firm position ***since knowing that the President will not accept reopening the swap nor payment as the judge is ordering***." Reed Decl., Ex. I (emphasis added). On the same day, Argentina's Minister of Foreign Affairs explained that Argentina will pay on the "restructured bonds" but "will not reward loan sharks who bought defaulted bonds." Reed Decl., Ex. J.[22] News reports over the past weekend

[22] Minister Lorenzino repeated this point in an interview this Sunday, November 19:

"[Interviewer:] Is Argentina's position regarding the claims made by vulture funds in the courts of New York still one of 'don't pay them a cent'?

[Lorenzino:] Of course. Argentina is responsible and will fulfill all obligations to its creditors. The country not only wants to meet them, but also is able to do so. Our creditors are all of those

[Footnote continued on next page]

added that President Kirchner has now given the "green light" to make the "payments to the holders of restructured debt through an account of Hugo Chavez's government and without having to go through New York." Reed Decl. K. And analysts continue to explain that Argentina's plan is to "request (and believes it will obtain) stays until the legal process is finished," and "if the legal strategy fails, Argentina will likely seek to re-route payments away from the US" because "Cristina Fernandez de Kirchner, who ultimately will decide what strategy to follow, is unlikely to be willing to accept the ruling and pay the holdouts." Reed Decl., Ex. U.

Argentina's declaration in response to this Court's directive in no way refutes many press reports that Argentina is actively scheming to evade the February 23 Orders. The declaration, provided by an official within Minister Lorenzino's Ministry of Economy, never disputes the truth of ***any*** of these reports, but instead merely states in conclusory and terse language that Argentina is complying with the March 5 Order. Decl. of Francisco Guillermo Eggers ¶ 3 (Nov. 16, 2012) ("Eggers Decl."). This assertion could be "true and correct" only if Mr. Eggers has adopted an

erroneous and self-serving reading of the March 5 Order as merely prohibiting the Republic from taking the final step of *changing* its payment mechanisms. *See also* Nov. 9 Tr. 23:23-25 (Argentina's counsel arguing that the Republic has "complied with" the March 5 Order because "the payment mechanisms remain in place"). Yet, planning to evade the February 23 Orders is clearly an "action to evade [those Orders'] directives." The declaration, like Argentina's derision of

---

[Footnote continued from previous page]
involved in the two restructuring proposals that Argentina carried out in 2005 and 2010. Those involved in these operations made significant sacrifices. From the point of view of both fulfillment with obligations and equity, Argentina's position cannot be anything other than to subject itself to these same commitments. We are going to continue opposing any alternative that goes beyond that." Reed Decl., Ex. L.

"newspaper gossip," is yet another non-denial denial tending only to demonstrate that Argentina, indeed, is actively attempting to create a plan to evade this Court's jurisdiction. *See* Carl Bernstein & Bob Woodward, *All the President's Men* 92 (1974).

It would be perverse in the extreme to grant to Argentina a stay to protect its right to appeal further the Orders, when Argentina has made plain that it will refuse to abide by those Orders if they are affirmed.[23]

2. Argentina Is Unable To Satisfy Any Of The Stay Factors

Even in the absence of unclean hands, Argentina would only be entitled to a stay pending appeal if it can prevail under the four stay factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). All of these factors militate against extension of the stay pending appeal.

a) Argentina Has No Possibility Of Success On The Merits

Argentina does not dispute that to be entitled to a stay pending further appeal, it must make a "***strong showing*** that [it] is likely to succeed on the merits." *Id.* (emphasis added); *Nken v. Holder*, 556 U.S. 418, 426 (2009) (same). Its only argument that it has made that showing is that "the Court of Appeals expressed multiple 'concerns' about the injunctions' application to third parties generally and in particular to intermediary banks." Argentina Br. 25-26. But the Second Circuit conclusively upheld the central aspects of the February 23 Orders—that Argen-

[23] While Argentina points out that the Court has previously issued stays to the plaintiffs in the present cases (Argentina Br. 24-25), at no point have the plaintiffs ever suggested that they would refuse to comply if they do not prevail on appeal.

tine breached the Equal Treatment Provision and that the remedy for that breach is that Argentina must make a Ratable Payment to the plaintiffs whenever it pays on the Exchange Bonds. Op. 28. As to the two issues that the Second Circuit left open, the first merely deals with to clarification as to "how [this Court] intends [the Ratable Payment formula] to operate," an issue about which Argentina does not even claim there is a likelihood that the Second Circuit will reverse. *See supra* section B.1. Argentina also does not endorse any alternative formulation.

The second concerns the application of the Orders to ***third parties***, but, as shown above, that is controlled in the first instance by Ruler 65(d)(2). The Second Circuit asked for clarification as to which non-parties that Rule might reach. Argentina has not shown any likelihood of success on that subject. In any event, if the Second Circuit concluded (contrary to Rule 65(d)(2)) that the Orders bound no third parties, Argentina has ***no*** likelihood of reversing the Orders as to ***its own conduct***. Accordingly, there can be no basis for extending the stay as to Argentina.

b) A Stay Would Substantially Injure The Plaintiffs

In their opening brief, the plaintiffs showed that if this Court extended the stay until after Argentina completed its over $3.3 billion in payments on the Exchange Bonds in December 2012, Argentina would use the period at least until its next scheduled payments—March 31, 2013 (or perhaps much longer)—to attempt to devise a plan to violate the Orders by designing a series of "alternative payment schemes . . . so that they can make [the Exchange Bond payments] abroad," outside of this Court's jurisdiction. Cohen Decl., Ex. GG.

In its response brief, Argentina does not deny these allegations, and rests instead upon a boilerplate declaration that merely avers that Argentina has not yet changed its payment mechanisms, and will not do so while the stay pending appeal is in place. *See supra* 23. But this declaration provides little comfort for the simple reason that while the stay is in place, Argentina can continue making all payments due on the Exchange Bonds, without paying anything to the plain-

tiffs, as it fully intends to do in December 2012. And Argentina does not deny that once that stay is no longer in place, it will do everything in its power to move its payment mechanisms out of this Court's reach, in violation of the February 23 Orders, hoping to deprive this Court of the ability to supervise compliance with its Orders. If such a diversion occurs, the plaintiffs will be consigned to yet more expensive and protracted litigation just trying to undo the damage and may ultimately be left without a practical remedy. Whether or not Argentina would succeed in implementing such a diversion, the plaintiffs simply should not have to bear the risk that it will do so.

In addition, granting a stay would harm the plaintiffs because they would once again receive nothing in December 2012, while the holders of the Exchange Bonds receive over $3.3 billion. As this Court explained at the November 9 hearing, the "the plaintiffs are entitled to money and they are entitled to money if the legal steps were in order, ***they are entitled to money out of the December payments***. They are entitled to money. And they have been waiting for years to get some money. But they are entitled to money. And they are going to get something." Nov. 9 Tr. 29:21-30:2 (emphasis added). Granting to Argentina yet another stay would only ensure that the plaintiffs get no money in December, as they have gotten no money for more than a decade.

c) Argentina Will Not Suffer Substantial Injury If The February 23 Orders Come Into Effect

Argentina will suffer no harm in the absence of a further stay pending appeal. Argentina has the money to pay all of its bondholders. Reed Decl., Ex. L. If it prevails on appeal, it can seek return of the money, which is the ordinary remedy under such circumstances. In any event, Argentina's further complaint that the failure to continue the stay would force it to use "immune assets to pay plaintiffs" is merely a rehash of the argument that the Second Circuit rejected. As

the plaintiffs pointed out, a requirement that Argentina comply with its obligations is not a legally cognizable harm, let alone an irreparable harm.

d) The Public Interest Weighs Strongly Against A Stay

Argentina attempts to hide behind alleged harm to third parties to justify continuance of the stay. Argentina Br. 25-26. Argentina's alleged harms to third parties will only come to pass if Argentina decides to violate the rights of either the plaintiffs or the beneficial holders of the Exchange Bonds by refusing to pay them. If, on the other hand, Argentina abides by all of its legal obligations and pays both groups of creditors in full in December 2012, there will be no harm whatever to any third party. The holders of the Exchange Bonds would receive all of the money that they are due, and the financial institutions would be able to process those payments just as they have been for more than six years. Argentina's threat to violate its legal obligations and thus harm third parties cannot possibly entitle the Republic to a stay, which is awarded only in equity. *See Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301 (1992) (Stevens, J., in chambers) (a party's "threat" to "punish[] innocent third parties cannot be permitted to influence a fair and impartial adjudication of the merits of [a stay] applicant's claims."). At the absolute minimum, Argentina cannot hide behind the rights of third parties—and its threats to harm those parties—to argue against lifting of the stay as applied to its own conduct.

In any event, the scenario hypothesized by Gramercy et al. and their declarant Professor Choi (who has previously been paid by Argentina to provide a declaration in this same litigation)—that Argentina will simply pay no one—ignores reality. EBG Br. 8; Decl. of Stephen Choi ¶ 14. Argentina has repeatedly and clearly said that it will continue to make all payments due under the Exchange Bonds. Cohen Decl. Exs. CC, DD, JJ, II, PP, SS; Reed Decl., Ex. . There is no reason to believe—and common sense rejects—the notion that Argentina would

harm its reputation and credit, and unnecessarily allow tens of billions of dollars of debt to accelerate, simply to avoid paying the plaintiffs $1.43 billion.[24]

The need to prevent Argentina from abusing the time afforded to it by another stay pending appeal presents a crucial test for the rule of law. If this Court lifts the stay now, the Republic will have little choice but to comply with the Orders when its December payments on the Exchange Bonds comes due (or at least within the applicable 30-day grace period). That prospect, in turn, may also cause the Republic to realize that it cannot endlessly burden this country's courts and flout its laws rather than deal with plaintiffs in a responsible fashion. On the other hand, if justice is delayed, the Republic's evasive tactics suggest strongly that it will make every effort to ensure that justice ultimately is denied.

3. If The Stay Is Maintained, This Court Should Require Argentina To Post A Bond

This Court should require the Republic to post a bond if it permits any further stay of the February 23 Orders. Requiring a bond is the customary and practical means to protect a prevailing party's rights during an appeal, at least where the losing party can afford to post that bond. *Leighton v. Paramount Pictures Corp.*, 340 F.2d 859, 861 (2d Cir. 1965). Here, plaintiffs are not only prevailing parties before this Court, but also before the Second Circuit, which has affirmed the ruling in their favor subject only to two minor clarifications. Furthermore, the Republic is far more likely than most non-prevailing parties to take deliberate action to deprive plaintiffs of the relief they were awarded if the Republic is permitted to do so. Indeed, the Republic has repeatedly declared its intent to evade this Court's decision if it is affirmed on appeal. *See supra* sec-

[24] The assertion by Gramercy et al. that the plaintiffs would "welcome default" is risible. EBG Br. 8 n.11. As this Court has recognized over and over again, the plaintiffs have a right to be paid under the terms of their bonds and the plaintiffs' interests would be served by Argentina simply honoring all of its payment obligations to all of its creditors.

tion C.1. The strong likelihood that the plaintiffs will ultimately prevail, compounded by the strong likelihood that the Republic will attempt to rob them of relief, leave no question that a bond should be an essential prerequisite to any further stay.

As a practical matter, requiring a bond would resolve every concern voiced by the third parties who made submissions to the Court. If Argentina posts a sufficient bond, the plaintiffs have agreed to forebear enforcement of the Court's orders, enabling Argentina to make the December payments as planned under Exchange Bonds and simultaneously to eliminate any immediate uncertainties on the part of the financial institutions that play a role in facilitating those payments.

As the plaintiffs explained in their remand brief, the Republic also can protect its "full appellate rights" by posting a bond. *See* Argentina's Br. 26. Argentina's brief does not respond to this point, meaning that the Republic has conceded that posting a bond would fully secure its rights. *See Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408, 441 (2d Cir. 2011) (a party's failure to "directly respond" to an argument constitutes forfeiture of the argument). Just as the Republic could resolve every concern presented to this Court about the application of the injunction by complying with February 23 Orders, it could resolve every question concerning its December payments by posting a reasonable bond, as virtually any other litigant in like circumstances would be compelled to do.

Once again, it is the Republic's unrelenting bad faith that has led to emergency litigation and anxiety. The Republic's brief fails even to acknowledge plaintiffs' offer to forgo enforcement of the February 23 Orders if bond is posted, and Minister Lorenzino declared that the Republic would not "validate in any manner" the plaintiffs' request for a bond. Reed Decl., Ex. L. In other words, the Republic has refused to post a bond in *any* amount. That disregard for the

plaintiffs' reasonable and commonplace request strongly suggests the Republic's intent to defy and evade the February 23 Orders, and weighs decisively against any further stay in the absence of a bond. *See, e.g.*, *Sales v. U.S. Underwriters Ins. Co.*, No. 93-Civ.-7580-CSH, 1995 WL 14478, at *6 (S.D.N.Y. Apr. 3, 1995) (Uganda not entitled to a stay because it "refused to post a bond" "[g]iven the immunity from attachment of Uganda's property, and its judicially recognized recalcitrance with regard to satisfying judgments").

D. The Arguments Raised By Non-Party Bondholders Are Jurisdictionally Barred, Untimely And Meritless

1. The Relief Belatedly Sought By The Non-Party Bondholders Would Violate The Mandate Rule

As explained above, the Second Circuit affirmed this Court's Orders requiring "Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt are affirmed." Op. 28. The Second Circuit's remand is limited to two—and only two—issues: (1) clarification as how this Court "intended [the Ratable Payment formula] to operate"; and (2) a more careful explanation of the February 23 Orders' "application" to "third parties [including] intermediary banks" under Rule 65(d)(2). Notwithstanding the limited nature of this remand, the Exchange Bondholder Group ("EBG") and Fintech Advisory Inc. ("Fintech")—non-parties who claim to be holders of Exchange Bonds (collectively "Non-Party Bondholders")—argue that the February Orders "must be vacated," or at least "revisit[ed]" in their "entirety." EBG Br. 16,17; Fintech Br. 3. The Non-Party Bondholders' rationale for this extraordinary request is their assertion that the Orders are "unsupported exercise of judicial power" because they "conscript[]" the Bondholders' property and "compromise[s] the property rights of innocent non-parties." EBG Br. 6-7, 11. These arguments are jurisdictionally barred by the Mandate Rule and come years too late to be considered.

The Non-Party Bondholders' request that this Court "vacate" or "reconsider" the entirety of the February 23 Orders is plainly outside of the scope of the limited remand and thus violates the Mandate Rule, which "compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or ***impliedly*** decided by the appellate court." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (emphasis in original) (quotation omitted). The Second Circuit's holding that Argentina must "make 'ratable payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured" is binding on this Court, so Non-Party Bondholders' arguments attacking this Ratable Payment remedy are jurisdictionally barred.

Nor can these Bondholders evade the Mandate Rule by pointing to the Second Circuit's remand for clarification of the operation of the February 23 Orders on "third parties including intermediary banks." Op. 4. The Second Circuit's limited question regarding third parties merely concerned which parties would be bound by the Orders under Rule 65(d)(2). The Second Circuit has already definitively held that Argentina may not make payments on the Exchange Bonds unless it also pays the plaintiffs. Op. 28.

Perhaps recognizing that their facial attack on the February 23 Orders is barred by the Mandate Rule, the Non-Party Bondholders alternatively request that this Court "strike § 2(e)" of the February 23 Orders. EBG Br. 11. But § 2(e) merely provides, consistent with Rule 65(d)(2), that those parties acting in active concert with Argentina may not assist Argentina in violating the Orders. Feb. 23 Order ¶ 2(e), Cohen Decl., Ex. L.[25] The Non-Party Bondholders seem to believe that if this Court eliminates § 2(e), the Orders would no longer bind third party financial

[25] The plaintiffs have responded to the Second Circuit's instructions by proposing to amend this section to clarify which third parties are bound by Rule 65(d)(2). Proposed Amending Order ¶ 2, Cohen Decl. Ex. A.

intermediaries at all, who would then be free to aid and abet Argentina in evading the February 23 Orders' requirements, especially the Ratable Payment mandate. EBG Br. 6-11. That is incorrect. Rule 65(d)(2) applies to "every injunction" regardless of the content of the orders. Moreover, the Non-Party Bondholders' proposed remedy of striking § 2(e) would violate the Second Circuit's directive to explain the "application" of the February 23 Orders to "third parties."

Finally, Non-Party Bondholders' request that this Court "vacate[]" or entirely "revisit" the February 23 Orders is untimely and thus be denied on that independent basis. *See NAACP v. New York*, 413 U.S. 345, 365 (1973) ("If it is untimely, intervention must be denied."). This case has been ongoing in this Court for more than two years, has been widely reported in the press, and was disclosed in a variety of public sources, most recently by Argentina in its most recent 18-K statement. Reed Decl., Ex. R. The sophisticated parties that comprise the Non-Party Bondholders were undoubtedly aware of the February 23 Orders for some time. Notably, these Bondholders do not even claim that they were unaware of this litigation, merely asserting that they have not received "formal notice." EBG Br.1. Their belated requests that this Court vacate or entirely redraft the February 23 Orders, after those Orders have been affirmed by the Second Circuit, must be rejected as untimely.

2. The Non-Party Bondholders' Arguments Are Meritless

In their desperate attempt to convince this Court to "vacate[]" or entirely "revisit" the February 23 Orders, the Non-Party Bondholders raise a slew of objections to those Orders. Even if these objections had been raised in a timely manner, and were not already barred by the Mandate Rule, they would be wholly meritless.

First, the Non-Party Bondholders argue that the February 23 Orders will "make it impossible" for them to receive payment on their bonds, thus setting off "a *cataclysmic* default that will further unsettle the already fragile global economy." EBG Br. at 1, 8 (emphasis in original).

But this Court and the Second Circuit ruled that Argentina has the financial resources to pay all of its obligations under the Exchange Bonds ***and*** the plaintiffs' bonds, and Argentina itself agrees. *See* Reed Decl., Ex. L. Indeed, the ***entire*** amount owed to plaintiffs under the injunction is ***less than half*** what Argentina is required to pay on the Exchange Bonds ***in the month of December alone*** and less than 1% of the face amount of Argentina's total outstanding performing debt. There is no evidence to support the notion that Argentina is willing to miss a payment on the Exchange Bonds beyond the applicable 30-day grace period and thereby allow tens of billions of dollars of debt to be accelerated simply to avoid paying $1.43 billion to the plaintiffs. *See, e.g.*, Cohen Decl. Exs. CC, DD, JJ, II, PP, SS; Reed Decl., Exs. A, I, J, K, M, N, O, P, U. The Non-Party Bondholders' declaration that the February 23 Orders will cause them and the world economy great harm is nothing more than unsupported fear mongering.

Second, the Non-Party Bondholders argue that the February 23 Orders violate the Due Process and the Takings Clauses of the Fifth Amendment because "the effect of Plaintiffs' Proposed injunction is to use the private property of the non-party EBHs for the private benefit of the Plaintiffs." EBG Br. at 12, 15. This argument is utterly without merit. The February 23 Orders have absolutely no impact upon the rights of the beneficial holders of the Exchange Bonds to be paid, including the right to receive over $3.3 billion in December 2012, which President Kirchner and Minister Lorenzino have repeatedly promised to honor. *See, e.g.*, Cohen Decl. Exs. CC, DD, JJ, II, PP, SS; Reed Decl., Exs. A, I, J, K, M, N, O, P, U. As such, the Non-Party Bondholders cannot show that there was any loss of their property rights—i.e., their rights to payment under their contract with Argentina—as a result of the February 23 Orders. *See Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1377 (Fed. Cir. 2008) (Takings Clause); *Int'l Union, United Gov't Security Officers of Am. v. Clark*, No. 02–1484-GK, 2012 WL

2930670, at *5 (D.D.C. July 19, 2012) (Fifth Amendment Due Process Clause) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).[26]

In arguing that the rulings of this Court constitute "a judicial intrusion" that violates their Fifth Amendment rights, the Non-Party Bondholders rely on Justice Kennedy's concurrence in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S.Ct. 2592, 2614 (2010). But in *Stop the Beach*, Justice Kennedy stated that the Due Process Clause limits the power of courts to ***eliminate or change established property rights***. *Id.* The February 23 Orders do not even arguably eliminate or change the Non-Party Bondholders' established property rights to be paid by Argentina, including the right to sue Argentina if it fails to honor its obligations under their bonds.

Finally, the Non-Party Bondholders bring motions to vacate the February 23 Orders under Rule 19(a), because they claim they are "necessary parties" due to the Orders' "confiscatory impact" on their rights, and under Rule 60(b)(4), because they did not receive formal notice and an opportunity to be heard. EBG Br. at 18-20; *see also* Fintech Br. at 8. These motions should not detain the Court during this limited remand. The Non-Party Bondholders' Rule 19(a) argu-

[26] Indeed, lead Non-Party Bondholder Gramercy was fully aware of the risk that the creditors who did not participate in the exchanges would enforce their rights under the Equal Treatment Provision. In a January 2005 press release discouraging investors from participating in the 2005 exchange, Gramercy explained that the exchange was "unilateral in nature . . . not a result of good faith negotiations," and "not consistent with Argentina's capacity to pay." Reed Decl., Ex. Q. In that same press release, Gramercy noted the case of *Elliott Associates v. Peru*, a case in which a Belgian court granted an injunction similar to this Court's February 23 Orders, based upon a similar equal treatment provision in Peru's sovereign bonds. *Id.* And all of the bondholders who chose to accept the 2005 and 2010 exchange offers were provided notice of the plaintiffs' claims, including the possibility that payments on the Exchange Bonds could be enjoined based on obligations to those who did not participate in the exchanges. *See, e.g.*, Reed Decl., Ex. S at S-31. With that knowledge, Gramercy and the other bondholders exchanged their non-performing bonds, which contained the protections of the Equal Treatment Provision, for the Exchange Bonds, which do not, and have been paid consistently on the Exchange Bonds.

ment that they should have been joined as a necessary party is wholly meritless because the February 23 Orders did not even arguably have a "confiscatory impact" on their rights, as explained above. *See Conntech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 682 (2d Cir. 1996) ("[a] nonparty to a commercial contract ordinarily is not a necessary party to an adjudication of rights under the contract" (citation omitted)). Their vague requests for an evidentiary hearing under Rule 60(b)(4), moreover, fail to explain what evidence the Bondholders wish to develop at this hearing or how such a hearing would help bring this case to an equitable resolution. In any event, the Bondholders have been well aware of this litigation for years, but have sat on the sidelines until after the Second Circuit affirmed the Orders and mandated this limited remand, during which their concerns under Rules 19(a) and 60(b)(4) are not even arguably relevant. There is no reason for this Court to permit the Non-Party Bondholders to delay disposition of the limited remand in order to address these frivolous motions.

III. CONCLUSION

For the reasons stated above, the Court should enter the Proposed Orders, including dissolving the stay on the February 23 Orders.

Respectfully submitted,

November 19, 2012

By:_____/s/ Robert A. Cohen_

Theodore B. Olson
(tolson@gibsondunn.com)
Matthew D. McGill
(mmcgill@gibsondunn.com)
Jason J. Mendro
(jmendro@gibsondunn.com)
Misha Tseytlin
(mtseytlin@gibsondunn.com)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Robert A. Cohen
(robert.cohen@dechert.com)
Eric C. Kirsch
(eric.kirsch@dechert.com)
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036-6796
(212) 698-3500

Kevin S. Reed
(kevinreed@quinnemanuel.com)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, N.Y. 10010
(212) 849-7000

Attorneys for Plaintiff NML Capital, Ltd.

Leonard F. Lesser
(llesser@simonlesser.com)
SIMON LESSER, P.C.
420 Lexington Avenue
New York, New York 10170
(212) 599-5455

Attorneys for Plaintiff Olifant Fund, Ltd.

Edward A. Friedman
(efriedman@fklaw.com)
Daniel B. Rapport
(drapport@fklaw.com)
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
7 Times Square
New York, N.Y. 10036
(212) 833-1100

Attorneys for Plaintiffs Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC

Michael C. Spencer
MILBERG LLP
(MSpencer@milberg.com)
One Pennsylvania Plaza
New York, N.Y. 10119
(212) 594-5300

Attorney for Plaintiffs Pablo Alberto Varela, et al.