IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AZQUERRETA, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD., *Plaintiffs-Appellees*, v. THE REPUBLIC OF ARGENTINA, *Defendant-Appellant*. BANK OF NEW YORK MELLON, as Indenture Trustee, EXCHANGE BONDHOLDER GROUP, *Non-Party Appellants*, FINTECH ADVISORY, INC., EURO BONDHOLDERS, *Intervenors*.	Nos. 12-105 (L), 12-109-cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON), 12-943-cv (CON), 12-951-cv (CON), 12-968-cv (CON), 12-971-cv (CON), 12-4694-cv (CON), 12-4829-cv (CON), 12-4865-cv (CON)

OPPOSITION TO THE NON-PARTY APPELLANTS'
MOTION TO STAY DISCOVERY PENDING APPEAL

Plaintiffs-Appellees NML Capital, Ltd., Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC, Olifant Fund, Ltd., and Pablo Alberto Varela, et al. (collectively, "Appellees"), submit this opposition to the Non-Party Appellants' (the "Intervening Bondholders'") December 21, 2012, Motion to Stay Discovery. See Dkt. 621 ("Mot.").

The Intervening Bondholders urge the Court to inject itself prematurely into a discovery dispute currently pending in the district court, a dispute on which the district court has yet to rule. The Court should decline that invitation.

Appellees have served subpoenas and noticed depositions pursuant to the district court's March 5, 2012, order, ("March 5 Order") which this Court has *not stayed*. Under that order, the district court retains jurisdiction. It is for the district court to determine, in the first instance, the extent to which *its* order authorizes that discovery. Because the Intervening Bondholders offer no legal basis for this Court to participate prematurely in that process, and because the discovery sought by Appellees is vital to ensure that Argentina and the Intervening Bondholders are not taking steps to evade the injunction, their Motion should be denied.

BACKGROUND

This case arises from the latest effort by the Republic of Argentina to skirt its legal obligations, a tradition that dates to the 1820s. See *EM Ltd. v. Republic of*

Argentina, 473 F.3d 463, 466 n.2 (2d Cir. 2007). On December 7, 2011, the district court held that Argentina had violated the Equal Treatment Provision in its bonds held by Appellees. O'Shea Ex. 21.[1] In particular, the district court ruled that Argentina has violated and is violating its express obligation, under the bonds, to rank its payment obligations at least equally with its obligations under other external indebtedness. Because of the Republic's longstanding and demonstrated intransigence, among other reasons, the district court further determined that a monetary remedy would not suffice. Therefore, on February 23, 2012, the court specifically enforced the Equal Treatment Provision by enjoining Argentina from paying the Intervening Bondholders unless it also made ratable payments to Appellees. O'Shea Ex. 22 ¶ 2. To better ensure compliance, the court explicitly included in its injunction "agents and participants" in Argentina's bond payments. *Id.* ¶ 2(e).

After entering its February 23 injunction, the district court entered a further order to preserve the *status quo* pending Argentina's appeal. Specifically, on March 5, the court stayed the injunction in its February 23 Orders and enjoined Argentina "during the pendency of the appeal" from taking "any action to evade the directives of the [district court's] Orders . . . or diminish the Court's ability to

[1] "O'Shea Ex." refers to exhibits to the declaration of Sean F. O'Shea in support of the Intervening Bondholders' Motion, Dkt. 621.

supervise compliance with [its] Orders." O'Shea Ex. 23 ¶ 2. Recognizing that Argentina might seek to evade the Orders, the district court "retain[ed] jurisdiction to monitor[,] enforce[,] . . . modify, amend, or extend" the March 5 Order. *Id.* ¶ 4.

On appeal, this Court had "little difficulty concluding" that Argentina had breached its obligations and "will simply refuse to pay any judgments." Dkt. 442 at 20, 24. It therefore affirmed the injunction fashioned by the district court in its February 23 Orders and remanded under *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), for the district court to clarify two points regarding the injunction (how the ratable payment formula was intended to operate and which third parties were bound by the injunction).

On remand, the district court clarified those two points, returning the matter to this Court automatically under the procedure established by *Jacobson*. O'Shea Exs. 17, 18. At the same time, on November 21, the court lifted its stay, without addressing any other aspect of its March 5 Order. O'Shea Ex. 16. Shortly thereafter, on November 28, this Court stayed "the November 21, 2012 orders of the district court entered in relation to this matter." O'Shea Ex. 6.

The parties now are briefing their arguments concerning the February 23 injunction, as amended by the district court's November 21 Order. The March 5 Order, however, has not been stayed and continues to prohibit evasion of the injunction.

In the meantime, history has threatened to repeat itself. Not long after this Court affirmed the district court, Argentina's attempts to shirk the Court's jurisdiction became apparent. Reports surfaced that the Intervening Bondholders were considering collecting payments in France or Switzerland, Stancil Ex. 2, or exchanging bonds governed by New York law for bonds governed by Argentine law, Stancil Ex. 3.[2] The Bondholders do not deny that those actions would directly violate the March 5 Order. But they complain that, beyond press accounts and Argentina's history of taking evasive measures to avoid fulfilling its obligations to Appellees,[3] Appellees have no *additional* evidence that plans of evasion are afoot. Mot. at 8-10. This does not even account for the cold reality that Argentine officials (including the Argentine Ambassador to the United States) have sworn not to pay Appellees, while simultaneously offering reassurances that the Intervening Bondholders somehow *will* be paid

In light of those developments, on December 10, Appellees issued subpoenas designed to elicit information that would further bolster the ample (and historically predictable) evidence of Argentina's defiance. The subpoenas sought

[2] "Stancil Ex." refers to exhibits to the declaration of Mark T. Stancil in support of this Opposition, attached as Appendix A.

[3] For example, Argentina has placed the vast majority of its foreign currency reserves in the Bank for International Settlements, in an attempt to frustrate creditors' collection efforts. Stancil Ex. 9 at 4.

limited discovery from the entities most likely to have knowledge of the putative scheme to evade the March 5 Order – the Intervening Bondholders themselves, who have intervened in the district court and are participating in these appeals as Non-Party Appellants. O'Shea Exs. 1-5.[4] Appellees have requested, among other things, all documents (after the district court's February 23 Orders) concerning actions, plans, or proposals (i) to evade the injunctions; (ii) to diminish the district court's ability to supervise compliance with the injunctions; or (iii) to alter or amend the processes by which Argentina makes payments on its exchange bonds. *Id.*

The Intervening Bondholders have served objections to those discovery requests. Stancil Exs. 4-6. Appellees, in turn, have filed a Motion to Compel. Stancil Ex. 7. The district court has not yet ruled – and has not yet had a genuine opportunity to rule – on any of those very recent filings.[5]

Not content to let the district court resolve this discovery dispute, the Intervening Bondholders filed a Motion asking this Court to do something that it

[4] Ironically, the Intervening Bondholders criticize Appellees for not issuing *more* subpoenas, including subpoenas to holders of Exchange Bonds who have not intervened. Mot. at 10 n.5.

[5] As the Intervening Bondholders note, the return date of the discovery requests was December 20, and Appellees filed their motion to compel on December 21, the same day the Intervening Bondholders filed their motion in this Court. As of this writing, the district court has not had even a single business day to consider this matter.

almost never does – take control over discovery away from a district judge who has extensive first-hand experience dealing with this particularly defiant litigant. They urge the Court to "enforce" its November 28 stay order, even though the stay order (and this Court's opinion affirming the district court) do not even mention the March 5 Order. Indeed, in urging this Court to deny Appellees' request that Argentina post a bond, the Intervening Bondholders conceded that "[t]he district court's March 5, 2012 stay order remains in effect by virtue of this Court's November 28, 2012 order." Dkt. 509 at 9. And the subpoenas that the Intervening Bondholders ask this Court to countermand – just like the March 5 Order itself – are meant to *preserve the status quo* during the appellate process.

ARGUMENT

I. THE DISTRICT COURT WILL DETERMINE WHETHER ITS MARCH 5 ORDER AUTHORIZES THE SUBPOENAS

The thrust of the Intervening Bondholders' Motion – and their principal argument in favor of a stay – is that "this Court's November 28 Order expressly stayed the [district court's] November 21 Order in its entirety." Mot. at 7. That is true, but completely beside the point. As the Intervening Bondholders concede, this Court did *not* stay the district court's *March 5 Order*, in which the district court specifically retained jurisdiction on appeal to monitor compliance with its injunction and to ensure that the Republic did not take any action to evade or cripple the court's orders.

The March 5 Order remains in full force and effect. See, *e.g.*, *Morisseau v. DLA Piper*, 707 F. Supp. 2d 460, 461-62 (S.D.N.Y. 2010) (court retains jurisdiction to enforce un-stayed order pending appeal). And it is pursuant to *that* order that Appellees have sought discovery to determine whether the Intervening Bondholders are colluding with Argentina to frustrate enforcement of the injunction. O'Shea Exs. 1-5. The stated intent of the March 5 Order was to preserve the *status quo*, and that is precisely what the subpoenas seek to accomplish.

The Intervening Bondholders do not argue to the contrary. Rather, they argue that the subpoenas are improper because the *district court's* March 5 Order does not expressly authorize discovery. "If the district court had intended to allow discovery in connection with the March 5 Order," they surmise, "it would have included express language to that effect." Mot. at 8. We disagree. But that question is not properly before this Court. "It is peculiarly within the province of the district court to determine the meaning of its own order." *County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (internal quotation marks and alteration omitted). The Intervening Bondholders have served formal objections to the subpoenas, and Appellees have filed a Motion to Compel. Stancil Exs. 4-7. Whether (and to what extent) the March 5 Order will abide discovery is therefore a question firmly before the district court, which enjoys

"ample authority" to answer it. See *New York v. Shore Realty Corp.*, 763 F.2d 49, 53 (2d Cir. 1985). In the meantime, the Intervening Bondholders are misguided to seek premature and unnecessary relief from this Court.

The Intervening Bondholders also suggest that, because the March 5 Order did not specifically mention "discovery," it follows that Appellees' discovery requests are unauthorized. Indeed, the Intervening Bondholders state (Mot. at 8 n.3) that "[t]he only Rule providing for postjudgment discovery is Fed. R. Civ. P. 69," suggesting that the district court is powerless to authorize discovery to determine whether parties are actively violating the March 5 Order. The Intervening Bondholders offer no authority for that sweeping proposition. To the contrary, this Court has rejected the Intervening Bondholders' reading of Rule 69, recognizing that a district court has full power "to issue all orders necessary for the enforcement" of a prior injunction. *Shore Realty*, 763 F.2d at 53. Furthermore, as counsel for Argentina emphasized in oral argument before this Court on July 23, 2012, Appellees are *pre-judgment* creditors. 7/23/12 Tr. at 37; see also *id*. at 25 (colloquy between Appellees' counsel and Judge Raggi). Thus, *even if* postjudgment discovery were not allowed unless specifically authorized by Rule 69, that proposition would have no effect on Appellees.

II. THE INTERVENING BONDHOLDERS' REQUEST FOR AN ADDITIONAL STAY OF DISCOVERY IS UNJUSTIFIED

The Intervening Bondholders ask, in the alternative, for the Court to issue an order staying all discovery. They offer no basis for such an extraordinary request. They advert to the Court's "inherent power to enforce its orders," Mot. at 8 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991)), but fail to explain how these subpoenas – tailored to help preserve the *status quo* – are somehow a *threat* to the Court's orders. Even more puzzling, they cite Federal Rule of Appellate Procedure 8(b), which concerns actions against a surety and is patently inapposite. Mot. at 1, 8.

A stay of all discovery would be manifestly unjustified. In determining whether to grant such a stay, the Court considers four factors: (1) likelihood of success on the merits; (2) irreparable injury to the applicant in the absence of a stay; (3) whether the stay "will substantially injure the other parties interested in the proceedings"; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

The Intervening Bondholders barely mention those factors, much less attempt to satisfy them.[6] Rather, they argue that this Court's November 28 Order

[6] Even a brief examination of those factors illustrates why the Intervening Bondholders do not directly confront them. (1) There is no plausible chance of success on the merits; for the reasons stated above, it is well within the district court's authority (and firmly within the district court's discretion in the first

"necessarily entailed" the findings that would support the relief they now seek. That is nonsense. This Court's November 28 Order stayed the *underlying injunctions* – which otherwise would have required Argentina to make a ratable payment to Appellees in December 2012 if it makes a payment to the Intervening Bondholders. By contrast, the Intervening Bondholders now are requesting a stay to avoid responding to targeted subpoenas. Those subpoenas seek to determine whether the Intervening Bondholders have discussed with Argentina methods that the Republic can use to pay them without paying Appellees. Such efforts, if successful, would threaten to render practically meaningless any relief upheld by this Court, including the relief this Court has *already* affirmed. To say that the Intervening Bondholders are comparing apples to oranges would be generous.

The Intervening Bondholders' self-serving submissions (Mot. at 8-9, citing exhibits) that no attempts are being made to frustrate the district court's injunctions are woefully insufficient to support a stay. For starters, only one of the Intervening Bondholders – Gramercy – has attempted to deny having discussions with

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instance) to authorize discovery to determine whether parties are circumventing a court order. (2) The Intervening Bondholders cannot seriously suggest that they would suffer irreparable injury by producing the requested information – after all, their position must be that such evidence would demonstrate their compliance. (3) Appellees, by contrast, would undoubtedly suffer harm if entry of a stay prevented them from exposing and stopping Argentina's efforts to set up a payment mechanism that would allow it to flout this Court's orders. (4) Likewise, the public interest could not possibly be served by concealing such wrongdoing.

Argentina. And even this denial was carefully worded, raising more questions than it provides answers. O'Shea Exs. 15, 20. Moreover, the Intervening Bondholders point to little more than *ipse dixit* declarations from interested parties and *amici curiae*. Such assertions are not credible, *especially because* they are untested by discovery or any other factfinding mechanism. For example, an Argentine employee's conclusory assertion that the Republic will obey the March 5 Order (O'Shea Ex. 19 at ¶ 4) is roundly contradicted by numerous sources – including "inflammatory declarations" from high-ranking Argentine officials "that the court rulings will not be obeyed," O'Shea Ex. 16 at 3, and by the Intervening Bondholders' own admission that "the Republic is not going to pay the Plaintiffs," Stancil Ex. 1 at 7. Likewise, the Intervening Bondholders rely heavily on the assertion of Argentina's own paid expert, Stephen Choi, that evasion would be "exceedingly difficult," O'Shea Ex. 14 ¶ 11 – but that claim is hardly objective and entirely untested. Even if true, Choi's assertion is no hurdle to the intrepid judgment-dodger – as Argentina and the Intervening Bondholders apparently acknowledge, Stancil Ex. 3.

The Intervening Bondholders charge that Appellees have "offered only silence" in response to their submissions, Mot. at 9, as if that belies the need for discovery. But the press reports and public declarations in which Argentina promises to continue to thumb its nose at U.S. courts are not "silence"; short of the

very discovery at issue here, that is the best available evidence that Argentina is planning to evade this Court's orders. Indeed, any asymmetry of evidence is the very *point* of conducting discovery. Moreover, the proposition that Argentina has resolved to flout the injunctions, which would implicate the Intervening Bondholders,[7] is not only a matter of public record but a *finding of fact by the district court*:

> From the moment of the October 26, 2012 Court of Appeals' decision, the highest officials in Argentina have declared that Argentina would pay the exchange bondholders but would not pay one dollar to holders of the original FAA Bonds. President Cristina Kirchner made such a statement. The Minister of Economy, Lorenzino, declared that despite any ruling to come out of any jurisdiction, Argentina would not pay the FAA bondholders.

O'Shea Ex. 16 at 2-3.

It is therefore reasonable for Appellees – at a minimum – to pursue limited discovery from the Intervening Bondholders concerning Argentina's efforts. Indeed, it borders on the absurd to suggest that the Intervening Bondholders will be irreparably harmed by responding to the subpoenas. If they are not coordinating with Argentina to evade the injunctions, the responses will be straightforward. Conspicuously, however, the Intervening Bondholders have never denied having

[7] At least one holder of Exchange Bonds has publicly professed a willingness to accept payment in contravention of the injunction. Constellation Capital, which has significant Exchange Bond holdings (about $500 million, by one account) has affirmed that, if Argentina can figure out a way to offer payment, it will gladly accept it. Stancil Ex. 8 at 2.

responsive documents and information. And, if they *are* conspiring with Argentina, what legitimate basis possibly could exist to allow them to conceal that fact? More than that – what *extraordinary* circumstances possibly could exist to justify their request for a stay of all discovery? And what *extraordinary* circumstances could cause *this Court* to rule in that way before the district court has even had a chance to address discovery? *Cf.* Fed. R. App. P. 8(a)(1) ("A party must ordinarily move first in the district court for" a stay or injunction pending appeal.).

In short, a stay of discovery in connection with the March 5 Order is wholly unwarranted. Such a stay would frustrate the entire purpose of that order – to preserve the *status quo* on appeal – and jeopardize the parties' ability to ensure compliance with this Court's October 26 judgment. Harms of that nature to the judicial process are what stays are designed to *avoid*. The Intervening Bondholders' Motion should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the Intervening Bondholders' Motion.

Respectfully submitted,

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By: /s/ Mark T. Stancil

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