12-105-cv(L)

12-109-cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON), 12-943-cv (CON), 12-951-cv (CON), 12-968-cv (CON), 12-971-cv (CON), 12-4694-cv (CON), 12-4829-cv (CON), 12-4865-cv (CON)

United States Court of Appeals

for the

Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs-Appellees,

— v. —

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

(Caption Continued on Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANT-APPELLANT
THE REPUBLIC OF ARGENTINA**

Of Counsel:
Jonathan I. Blackman
Carmine D. Boccuzzi
Ezequiel Sanchez-Herrera
Sara A. Sanchez
Michael M. Brennan

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for Defendant-Appellant
One Liberty Plaza
New York, New York 10006
(212) 225-2000

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 AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE, EXCHANGE BONDHOLDER GROUP, ICE CANYON LLC, FINTECH ADVISORY INC.,

Non-Party Appellants,

EURO BONDHOLDERS,

Intervenor.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Rules and Statutes

Other Authorities

Page(s)

PRELIMINARY STATEMENT

On October 26, this Court remanded to the district court for further proceedings on two central issues regarding the district court's Injunctions[1] purporting to remedy the Republic of Argentina's (the "Republic") alleged violation of the pari passu clause: (1) the operation of "Ratable Payment" as an equitable remedy; and (2) the effect of the Injunctions on third parties. Following an extremely expedited briefing period on remand that gave the Republic and all potentially affected third parties only three days to respond to plaintiffs' papers, the district court entered unprecedented orders conditioning the Republic's service of its restructured debt on the Republic's paying over $1.3 billion into an escrow, and extended the application of its Injunctions to broad catch-all categories of third parties comprising the international payment system that transfers to the exchange bondholders funds held in trust for their benefit.

The district court's order that the Republic must pay sovereign funds *into an escrow account in the United States* in an amount that satisfies plaintiffs' monetary claims in full is a patent violation of the Foreign Sovereign Immunities Act ("FSIA"), which limits creditor process to sovereign property already located

---

[1] "Injunctions" refers to the permanent injunctions entered by the district court on February 23, 2012 that were the subject of the Court's October 26, 2012 decision (the "October 26 Decision") (SPE-267). "Amended Injunctions" refers to the injunctions now before the Court, which were entered on remand on November 21, 2012 (SPE-1378).

in the United States and used for a commercial activity here. There is no authority permitting a U.S. court to order a sovereign to *bring* its immune assets into the United States in order to "turn over" or distribute them to its creditors. More broadly, there is no legal basis for this kind of judicial "commandeering" of the Treasury of a foreign state, which would also command a sovereign to violate its own law and public policy concerning the equitable treatment of creditors – which it cannot do – on pain of having a U.S. court disable its regular, longstanding debt service and the international payment system.

The district court's definition of "Ratable Payment" in its orders is the antithesis of equity. In the name of "equal treatment" the district court conditioned a single periodic interest payment to holders of the Republic's discounted restructured debt upon payment to plaintiffs of 100% of all principal and interest on undiscounted debt. The effect of the orders was to put plaintiffs – at the *expense* of countless others and to the detriment of New York law – in a far better position than other creditors. In fact, under a "Ratable Payment" standard by which plaintiffs get preferential treatment, it is impossible to see how any payment could be made to them without violating the purported "pari passu rights" of all other creditors holding debt governed by the clause. As demonstrated by the third parties that have appeared in this case, this radical "remedy" will spawn more litigation, not end it.

Nor is there any basis for a court to enter "equitable" orders that threaten service on at least $24 billion of restructured sovereign debt and significantly impair the rights of numerous third parties who owe absolutely nothing to plaintiffs. Among the affected third parties are the indenture trustee for holders of the Republic's restructured debt (the "Trustee"), and broad, ill-defined categories of banks, clearinghouses, depositories and other entities comprising the international payment system, none of which is an agent of the Republic or owes any obligation to either the Republic or plaintiffs.

Recognizing that courts are barred from enjoining non-parties, the Amended Injunctions purport to enjoin each of these entities *indirectly* by mischaracterizing the fulfillment of their ministerial funds transfer duties to third parties as "aiding and abetting" an enjoined "act" of the Republic. This unprecedented theory is unsupportable. "Aiding and abetting" liability in this context is reserved for third parties who substantially assist a party in evading a court order – *not* for third parties who, in connection with a legal, arms-length transaction, engage only in independent acts pursuant to their pre-existing duties to other non-parties. This sweeping encumbrance of third-party rights also violates the Uniform Commercial Code ("UCC"), a statute summarily dismissed by the district court despite the UCC's central relevance, as identified by the Court in the October 26 Decision.

Although the orders on appeal violate the FSIA and are not supported by the underlying pari passu clause, Argentina understands the Court's desire to resolve the lengthy litigation, and is prepared to do what it can to end it. But the Republic can only act in accordance with a "Ratable Payment" formula that treats plaintiffs the same as exchange bondholders. Any other solution is contrary to Argentina's law and public policy, and would open the door to further litigation while threatening to undo the debt restructuring in which creditors holding 92% of the Republic's defaulted debt took part.

The Executive is therefore prepared once again to present a proposal to Congress to definitively end the litigation through the equitable treatment of plaintiffs and those similarly situated on the same terms as participants in the Republic's 2010 Exchange Offer. Paying plaintiffs *more* would discriminate in the very manner criticized by this Court in multiple ways against numerous parties, including not only exchange bondholders, but also litigants similarly situated to plaintiffs, all of whom hold debt with pari passu clauses and would presumably be entitled to the same "Ratable Payments." The only definitive and equitable solution to pari passu claims that would bring legal and economic certainty is to treat plaintiffs and all other similarly situated claimants equitably on the same terms as participants in the Republic's 2010 Exchange Offer.

The Amended Injunctions have no basis in law, are inequitable, and threaten to wreak havoc on countless innocent third parties, which have already suffered losses due to the plunge in their bonds' value provoked by the insecurity that the Amended Injunctions have created in the market for Argentina's New York law-governed bonds. This harm to private and sovereign creditors, as well as to New York law and New York as a place to do business, will only grow if the Amended Injunctions are affirmed. The district court was wrong to ignore the chorus of voices against the entry of the Amended Injunctions; the Amended Injunctions must be vacated in full.

JURISDICTIONAL STATEMENT

The district court originally had jurisdiction over this action under the FSIA, 28 U.S.C. §§ 1330, 1605(a)(1). Thereafter, this Court exercised appellate jurisdiction over the Injunctions and the earlier Declaratory Orders entered by the district court pursuant to 28 U.S.C. § 1292(a)(1) and *Lamar Adver. of Penn LLC v. Town of Orchard Park*, 356 F.3d 365, 372 (2d Cir. 2004).

In the October 26 Decision, the Court remanded to the district court pursuant to the procedures set forth in *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994). The Court directed the district court to conduct "proceedings as are necessary to address the operation of the payment formula and the Injunctions' application to third parties and intermediary banks," Oct. 26 Decision at 28-29

(SPE-295-96), and stated that after such proceedings, it would further consider the "merits of the remedy without need for a new notice of appeal." *Id*.

Although the Court's mandate on the October 26 Decision (which was the subject of a timely petition for panel rehearing and rehearing *en banc* ("Rehearing Petition"))[2] was not issued, the district court immediately scheduled proceedings on remand, and within twelve days entered the Amended Injunctions, its Injunction Opinion and its Stay Opinion on November 21, 2012 (together the "November 21 Orders"). Without the mandate having issued, the district court lacked jurisdiction to enter any substantive relief and exceeded its power in issuing the November 21 Orders, which under *Jacobson* is limited to explaining its prior decision to assist the Court in deciding the original appeal. *See, e.g.*, *Dague v. City of Burlington*, 976 F.2d 801, 805 (2d Cir. 1992) (order issued by district court prior to mandate being issued by Court of Appeals was a "nullity"); *Doe v. Gonzales*, 449 F.3d 415, 420 (2d Cir. 2006) (same).

This Court has jurisdiction over the present appeals of the November 21 Orders because the action has automatically returned to the Court – as the Court directed in its October 26 Decision – pursuant to *Jacobson*. *See* SPE-295-96. This Court also has jurisdiction over the appeals under 28 U.S.C. § 1292.

[2] The Republic respectfully continues to disagree with this Court's October 26 Decision, and adheres to the arguments set forth in the Rehearing Petition.

ISSUES PRESENTED

1. Do the November 21 Orders violate the FSIA by enjoining the Republic from paying legitimate debts with its immune property located outside the United States, unless the Republic pays over $1.3 billion into a court-controlled escrow account?

2. Did the district court err in holding that the pari passu clause's statement that the Republic will rank certain payment obligations "equally" supports an equitable remedy whereby the Republic must pay plaintiffs all principal and interest owed on their defaulted debt as a condition to the Republic making a single interest payment to exchange bondholders who settled their claims in exchange for discounted restructured debt?

3. Did the district court err in denying the third-party exchange bondholders' objections to the court's conditioning their undisputed right to receive bond payments on the Republic's paying plaintiffs on their wholly separate debt obligations, notwithstanding the fact that the exchange bondholders owe no duties to, and have not harmed, plaintiffs, and the only common link between the two sets of creditors is a common obligor?

4. Did the district court err in binding to the Amended Injunctions the Trustee for the holders of the Republic's restructured debt, and countless other financial institutions located throughout the world that process payments en route

from the Trustee to the exchange bondholders, where plaintiffs do not even purport to have a claim against those third-party bondholders, and none of the restrained entities holds property in which either the Republic or plaintiffs have an interest?

5. Did the district court err in granting equitable relief, which this Court held is not contractually required, where that relief will substantially harm the public interest by threatening the resolution of thousands of previously settled claims as well as the ability of other sovereigns to restructure their debt, and will harm New York's status as the world's financial leader by injecting great uncertainty into trillions of dollars of debt governed by New York law?

6. If the Court does not otherwise vacate the Amended Injunctions, should the Court certify to the New York Court of Appeals the following question: Under New York law, does a violation of a pari passu clause support the remedy at issue in this case, *i.e.*, enjoining payments to third party creditors and transfers by participants in the funds transfer system, unless the debtor pays other creditors 100% of what they are owed?

STATEMENT OF THE CASE

These appeals return to this Court after remand proceedings during which the district court (Griesa, J.) was required by this Court to consider two central issues concerning the Injunctions entered by the court on February 23, 2012.

First, the Court asked for clarification of how the Injunctions were "to operate" with respect to the "Ratable Payments" the district court found were owed to plaintiffs when the Republic makes a scheduled payment on its performing debt. Oct. 26 Decision at 11 (SPE-278).

Second, the Court, expressing serious "concerns" about the effect of the Injunctions on third parties, directed the district court to "determine the third parties to which the Injunctions will apply" so that this Court could assess "whether the Injunctions' application to them is reasonable." *Id.* at 28 (SPE-295). The Court thus questioned whether the Injunctions' sweeping application to third parties was appropriate at all – a concern that was also raised by this Court during oral argument. *See* July 23, 2012 Hr'g Tr. at 56:12-14 (SPE-872) ("I'm not sure that courts [can] enter injunctions primarily for the purpose of taking action against such third parties.").

In remand proceedings conducted at break-neck speed, and before the Court issued its mandate, the district court adopted a definition of "Ratable Payment" that conditions the Republic's ability to service its restructured debt on payment to plaintiffs of the full face amount, plus all accrued interest, on their defaulted debt, and ordered the Republic to "turn over" more than $1.3 billion into a U.S. escrow account. In addition, over the objections of the Republic, numerous holders of the Republic's restructured debt, The Bank of New York Mellon

("BNYM"), which acts as the Trustee for the exchange bondholders, The Federal Reserve Bank of New York ("FRBNY"), The New York Clearing House Association ("Clearing House"), and The Depository Trust Company ("DTC"), the district court issued the Amended Injunctions expanding the broad scope of its previous Injunctions. The Amended Injunctions purport to bind not only the Republic, but also the numerous entities comprising the international payment system that processes payments from the Trustee to holders of the Republic's restructured debt. Finally, the district court lifted its March 5, 2012 stay (the "March 5 Stay") of the Injunctions (SPE-1386).

This Court stayed the district court's November 21 Orders pending further order of the Court, and thereafter denied plaintiffs' request to condition that stay on the Republic's posting security of $1.45 billion. *See* Order, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Nov. 28, 2012); Injunction Opinion (SPE-1360); Amended Injunctions (SPE-1378); Stay Opinion (SPE-1372).

STATEMENT OF FACTS

A. The District Court's Remand Proceedings

Following this Court's remand, the district court held a conference on November 9, 2012, at which it denied plaintiffs' request to enter proposed orders substantially identical to the Amended Injunctions it ultimately entered. *See* Nov. 9, 2012 Hr'g Tr. at 3:14-18 (SPE-448). The district court noted that "[t]his is a matter that has to have some briefing and hearing and so forth." *Id.* However, the court then entered a schedule giving the Republic and any interested third parties *three business days* to respond to plaintiffs' papers in support of their requested relief, *see* Nov. 9, 2012 Hr'g Tr. at 4:19-22 (SPE-449), a schedule that all but shut out other parties that wanted to be heard. Three business days after receiving briefs from numerous interested third parties the district court entered the November 21 Orders (SPE-1360-1424), acting on plaintiffs' demands for immediate entry of their broad proposed orders without permitting the Republic or any of the numerous third parties that appeared to present oral argument.

In the Amended Injunctions, the court supplemented the "Ratable Payment" language included in the Injunctions by requiring the Republic to pay plaintiffs all principal and interest owed as a precondition to paying a single installment of interest to the exchange bondholders on their discounted debt. *See* NML Amended Injunction ¶ 2 (SPE-1384); Stay Opinion at 4 (SPE-1375). Notwithstanding this Court's concerns about the application of the Injunctions to third parties, the district court *expanded* the coercive reach of the Injunctions, and in the Amended Injunctions bound numerous specific entities that are "participants in the payment process of the Exchange Bonds," *see* NML Amended Injunction ¶ 2(e) (SPE-1382), *as well as* countless other unspecified entities and individuals, some of which (*i.e.*, the Euroclear and Clearstream entities) are not even within the court's jurisdiction[3]:

> (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon . . .);
>
> (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees;
>
> (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depositary Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System);
>
> (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and
>
> (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

NML Amended Injunction ¶ 2(f) (SPE-1382-83).

---

3 The district court bound these entities despite the fact that it had already held that Euroclear S.A./N.V. and Clearstream Banking S.A. were not subject to injunction here. *See* Hr'g Tr. at 52:7-9, *Seijas v. Republic of Argentina*, No. 04 Civ. 400 (TPG) (S.D.N.Y. Apr. 30, 2008) (SPE-1097) ("I have a document on its face which has requests for injunctive relief about trust bonds held in Belgium and Germany. I can't do that."). Restraining these entities is all the more improper because they are further protected from such orders by local legislation. Indeed, following an NML-affiliate's previous invocation of the pari passu clause to stop payments by a foreign state on its restructured debt, Belgium passed a law preventing a similar funds transfer disruption from occurring again. *See* Rodrigo Olivares-Caminal, *Legal Aspects of Sovereign Debt Restructuring* 94 (Sweet & Maxwell 2009).

BNYM. The Amended Injunctions purport to enjoin BNYM, the Trustee for holders of approximately $24 billion of the Republic's restructured debt. *See* Trust Indenture, dated June 2, 2005 ("Indenture") (SPE-627); Argentine Ministry of Economy and Public Finance, Public Debt Chart at A.1.11, dated June 30, 2012 (SPE-902). Under the terms of the governing Indenture, BNYM owes duties *only* to the holders of the Republic's restructured debt – *not* the Republic – and the Republic pays the Trustee for the account of the exchange bondholders. *See* Indenture § 3.1 (SPE-648) ("All monies . . . paid to the Trustee under the [restructured debt] and this Indenture shall be held by it in trust for itself and the [exchange bondholders] in accordance with their respective interests to be applied by the Trustee to payments due under the [restructured debt]."). The Republic's payment to BNYM, and BNYM's corresponding receipt of the funds, takes place in Argentina.[4] Once that transfer to the account of BNYM takes place, the Republic has no right to the funds, and they are no longer the property of the

[4] This Court has recognized that, notwithstanding plaintiffs' assertion to the contrary below, this transfer takes place outside the United States. *See* Oct. 26 Decision at 8 (SPE-275) ("Argentina makes principal and interest payments to a trustee *in Argentina*") (emphasis added); Decl. of Matias Isasa ¶ 4, dated Feb. 1, 2012 (A-2288) ("The Trustee receives payment in trust for the account of the holders and once it receives such payment, the moneys belong to the bondholders, not to the Republic. *Argentina has paid all monies to the Trustee outside of the United States*. When the Trustee pays a U.S. registered holder, the moneys already belong to such holders, not the Republic.") (emphasis added); Decl. of Kevin F. Binnie of The Bank of New York Mellon ("Binnie Decl.") ¶¶ 10-12, dated Nov. 16, 2012 (SPE-623-25) ("Step One: The Republic transfers funds to a US Dollar deposit account in the name of the Trustee").

Republic. *See id.* § 3.5(a) (SPE-650) ("[T]he Trustee shall apply [the amount due on the bonds] to the payment due on such Payment Date. Pending such application, such amounts shall be held in trust by the Trustee for the exclusive benefit of the Trustee and the [exchange bondholders] . . . in accordance with their respective interests and the Republic shall have no interest whatsoever in such amounts.").

In furtherance of its obligations under the Indenture to the exchange bondholders, BNYM sends a funds transfer from its account in Argentina to its account in the United States. *See* Binnie Decl. ¶¶ 10-12 (SPE-623-25). The money BNYM transfers does not belong to Argentina and is part of a separate funds transfer that is distinct from the funds transfer it receives from Argentina.[5]

Financial Institutions. The Amended Injunctions also purport to restrain a multitude of other financial entities, including the "clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds," NML Amended Injunction ¶ 2(f) (SPE-1383), that play some ministerial role in transferring payments from the Trustee to the exchange bondholders. At all times *the funds remain in trust* for the exchange bondholders,

---

[5] BNYM alone has authority over any trustee paying agent as defined in the Indenture. Indenture § 3.5(a) (SPE-650) ("[A]ny trustee paying agents appointed pursuant to this Indenture shall be agents solely of the Trustee, and the Republic shall have no authority over or any direct relationship with any such trustee paying agent or agents.").

and neither the Republic nor plaintiffs have any interest in those amounts. Each of these entities owes duties only to the entities immediately before and/or after it in the payment chain. The book-entry depository systems, such as DTC – the principal U.S. securities depository that facilitates numerous and massive daily book-entry operations for its Participants – and its nominee Cede & Co. owe no obligations to the Republic (which is not a Participant of DTC and has no account at DTC) or to plaintiffs. DTC receives instructions for the transfer of securities and cash from its Participants, including BNYM, but is in no position to evaluate the status of those entities, let alone the relationship between their Participants and other parties. *See* DTC Letter at 2-3 (SPE-1290-91).

In hastening to enter the Amended Injunctions, the district court ignored the interests and positions of numerous third parties directly affected by them. These included the Exchange Bondholder Group ("EBG"), representing significant holders of the Republic's restructured debt (SPE-1120-25), Fintech Advisory Inc. ("Fintech") (SPE-1159), which also participated in the Republic's debt restructuring, and BNYM (SPE-619). The court also disregarded the arguments and policy concerns raised by the Clearing House, which represents the world's largest commercial banks, DTC and the FRBNY, each of which submitted letters to the district court opposing the application of any injunctions to them and the entities involved in the funds transfer process and caught up by the broad categories of third parties in Amended Injunctions. *See* Clearing House Letter (SPE-1294); DTC Letter (SPE-1289); FRBNY Letter (SPE-1301).

Finally, the district court vacated the March 5 Stay of the Injunctions pending appeal, and ordered the Republic to pay into an escrow over $1.3 billion as a precondition to making a scheduled December 15 payment to holders of its restructured debt. *See* Stay Opinion at 4-5 (SPE-1375-76). In vacating the March 5 Stay, the district court cited and relied solely on newspaper articles reporting purported statements of the Republic's President and Minister of Economy publicly manifesting their shock and indignation at the October 26 Decision. *See id.* at 2-5 (SPE-1373-76). From this, the court concluded that an "extraordinary circumstance" had occurred and found that the Republic had violated the March 5 Stay's condition that "the Republic shall not during the pendency of the appeal to the Second Circuit take any action to evade the directives of the February 23, 2012 Orders in the event they are affirmed," *id* at 1-2 (SPE-1372-73), even though the only competent evidence before the district court on this point was the Republic's declaration, dated less than a week prior, unequivocally confirming that it "*has complied, is complying and will comply* with the terms of the March 5 Stay." *See* Decl. of Francisco Eggers ¶ 4, dated Nov. 16, 2012 ("Eggers Decl.") (emphasis added) (SPE-1118).

B. This Court's Stay Of The November 21 Orders

Following entry of the November 21 Orders, the appeals automatically returned to this Court. Given the imminent irreparable injury facing the Republic as well as the exchange bondholders and countless other third parties, the Republic, the EBG and Fintech immediately filed emergency motions to stay the November 21 Orders. On November 28, this Court entered a stay of the district court's November 21 Orders (the "Stay") and expedited the appeal from them.

STANDARD OF REVIEW

This Court reviews the district court's Amended Injunctions for abuse of discretion, which occurs when a district court bases its ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." *Sims v. Blot (In re Sims)*, 534 F.3d 117, 132 (2d Cir. 2008) (citation and internal quotation marks omitted). To the extent they deny FSIA immunity to the Republic's property, including by requiring an escrow of immune property, this Court reviews the November 21 Orders *de novo*. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009).

SUMMARY OF ARGUMENT

The Amended Injunctions and associated November 21 Orders under review have caused shock in the world of sovereign debt, and deep concern over the continued primacy of New York law in sovereign debt instruments and otherwise, because they radically depart from accepted legal principles.

First, the November 21 Orders violate both the FSIA and the basic principles of comity underlying it. By ordering the Republic to pay immune assets into an escrow, the district court directly ordered the turnover of funds that are immune from attachment and execution under the FSIA. Beyond that, the Amended Injunctions themselves did exactly the same thing, ordering the Republic to turn over immune assets to plaintiffs on pain of being forbidden to use other equally immune assets to service its debts. However labeled or rationalized, these were restraints, impermissible under the FSIA, on the use of immune property to enforce monetary claims, whether or not reduced to judgment. They have the direct effect of both commandeering the Legislative and Executive branches of the Argentine government to appropriate funds from the Argentine Treasury to pay plaintiffs in violation of Argentine law and policy, and forbidding those branches of government to appropriate funds (or, what amounts to the same thing, to spend appropriated funds) for another purpose: to pay exchange bondholders. There is no basis in U.S. jurisprudence for such extraordinary judicial commands to a foreign state.

Second, the Amended Injunctions are grossly disproportionate to the contractual violation they purport to address. By conditioning any single interest payment on the Republic's restructured debt upon payment in full to plaintiffs on their defaulted debt, the Amended Injunctions do not "restore" rights to plaintiffs, but grant them special, unbargained-for rights well beyond those of unsecured creditors. A "Ratable Payment" formula that treated plaintiffs and those similarly situated on the same terms as participants in the Republic's 2010 Exchange Offer would be a "remedy" consistent with "equal treatment" and Argentine law and public policy, which the Argentine Executive could once again present to Congress. The Republic has already made two debt restructuring offers that plaintiffs chose to reject. It cannot present a proposal that treats holdout creditors better than exchange bondholders, it cannot fund an escrow, and it cannot be *ordered* by a United States court to change or violate its laws.

Third, the Amended Injunctions trample on the rights of numerous third parties and on the integrity of the international payment system. As the aggrieved third parties set forth at greater length in their own briefs, it is unprecedented for injunctions in an ordinary civil action to restrain and effectively seize the property of third parties who owe no duties to plaintiffs and who are not in any way responsible for any wrongdoing that is the ostensible basis of the injunctions. In this case, the Amended Injunctions also interfere with payment systems in a manner that clearly violates Article 4A of the New York Uniform Commercial Code and contravenes New York trust law, which forbids interference with property held by an indenture trustee for the benefit of third parties not liable to plaintiffs.

Fourth, the Amended Injunctions, if affirmed, not only would imperil the Republic's debt restructuring, thereby undermining the massive settlement of claims accomplished by that restructuring, but would also severely endanger sovereign debt restructuring for all financially distressed states.

ARGUMENT

POINT I

THE NOVEMBER 21 ORDERS VIOLATE THE FSIA

The Amended Injunctions and associated November 21 Orders must be vacated because they grant relief not contemplated by the FSIA, which sets forth the "sole, comprehensive scheme" for obtaining and enforcing a judgment against a sovereign state. *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006). Under the FSIA, the only remedy provided to creditors by Congress is execution on non-immune property, which is limited to property of a foreign state that is in the United States and used here for a commercial activity.

See 28 U.S.C. §§ 1609-1610; *De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984) (Congress "create[d] a right without a remedy" in enacting the FSIA"); *see also* Rehearing Petition at 4-10.

On remand, the district court modified and supplemented its Injunctions by (i) ordering the Republic to pay into an escrow account the total amount of plaintiffs' outstanding monetary claims, and (ii) extending the application of the Injunctions to the numerous entities comprising the international payment system. The November 21 Orders, which were entered solely because the Republic *does not have* $1.3 billion of non-immune property in the United States, clearly violate the FSIA by compelling the Republic to bring immune assets into the country to satisfy the balance of plaintiffs' contract claims for money damages. They also make clear the artificiality of the distinction – rejected by this Court's precedent – between an injunction and restraint that compels the payment in full of a plaintiff's monetary claim, and an attachment or execution. *See S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (courts "may not grant, by injunction, relief which they may not provide by attachment").

Although framed as an *in personam* order, the command that the Republic pay over $1.3 billion into an escrow account is the functional equivalent of a C.P.L.R. § 5225(b) "turnover" order, which would clearly be barred by the FSIA. *See Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 Civ.

2715 (TPG), 2010 WL 2925072, at *4 (S.D.N.Y. July 23, 2010) (finding that Trust Bonds sought to be seized by turnover order were sitused *in Argentina* and therefore outside scope of execution under the FSIA). Moreover, to the extent the Amended Injunctions restrain the numerous banks and institutions from transferring to exchange bondholders funds in which the Republic has no interest, they operate precisely as C.P.L.R. § 5222 restraining orders and are likewise barred by the FSIA because the funds do not belong to the Republic. *See Aurelius Capital Partners*, 584 F.3d at 120 (vacating, *inter alia*, restraining notices directed to assets of private pension funds and therefore not property "of" the sovereign being used for commercial activity in the United States); *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 424 (S.D.N.Y. 2012) (funds in which "the Republic ha[s] no [] interest" en route to bondholders are not "property of the Republic" and thus cannot be attached or restrained under the FSIA). That the November 21 Orders function as an improper execution device is why NML itself has characterized the pari passu clause as an "enhanced *judgment enforcement* mechanism." NML Letter at 3 (A-210) (emphasis added).

Besides violating the terms of the FSIA, the Amended Injunctions violate the principles behind it by essentially invading the Treasury of a foreign sovereign, and commandeering its Legislative and Executive branches – based on an unprecedented reading of a boilerplate clause – to appropriate funds for a specific purpose while forbidding their appropriation for another purpose unless the first appropriation is made. Commandeering the legislature of a U.S. state would be clearly impermissible for a federal court under the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program") (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). *A fortiori*, such judicial commandeering of a *foreign* state cannot be proper as a remedy, cut from whole cloth, for the purported breach of a private creditor's contract "right." A court can arguably enjoin a foreign state from engaging in a commercial activity within the United States. But it cannot issue an order to force or preclude a foreign sovereign to act or not act within the limits of that sovereign's own territory. By dictating to Argentina that it cannot pay moneys it owes to the exchange bondholders in a funds transfer in its own country, and commanding that it make a payment (including via escrow) to holdout creditors that it is precluded from paying under its own laws, the Amended Injunctions violate this fundamental principle. *See The Schooner Exchange v. McFadden*, 11 U.S. 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.”).

The escrow component of the November 21 Orders exposes as illusory the alleged difference between outright commandeering a sovereign state and threatening to halt its debt service unless it complies with a court order to pay another debt. The FSIA provides the *sole* basis for a court to *enforce* a monetary obligation against a sovereign even if that sovereign, like Argentina, is subject to *in personam* jurisdiction in the United States. Argentina consented to suit and execution in the United States, not to orders of a United States court directing its activities in Argentina.

The Amended Injunctions were all the more inappropriate here, where plaintiffs do not even have judgments against the Republic, and their cause of action for injunctive relief “is incidental to and purely for the purposes of enforcement of the primary relief sought here, a money judgment.” *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 548 (2000); *see also id.* (“[T]he court will refuse the injunction if convinced that a money judgment is the true object of the action and that all else is incidental.”) (citation omitted); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999) (vacating pre-judgment injunction restraining defendant’s use of assets in contract action for money damages as “a nuclear weapon of the law” and stating that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence"); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002) ("[A]n injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity. . . . Those rare cases in which a court of equity would decree specific performance of a contract to transfer funds were suits that, unlike the present case, sought to prevent future losses that either were incalculable or would be greater than the sum awarded.") (citation omitted). Plaintiffs, who deliberately chose not to obtain money judgments on their defaulted debt, cannot seriously claim to be better off than if they had such judgments.[6]

Countries with unsustainable debt burdens will always be a part of the world, and sovereign debt crises have been, and will continue to be, inevitable products of the international economy. But we are long past the days when creditors seeking payment tried to enforce their sovereign debt through so-called gunboat diplomacy – *i.e.*, forced payment through the threat of invasion. Modern

[6] Nor can plaintiffs claim that they are entitled to the Amended Injunctions that run roughshod over these principles to enforce a "separate" claim to "equal treatment." Plaintiffs are seeking a monetary recovery in the amount of their debt. Whatever else the pari passu clause does, it is not a guarantee of payment: a holder of defaulted senior debt must still sue and enforce a judgment within the limits of the law (here the FSIA) in order to be paid, and cannot seek to block payments to other holders of senior debt to circumvent that process.

sovereign immunity laws, coupled with the general acceptance of voluntary debt restructurings as the principal means by which sovereigns emerge from post-default crises, reflect a policy choice, supported by the international community – including the United States – that judgment debts can be collected by those who decline voluntary restructuring through execution on non-immune property, but not through extraterritorial coercion.

Seeking to force payment to holdouts by threatening through extraterritorial injunction a country's servicing of its restructured debt would disable the *only* restructuring mechanism available to foreign states, and run exactly counter to the universally accepted principles on which sovereign debt restructuring is based. In line with these principles, Argentina conducted a debt exchange offer consistent with its capacity for payment, and included GDP-linked securities that provide a higher return if the country grows. Argentina has honored the commitments it made to exchange bondholders and wants to continue to honor them, but by threatening debt service on over $24 billion of the Republic's performing debt, the Amended Injunctions would disrupt Argentina's restructuring. If the Amended Injunctions are allowed to stand, we may very well see the end of such restructurings and enter an era where debt crises are unresolvable. This will increase litigation, not reduce it.

POINT II

THE DISTRICT COURT'S "RATABLE PAYMENT" REMEDY IS INEQUITABLE ON ITS FACE AND IS UNTETHERED TO ANY PURPORTED INJURY TO PLAINTIFFS

In its October 26 Decision, this Court made clear that the "Ratable Payment" component of the Injunctions is an equitable remedy as opposed to a contractual requirement of the pari passu clause. *See* Oct. 26 Decision at 19 n.10 (SPE-286) (noting plaintiffs' reasoning that "Ratable Payments" are not mandated by the pari passu clause, but rather are the proposed equitable "*remedy* for Argentina's breach") (emphasis in original). The district court transgressed any plausible theory of equity by defining "Ratable Payment" in the Amended Injunctions to require the Republic to pay plaintiffs the full face value of their defaulted debt – plus interest – as a precondition to the Republic's making a single scheduled interest payment to exchange bondholders on their discounted debt.

A payment consistent with principles of equity, and the Republic's law and policy, would be of the *same* amount and of the *same* nature as the payments received by exchange bondholders. The district court itself recognized this, and had previously rejected the notion that payments to the exchange bondholders on their discounted debt can be equated via a theory of "equal treatment" to payments on the full face amount of plaintiffs' defaulted debt. *See* Sept. 28, 2011 Hr'g Tr. at 12:8-13 (A-2128) (THE COURT: "[W]hat would need to be done to apply the pari passu clause is to do something, which of course the plaintiffs would not want at all, but it would be to give the plaintiffs the same percentage of the face amount of the bonds that the exchanges received, *because they're not receiving 100 percent*.") (emphasis added). As the district court stated in February 2012, "the exchange people are not getting 100 percent of their bonds, of course, they are getting something less." Feb. 23, 2012 Hr'g Tr. at 23:1-3 (A-2312). But on remand, goaded by plaintiffs, the court dismissed this obvious flaw and granted plaintiffs relief well beyond any contractual performance supported by the pari passu clause. *See Lamberti v. Angiolillo*, 905 N.Y.S.2d 560, 561 (1st Dep't 2010) (courts may not grant "superior rights" under guise of specific performance).[7]

As this Court recognized when it affirmed the district court's rejection of plaintiffs' attempt to disrupt the 2005 Exchange Offer, the Republic's "[debt] restructuring [was] obviously of critical importance to the economic health of a nation." *EM Ltd. v. Republic of Argentina*, 131 F. App'x 745, 747 (2d Cir. 2005) (summary order); Opinion, *H.W. Urban GmbH v. Republic of Argentina*, No. 02 Civ. 5699 (TPG) (S.D.N.Y. Apr. 26, 2010) (A-2269) (rejecting attempt to enjoin the Republic's 2010 exchange offer; "[a]ll recipients of the exchange offer are treated the same, and that is the way it should be."). Fundamental to the

---

[7] Further highlighting the district court's error is the fact that the court based its remedy on the Black's Law Dictionary definition of "pari passu" – a phrase that does not even appear in the so-called "Equal Treatment Provision" it purported to enforce. *See* Injunction Opinion at 6-7 (SPE-1365-66).

Republic's restructuring process were the principles that all creditors who accepted the debt exchange would be treated the same, and likewise that holdout creditors would not be treated better than participants who accepted a steep discount when exchanging their defaulted debt.

Inherent in the district court's interpretation of pari passu – that it supports specific performance by "Ratable Payment" to creditors when restructured debt is paid – is the idea of equality of treatment. But the district court's version of "Ratable Payment" would violate this equality in two ways. It would treat plaintiffs better than the exchange bondholders, because plaintiffs would get 100% of all debt while the exchange bondholders (representing 92% of the old debt) would get only a single installment of interest on a lower amount. And it would put plaintiffs ahead of other holdouts, who would presumably have claims based on their own "pari passu rights." Both groups would have the right to demand in the name of "equality" what plaintiffs get, and as a result would trigger claims by *all* Argentine debt holders, thus threatening to undo Argentina's debt restructuring. It cannot have been the intention of this Court to provoke this result. The district court's "Ratable Payment" formula is therefore not "equal treatment," but a judicially imposed preference that violates basic principles of equity because it grants plaintiffs far greater rights than they could possibly be entitled to under the pari passu clause – *i.e.*, *better* treatment than other creditors. *See* 2004 U.S. Br. at 15

(A-1780) (plaintiffs' interpretation of the pari passu clause grants them "an additional contractual right – a right they did not bargain for").[8]

Argentina understands this Court's desire to end the litigation. The Executive is prepared to once again present to Congress a proposal that definitively treats all holdout creditors on the same terms as participants in the Republic's 2010 Exchange Offer, but it cannot pay plaintiffs on terms that the district court itself had previously recognized are patently inequitable.

POINT III

THERE IS NO BASIS FOR BINDING TO THE AMENDED INJUNCTIONS THE INTERNATIONAL PAYMENT SYSTEM THAT TRANSFERS TO THE EXCHANGE BONDHOLDERS THEIR UNDISPUTED PROPERTY

A. The Amended Injunctions Place An Improper Condition On The Exchange Bondholders' Property

By conditioning payment to the exchange bondholders on the Republic's payment of over $1.3 billion of immune assets to plaintiffs, the Amended Injunctions run afoul of the fundamental principle of equity that an order granting specific performance "*must not* be . . . unjust to innocent third parties." *Mofsky v. Goldman*, 3 A.D.2d 311, 316 (4th Dep't 1957) (emphasis added); 96

[8] This observation was consistent with the United States' long-held position that a party may not "read into [a] contract a term restricting the rights of another creditor," because "[p]ermitting [a] plaintiff to do so would be contrary to the efforts the United States has expended since 1982 to resolve [] debt cris[es] through cooperative negotiations." Statement of Interest of the United States of America ("U.S. CIBC Br.") at 8, *CIBC Bank & Trust Co. v. Banco Central do Brasil*, No. 94 Civ. 4733 (LAP) (S.D.N.Y. Sept. 8, 1994) (SPE-1113).

N.Y. Jur. 2d *Specific Performance* § 5; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 375 (1977) ("Especially when immediate implementation of an equitable remedy *threatens to impinge upon the expectations of innocent [third] parties*, the courts must look to the practical realities and necessities inescapably involved in reconciling competing interests, in order to determine the special blend of what is necessary, what is fair, and what is workable.") (emphasis added) (internal quotation marks omitted); *Brody v. Vill. of Port Chester*, 261 F.3d 288, 290 (2d Cir. 2001) (vacating an injunction where "the district court failed to consider the public interests at issue" and "weigh them against" the plaintiff's interests). Where, as here, an injunction places an unreasonable burden on third parties, it must be vacated. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1141-42, 1144 (D.C. Cir. 2009) (vacating injunction and noting that "third parties may be so adversely affected by an injunction as to render it improper."); *see also Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 744 (7th Cir. 2003) (injunction "violate[d] the principle that in determining the appropriate scope of an injunction the judge must give due weight to the injunction's possible effect on third parties.") (citation omitted).

Notwithstanding this Court's observation that the Injunctions could not be interpreted to mean that "plaintiffs would 'execute upon' any funds, much less those held in trust for the exchange bondholders," Oct. 26 Decision at 25 n.14

(SPE-292),[9] the Amended Injunctions in fact restrain any and all funds *held in trust for the exchange bondholders*, and threaten to hold third parties liable as "aiders and abettors" should they fulfill their duties to third parties by transferring funds en route to the exchange bondholders. The Amended Injunctions therefore function in the precise manner as a C.P.L.R. § 5222 restraining notice, including with extraterritorial effect on funds that are not in the United States and not used for a commercial activity in the United States. *See* U.S. CIBC Br. at 8 (SPE-1113) (rejecting plaintiffs' attempt to restrict the rights of other creditors as contrary to U.S. policy). Plaintiffs cited no case below, and we are aware of none, granting such patently inequitable "relief" – wholly unsupported by the plain language of the contract – that indefinitely restrains, based upon the actions of a separate obligor, an innocent third party's property in which plaintiffs can assert no right.[10] *See Lamberti*, 905 N.Y.S.2d at 561 (courts may "grant[] no party superior rights

---

[9] On remand, the district court in rushing to enter the Amended Injunctions appeared to accept the incorrect premise that plaintiffs are entitled to execute on the December 2012 payments to the exchange bondholders. *See* Nov. 9, 2012 Hr'g Tr. at 30:21-22 (SPE-475) ("[S]ome money is due to the plaintiffs out of those December payments.").

[10] To the contrary, C.P.L.R. § 5222(b) expressly bars indefinite restraints, as well as restraints directed at third-party property. *Id.* ("A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or she is in possession or custody of property in which he or she knows or has reason to believe the judgment obligor has an interest . . . ."); *id.* (forbidding interference with such property only "until the expiration of one year after the notice is served . . . .").

than would have been enjoyed had there been proper performance”); Feb. 23, 2012 Hr’g Tr. (A-2300-01) (THE COURT: “I don’t understand the pari passu clause . . . to mean that the Republic is *forbidden* to pay the exchange offers unless they pay NML.”) (emphasis added); *Reiss v. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001) (“Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.”).

B. The Amended Injunctions Violate UCC Article 4A

In addition to interfering improperly with the property of innocent third parties, the Amended Injunctions must also be vacated because they expressly enjoin the independent acts of hundreds of third parties located throughout the world, “including” BNYM, DTC, the European “clearing systems” Euroclear and Clearstream, and other entities that are neither the “agent” of, nor acting in “concert” with, the Republic. *See* NML Amended Injunction ¶ 2(f) (SPE-1382-83). Both longstanding principles of common law and Article 4A of the New York UCC prohibit such an extension of the Injunctions.

Article 4A of the UCC “was enacted to provide a comprehensive body of law that defines the rights and obligations that arise from wire transfers.” *Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 118 (2d Cir. 2010) (citation omitted). Central to Article 4A’s limits on the rights and obligations of parties involved in funds transfers is the principle that each funds transfer is a distinct transaction, and the entities involved in that funds transfer owe no duties or obligations to any other third party. *See* Permanent Editorial Board for the Uniform Commercial Code, *PEB Commentary No. 16 Sections 4A-502 and 4A-503* (July 1, 2009) ("A funds transfer is a series of payment orders that create contractual obligations only as to the sender and receiver of each payment order. Those contractual obligations are not the property of either the originator or the beneficiary."). As this Court has expressly recognized, "resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities inconsistent with those stated in [that] Article." *ReAmerica, S.A. v. Wells Fargo Bank Int'l*, 577 F.3d 102, 106 (2d Cir. 2009) (citing U.C.C. §4A-102).

Section 503 of Article 4A, titled "Injunction or Restraining Order With Respect to Funds Transfer," 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.*

U.C.C. § 4A-503 (emphasis added). The plain language of this provision, read in conjunction with the other provisions of Article 4A, including Section 502 – which provides that *all* "creditor process" must be directed only *to the bank of the party* *that owes the creditor the debt* – demonstrate that Article 4A protects from restraint the third parties to which the Amended Injunctions purport to apply. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) (explaining that the Court "do[es] not . . . construe statutory phrases in isolation [but] read[s] statutes as a whole") (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). When so read, it is clear that a creditor of the originator of a funds transfer is entitled to injunctive relief only with respect to its debtor's property – not the property of a third party.

Here, when Argentina – the only party against which plaintiffs purport to have "proper cause" – pays its exchange bonds, it does so by initiating as an originator in Argentina a funds transfer to BNYM; when BNYM receives the funds, they are no longer property of the Republic, but are held in trust for the exchange bondholders. *See* Isasa Decl. ¶ 4 (A-2288); Indenture § 3.5(a) (SPE-650-51). When BNYM initiates its *separate* funds transfer to distribute payment to the exchange bondholders, it cannot be enjoined because it does not owe any obligation to the Republic or plaintiffs, does not have any assets of Argentina, and is thus not a party against which any proper cause exists. The Amended Injunctions' application to BNYM is therefore barred under Section 503. *See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 70 (2d Cir. 2009) ("*Jaldhi*") (creditor of originator can only restrain funds owned by originator; "Apart from [such an] injunction[], '[a] court may not otherwise restrain [any activity] with respect to a funds transfer." *Id.* § 4A-503.'").

Nor does Article 4A permit the application of the Amended Injunctions to the numerous other entities in the chain of payment to the exchange bondholders. Like BNYM, plaintiffs do not even purport to have a claim against any of these banks and financial institutions with respect to the funds they transfer, and the Republic has no interest in the funds as they flow from the Trustee to the exchange bondholders. *Jaldhi*, 585 F.3d at 70 (vacating creditor process – there an attachment – under Section 503 where judgment debtor had no interest in the targeted property and so plaintiff had no claim to it); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124 (2d Cir. 2009) (vacating attachments and restraints directed to funds in which the Republic had no interest); *Save Way Oil Co. v. 284 E. Parkway Corp.*, 453 N.Y.S.2d 554, 557 (1982) (vacating restraining notice issued against bank account of third party where there was no identity of interest between debtor and third party).

If the fulfillment of their independent obligations to third parties by executing ministerial roles in the funds transfer process were sufficient to constitute proper cause to bind non-parties to the Amended Injunctions, there would be little preventing plaintiffs from enjoining the world at large. *See Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930) ("[A] court of equity . . .

cannot lawfully enjoin the world at large, no matter how broadly it words its decree," but can only enjoin "what it has power to forbid, an act of a party."). It was precisely this kind of uncertainty and disruptive interference with the financial system that Article 4A was drafted to preclude.

Plaintiffs conceded in this Court that they have no basis for attaching any of the funds held in trust for the exchange bondholders – *i.e.*, that Section 502 would bar any attachment here. *See* July 23, 2012 Hr'g Tr. at 54:5-9 (SPE-870) (THE COURT: "What would you try and do, attach those [funds at] Bank of New York. NML COUNSEL: Well, no, we're not attaching. We can't attach anything with respect to – we're not saying that."). They nonetheless sought to avoid the effect of that concession by claiming below that the limitations on creditor process reflected in Section 502 are somehow irrelevant in the injunction context. This argument, which seeks to read Section 503 as divorced from the limitations on funds transfer disruptions enshrined in the Article 4A framework, is meritless. *See Weston Compagine de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, No. 93 Civ. 2698 (LMM), 1993 WL 267282, at *3 (S.D.N.Y. July 14, 2003) (rejecting contention that Section 503 did not apply to the dispute "because that section relates to injunctions, not attachments. . . . The term 'creditor process' is a generic term and covers a variety of devices by which a creditor can seize an account."). To read Section 503 otherwise would lead to the absurd result that a creditor could serve restraining orders – which are also expressly governed by Section 503 – on banks holding property not belonging to their debtor. No case supports such an outcome.

The consistent limitation that Sections 502 and 503 place on creditor process is an essential part of Article 4A's purpose to direct process only at funds of the debtor, and not disrupt the funds transfer system. *See Jaldhi*, 585 F.3d at 62 (noting that, with respect to Article 4A's application to funds transfers, "justice is fostered by expressly telling litigants *where* the process should be served") (emphasis added). To freeze a funds transfer is clearly related to "creditor process." *See* U.C.C. § 4A-502(a) (creditor process "means 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") (emphasis added). The framework restricting creditor process to funds of the debtor serves "[o]ne of Article 4-A's primary goals [of] promot[ing] certainty and finality so that the various parties to funds transfers will be able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds transfer services appropriately." *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) (internal quotation marks omitted). As the Clearing House explained, binding banks with such injunctions "will have a deleterious long-term impact on New York's financial institutions and its preeminence as a financial center" because they "would inhibit the free flow of funds among financial institutions, create uncertainty as to rights and liabilities, and place intermediary banks in the middle of civil disputes." 2012 Clearing House Br. at 26 (SPE-936); *see also* 2004 FRBNY Br. at 5-6 (A-1795) (observing that similar injunctions "would allow holdout creditors to disrupt the efficient operation of payment and settlement systems, create legal uncertainty for those systems, and ultimately cause adverse economic implications far beyond the sovereign bond dispute.").

Plaintiffs' acknowledgement, accepted by the district court, that the Amended Injunctions carve out "intermediary banks" is yet another concession that the principles of Article 4A must be applied here. *See* NML Amended Injunction ¶ 2(g) (SPE-1383). As an initial matter, notwithstanding the carve-out, the Amended Injunctions expressly *do* apply to numerous intermediaries. *Id.* ¶ 2(f) (SPE-1383-84). In any event, that limited carve-out does not resolve the uncertainty, risk, confusion, and ultimately cost, injected into the market by binding the other financial institutions in a manner contrary to Article 4A. For example, when the *Aurelius* plaintiffs served process on the FRBNY purporting to restrain bondholder funds passing through the Central Bank of Argentina's account at the FRBNY, the FRBNY "shut down" the account entirely in an attempt to avoid noncompliance, and in doing so "jeopardized the functioning of [the Central Bank]." *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 418 (S.D.N.Y.

2012). That is the precise result that would flow from the application of the Amended Injunctions to these financial institutions, but on a much larger scale. *See* 2004 FRBNY Br. at 7-8 (A-1797-98) (such injunctions threaten "stability of the global financial system by seriously impacting on the reliability and certainty of large value payments"); *see also* Agustino Fontevecchia, *Fed's $2.6T Payments System Risks Paralysis As Judge Orders Argentina To Pay Defaulted Bonds*, Forbes, Nov. 26, 2012 ("There's a big problem with this ruling . . . it could paralyze the Fed's largely automated payments system, which processes an average of $2.6 trillion a day.").

C. Plaintiffs Cannot Invoke Rule 65(d) To Evade The Substantive Limitations Otherwise Imposed By Applicable Law

Recognizing that entities in the international payment system cannot be enjoined directly, the district court extended the Amended Injunctions to those numerous third parties based on the novel proposition that under Rule 65(d) they would be "in active concert or participation" with the Republic if they transferred funds en route to the exchange bondholders without receiving notice that the Republic had paid plaintiffs in full.[11] Injunction Opinion at 10-11 (SPE-1369-70);

---

[11] Plaintiffs also argued below that the third parties targeted in the Amended Injunctions could be bound under Rule 65(d) as "agents" of the Republic, but the district court properly rejected the notion that third parties who owe no duties or obligations to the Republic could be deemed the Republic's agents, *see* Injunction Opinion at 10-11 (SPE-1369-70), (although it enjoined them anyway).

Fed R. Civ. P. 65(d)(2); *see Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) (non-party "could commit contempt only as an aider or abettor"). This attempt to use Rule 65(d) to override Article 4A and basic principles of common law was clear error.

In extending the application of the Amended Injunctions to an unprecedented extent, the district court cited no caselaw and offered no rationale other than its view that binding these third parties was "necessary" to ensure enforcement of the Amended Injunctions. Injunction Opinion at 9 (SPE-1368). But the court's self-created need to enforce its Amended Injunctions cannot justify extending their application to innocent third parties beyond the bounds of the law. *See Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975) (rejecting injunction that improperly "adjudicated the merits of [a non-party's] property rights" as "an attempt to obtain satisfaction of [the] judgment [against the defendant] by binding a person not a party to the suit;" such an order "is antithetical to the primary axiom of our jurisprudence that no man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim against him"). Plaintiffs cited no case below, and we are aware of none, where a court has characterized as "aiding or abetting" a pre-existing payment system associated with a legal, arms-length business transaction.

As the district court had previously recognized, in fulfilling their obligations to other parties in the international payment system "[t]he banks wouldn't be aiding and abetting. The banks only pay the exchange offer people. That's what they do." Feb. 23, 2012 Hr'g Tr. at 7:22-24 (A-2296); *see also id.* at 11:2-3 (A-2300) (district court noting that the exchange bondholders "can be legally paid," and "the exchange offers were lawful"). And in these very cases, this Court directed the district court to "take care to craft [] orders so as to avoid interrupting Argentina's regular payments to bondholders." *Capital Ventures Int'l v. Republic of Argentina*, 282 F. App'x 41, 42 (2d Cir. 2008) (summary order). It is utterly contrary to that instruction to issue an order designed to interfere with BNYM's transfers, on behalf of the exchange bondholders, to DTC and other depositories involved in the distribution of payments.

The district court's improper extension of the Amended Injunctions to all "persons and entities" involved in transferring funds to the exchange bondholders entirely ignores that *none* of these entities help to "bring about . . . an act of" the Republic, as is required for aiding and abetting liability. *Alemite Mfg.*, 42 F.2d at 833; *see also In re Sharp Int'l Corp.*, 403 F.3d 43, 50 (2d Cir. 2005) (well-settled that aiding and abetting liability requires showing of "substantial assistance" in party's violation of an order); *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 883 N.Y.S.2d 486, 489 (1st Dep't 2009) ("aiding and abetting" requires, *inter alia*, that the actions of the aider/abettor proximately cause the harm). In each of the contempt cases relied on by plaintiffs below, the party held liable as an aider and abettor substantially assisted the violation of the court order at issue. *See Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 191-92 (2d Cir. 2010) (aider and abettor attorney intervened in a litigation for purposes of issuing sham subpoena designed to elicit disclosure of documents in violation of confidentiality order); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) (non-party bank aided and assisted defendant in "completing a fairly complicated series of fund withdrawals and transfers" in violation of restraining notice served on bank); *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 75-76 (1st Cir. 2002) (couple in contempt for knowingly buying liened apartment in secret transaction).

Here, none of the Trustee, financial institutions, or registered bondholders who receive funds in connection with the performing debt plays any role in "aiding" the Republic's non-payment of plaintiffs or is part of a "sham" relationship devised after the entry of the Amended Injunctions as a means to evade them. *Cf. Eli Lilly*, 617 F.3d at 191. Nor do any of the enjoined third parties "aid" the Republic in its payment to BNYM; once that initial funds transfer takes place that payment is complete. No other subsequent funds transfer involves any act of the Republic, but instead involves the separate and independent acts of the non-party entities in the payment system, none of which owe duties to the Republic. In connection with the performing debt, they act no differently than they have for the past seven years, *i.e.*, since the settlement of the Republic's Exchange Offers in 2005 (or 2010) – transactions which this Court noted did not violate the pari passu clause. *See* Oct. 26 Decision at 19 n.10 (SPE-286). It would be unprecedented – and would vitiate Article 4A – to hold liable as aiders and abettors participants in the financial markets doing no more than carrying out their normal business functions and fulfilling their *own* obligations to third parties.

* * *

Once the third parties are properly excluded from the Amended Injunctions, the only enjoined act remaining is the Republic's payment to BNYM *outside the United States*. In addition to the fact that such an injunction violates the FSIA, to the extent they only restrain acts that take place beyond the jurisdiction and control of the district court, the Amended Injunctions must be vacated as impracticable. Indeed, the sole case cited in the October 26 Decision, *see* Oct. 26 Decision at 26 (SPE-293), as authority for a U.S. court to enjoin the Republic's payments outside the United States, *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), affirmed the *denial* of extraterritorial injunctive relief due to the "difficulty that a United States court would have in controlling and overseeing" an injunction in a foreign country. *Id.* at 716; *see also id.* ("Injunctive relief may properly be refused when it would interfere with the other nation's sovereignty") (citations omitted).

As this Court explained, a "federal court sitting as a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere," but "this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." *Id.* (citing *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956)); *see also Bethlehem Eng'g Exp. Co. v. Christie*, 105 F.2d 933, 935 (2d Cir. 1939) (rejecting specific performance and injunction where their enforcement would be "impracticable" and "not . . . feasible"). Even if the Court had the power to enjoin the Republic under the FSIA, the Amended Injunctions should still be vacated because it would be *impossible* to secure compliance, and they are not merely fraught with the *possibility* of conflict with Argentina's laws requiring that holdout creditors not be treated better than the participants in its debt restructuring, but would directly command Argentina to violate its own laws in its own territory.

POINT IV

THE AMENDED INJUNCTIONS VIOLATE THE PUBLIC INTEREST

The effect of the Amended Injunctions on the third parties to which they apply and the greater public interest is impermissible under any measure of equity. In fashioning injunctive relief, courts must conduct a careful balancing of those factors that weigh in favor of, or militate against, issuing an injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("In exercising their sound discretion, courts of equity should pay particular regard [to] the public consequences in employing the extraordinary remedy of injunction"); *Beal v. Stern*, 184 F.3d 117, 123 n.2 (2d Cir. 1999) ("courts must sensitively assess all the equities of the situation, including the public interest." (quoting *Million Youth March, Inc. v. Safir*, 155 F.3d 124, 125 (2d Cir. 1998))). These factors clearly weigh against the maintenance of the Amended Injunctions.

First, by conditioning payments of the Republic's restructured debt on its payment in *full* to plaintiffs on their defaulted debt, the Amended Injunctions threaten the very process by which the Republic successfully restructured 92% of its defaulted debt in 2005 and 2010, thus resolving a vast amount of claims that had the potential to overwhelm the district court's docket. This harmful effect is clearly contrary to the public interest, which encourages the settlement of claims, and the Court's longstanding principle that "courts are bound to encourage the settlement of litigation," *not* to fashion relief that threatens to subject a party to potentially hundreds of new claims. *See In re Tamoxifen Citrate Antitrust Litig*., 466 F.3d 187, 202 (2d Cir. 2006). The myriad parties – including BNYM, the exchange bondholders and the payment system representatives – that have already appeared to protect their interests are but the tip of the iceberg of the Hobbesian war of "all against all" should the Amended Injunctions be affirmed. *See* 2004 Clearing House Br. at 11-12 (A-1820-21) (the court's remedy will result in a virtually endless "web of claims, counterclaims and cross-claims").

In an attempt to minimize the impact of the extraordinary remedy provided by the district court, plaintiffs have sought to "limit" the Amended Injunctions to payments of restructured Argentine debt and to those entities involved in such payments – itself an enormous and ill-defined universe. But it is probable that plaintiffs or other creditors would eventually move against multilateral and official sector entities that – unlike the exchange bondholders – actually often enjoy "de facto" preferential creditor status in sovereign debt restructuring.

Second, as the steady outpouring of adverse commentary graphically demonstrates, the Amended Injunctions imperil future sovereign debt restructurings by significantly reducing the incentive for creditors to participate in them, thereby threatening the ability of a sovereign to emerge from financial crisis.

See Joe Leahy, *Brazil warns on Argentina debt ruling*, Fin. Times, Nov. 29, 2012 (Brazil's Central Bank governor noting that the Amended Injunctions "set[] a negative precedent that could hurt sovereign debt negotiations elsewhere."); Stephen M. Davidoff, *In Court Battle, a Game of Brinksmanship with Argentina*, N.Y. Times, Nov. 27, 2012 ("The ability of a country to achieve a workout and avoid this type of guerrilla action just got harder and more uncertain at a time of debt restructuring in Europe. This is not supposed to happen.").

Creditors enter into voluntary restructurings because they know that if they hold out for full payment, which they have the legal right to do, the debtor state will likely never be able to pay them anything. Even if they choose to pursue the legal alternatives of suit and judgment enforcement, these creditors are aware that they may well face difficult sovereign immunity obstacles to collection. This creditor calculus would drastically change if creditors knew that they could instead let others restructure, wait until their own defaulted debts became "de facto" subordinated by nonpayment, and then invoke a boilerplate pari passu clause to compel full payment by blocking and effectively seizing amounts due to those foolish enough to enter into the restructuring. *See* James Mackintosh, *Argentina's battle with Elliott*, Fin. Times, Nov. 22, 2012 ("The ruling increases the incentive to reject future restructurings, even those with collective action clauses. Countries that find themselves unable to pay their debts will be locked out of the international financial system until they somehow come up with the money.”).[12] In leading to this result, the Amended Injunctions directly “undermine[] the orderly consensual restructuring process the United States has been at pains to foster for the past several decades.” 2012 U.S. Br. at 18. *See also* Nouriel Roubini, *From Argentina to Greece: Crisis in the Global Architecture of Orderly Sovereign Debt Restructurings*, Nov. 28, 2012 (as to the Argentine and Greek cases, the “new broad and radical interpretation of the *pari passu* clause” and in particular the remedies ordered upon the sovereign and associated third parties, “risks destroying the current international regime for the orderly restructurings of sovereign debts of insolvent countries”).

Contrary to the Court’s suggestion, *see* Oct. 26 Decision at 8 (SPE-275), collective action clauses (“CACs”) do not eliminate the dangers posed by the Amended Injunctions to sovereign restructurings. CACs in New York law-governed sovereign bonds only came into common use as a result of enormous

---

[12] It is not a question of if, but when such a situation will arise. Between 1950 and 2010, there were more than 600 individual cases of sovereign debt restructuring, involving 95 different countries. Udaibir S. Das, et al., IMF Working Paper, *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts*, dated Aug. 2012; Robin Wigglesworth & Joseph Cotterill, *Creditors weigh up Argentina debt Ruling*, Fin. Times, Nov. 4, 2012 (SPE-804) (discussing the “far reaching implications” of the injunctions); Bob Van Voris, *Argentina Loses U.S. Appeal of Ruling on Defaulted Bonds*, Bloomberg, Oct. 26, 2012 (SPE-810) (discussing decline in the Republic’s bond values).

efforts by the U.S. Treasury following Argentina's default in 2001, and billions of dollars of non-CAC debt remains outstanding. *See* Decl. of Stephen Choi ¶ 26, dated Nov. 16, 2012 ("Choi Decl.") (SPE-1133) (noting that there is at least $45.8 billion of sovereign debt outstanding not subject to CACs).

In any event, the Amended Injunctions incentivize creditors *not* to restructure, thereby making it difficult, if not impossible, to muster the majority needed to invoke CACs. *See* James Mackintosh, *Argentina's battle with Elliott*, Fin. Times, Nov. 22, 2012 (the district court's decision "increases the incentive to reject future restructurings, even those with collective action clauses"). Moreover, many sovereign bond issuances containing a CAC bind only the bondholders of a particular bond issuance, thus allowing holdouts to purchase a large stake in a particular bond and block a foreign state's restructuring of that bond or to seek to interfere with payments on other bonds. *See* Choi Decl. ¶¶ 27-28 (SPE-1134); Robin Wigglesworth & June Webber, *Markets: An unforgiven debt*, Fin. Times, Nov. 27, 2012 ("Collective action clauses, for example, are no panacea because they largely apply only to individual bonds, not a country's overall debt burden. Hedge funds can still play holdout by gaining a blocking minority in one bond, making a restructuring of that instrument impossible."). Indeed, even those countries that have issued bonds with CACs are worried about the effect of the Amended Injunctions. *See, e.g.*, Sujata Rao, *Analysis: Argentina debt case* *weakens incentives to settle*, Reuters, Dec. 11, 2012 ("Emerging market countries, some of which have bought back billions of dollars of older debt and replaced it with CAC bonds, have expressed concern about the ruling's impact.").

Finally, the status of New York as a financial center and of New York law as secure and fair, which are critical elements to New York City's, New York State's, and ultimately the United States' positions in the international economy, will be undermined if the Amended Injunctions are not rejected by the Court. *See Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 (2d Cir. 1985) (recognizing "[t]he United States['] . . . interest in maintaining New York's status as one of the foremost commercial centers in the world"); *Jaldhi*, 585 F.3d at 62 (overturning prior decision because, *inter alia*, it not only introduced "uncertainty into the international funds transfer process . . . but also undermined the efficiency of New York's international funds transfer business," which could "discourage dollar-denominated transactions and damage New York's standing as an international financial center").

The district court's pari passu clause interpretation and related remedy will encourage commercial parties to avoid New York law, and as a consequence to move their financing business outside the realm of New York and the New York financial services industry. Not only sovereign, but private parties may opt to avoid New York law and jurisdiction rather than face the threat of this pari passu "discrimination" remedy that is unavailable to creditors elsewhere. Cross-border private debt governed by New York law regularly contains pari passu clauses. Private parties may avail themselves of (or be compelled by creditors into) bankruptcy, but many avoid that fate through voluntary debt work-outs. It is easy to foresee that the theory of "discrimination" and the associated remedy set out by the district court creates the possibility that voluntary work-outs in such debt in the private realm will be significantly hindered. *See* Stephen J. Lubben, *Possible Ripples From the Argentine Bond Litigation*, N.Y. Times, Dec. 13, 2012 ("But the decisions in the Argentine litigation do seem to go a long way toward transforming the pari passu clause from a rule of rank into a prohibition on preferences. And if this is right, is there any reason to think the holdings will be confined to the sovereign context?"). The result would be to drive cross-border financings to seek the safer ground of U.K. law. It is also foreseeable that creditors will seek to include pari passu clauses even in domestic U.S. debt based on the ruling below, with the same damaging impact on voluntary restructurings.

Accordingly, sovereign and private debtors will be deterred from selecting New York law as the governing law for sovereign financings, further reducing the need to use financial institutions and lawyers located in New York. *See* 2012 Clearing House Br. at 26 (SPE-936) (noting "deleterious long-term impact on New York's financial institutions and its preeminence as a financial center"); Jonathan Wheatley, *New York law: not what it used to be*, Fin. Times, Nov. 23, 2012 ("Judge Thomas Griesa's ruling that Argentina must pay $1.3bn to holdout creditors has all sorts of implications for sovereign borrowers and lenders. It has also, at a stroke, *wiped out the New York law premium*.") (emphasis added). And even if the drafters do not lead the flight to other law, the drop in the New York law-governed sovereign bond prices relative to those subject to other jurisdictions suggests that the market may take them there. *See* James Mackintosh, *Argentina's battle with Elliott*, Fin. Times, Nov. 22, 2012 (due to the district court's decision "future borrowers would be well advised to avoid issuing bonds under New York law, unless they are happy to run the risk of ending up in the sovereign equivalent of a 19th-century debtors' prison").

Plaintiffs argued below that the Amended Injunctions serve the public interest of enforcing contracts and upholding the rule of law – a position that directly conflicts with the United States' continuing view that the Amended Injunctions are illegal restraints. *See* U.S. Motion to File Amicus Br. at 5, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir. Dec. 13, 2012). Plaintiffs' argument is both incorrect, and proves too much. The fact that a loan contract is breached does not allow a court at a creditor's behest to exceed the legal and equitable limits on its powers. If it did, courts sufficiently displeased by a breach of contract could ignore statutory immunities – including sovereign immunity from execution – deliberately designed to limit the ability of a creditor to execute a judgment, *see De Letelier*, 784 F.2d at 799 (recognizing that the FSIA contemplates the existence of "a right without a remedy"), issue injunctions against innocent third parties to coerce the debtor, impose daily fines for the non-payment of judgments, or throw individual debtors into prison.

Argentina has not acted capriciously; it restructured 92% of its defaulted bonds on the basis of inter-creditor equity – a universally accepted concept. Argentina offered a restructuring package that provided an upside, in the form of GDP-linked securities, if the country grew. Argentina has honored this commitment. To threaten Argentina's current debt service in violation of U.S. law and contrary to Argentina's sovereignty over its own actions in its own territory undermines the standing of U.S. law and U.S. jurisdiction. The rule of law is not upheld when an injunction, which as an equitable remedy should be reasonable and consistent with the public interest, is wielded with such blasting effect on so many other interests and legal principles.

POINT V

THE COURT SHOULD CERTIFY THE PARI PASSU MATTER TO THE NEW YORK COURT OF APPEALS

If the Court does not vacate the Amended Injunctions based on the dispositive legal issues discussed in Points I-IV, *supra*, at a minimum this Court should certify the following issue to the New York Court of Appeals: Does violation of a pari passu clause support the remedy at issue in this case, *i.e.*, enjoining payments to third party creditors (and transfers by participants in the funds transfer system) unless the debtor pays other creditors 100% of what they are owed?

This case amply warrants certification of the New York law issues raised by the Amended Injunctions and associated November 21 Orders, which purport to enforce the pari passu clause under governing New York law. Under New York law, this Court may certify to the New York Court of Appeals "determinative questions of New York law [that] are involved in a case pending before [it] for which no controlling precedent of the Court of Appeals exists." 22 N.Y.C.R.R. § 500.27(a); *see also* 2d Cir. R. 27.2(a) ("If state law permits, the court may certify a question of state law to that state's highest court."). Certification is proper where, as here, the Court is "confronted with a dispositive complex question of New York common law for which no New York authority can be found." *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 285 (2d Cir. 2006) (internal quotation marks omitted).[13]

No New York state court has addressed the proper interpretation of the pari passu clause. Nor has any New York court construed any similar clause as requiring an analogous remedy, such that "the decisions of other New York courts

[13] The EBG has filed a similar motion, which the Republic joins.

permit us to predict how the Court of Appeals would resolve it . . . ." *Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012). The New York Court of Appeals *has* held, however, that a party "who obtains specific performance of his contract is entitled to no greater rights than he would have had had the contract been performed at the agreed time." *F & F Restaurant Corp. v. Wells, Goode & Benefit, Ltd.*, 61 N.Y.2d 496, 502 (1984) (citing *Bostwick v. Beach*, 105 N.Y. 661, 663 (1887)); *see also Stephens v. Messing*, 162 A.D.2d 352, 353 (1st Dep't 1990) (stating that in an equitable action for specific performance, damages "are limited to the amount necessary to place the parties in the positions they would have occupied had the contract been performed according to its terms."). Because the Amended Injunctions grant plaintiffs *superior* rights to exchange bondholders, if this Court does not vacate the Amended Injunctions outright, it should certify to the Court of Appeals the question of whether the Amended Injunctions are an appropriate remedy for breach of the pari passu clause.

Finally, in determining whether an issue should be certified to the New York Court of Appeals, it is important to consider the degree to which "the question is of importance to the state and may require value judgments and public policy choices . . . ." *Barenboim*, 698 F.3d at 109. Here, because pari passu clauses are included in the bond indentures of countless sovereign and private bonds issued under New York law, *see* 2012 U.S. Br. at 17 (SPE-968) (describing pari passu clause as "boilerplate language contained in many sovereign debt instruments"), the interpretation of the clause and the appropriate remedy for its breach are extremely important issues in any cases brought by creditors under New York law-governed debt instruments. Because of the enormous impact the Amended Injunctions, if affirmed, will have on the integrity of New York law, the functions of intermediary banks, the international payment system, and sovereign debt restructurings, "not only [is] the question at issue . . . likely to recur, but also [] the likelihood of recurrence plainly renders the proper meaning of the bond provision 'an important policy issue for a state that plays a pivotal role in international commerce.'" *NML Capital v. Republic of Argentina*, 621 F.3d 230, 243 (2d Cir. 2010) (citing *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 166 (2d Cir. 2007) (certifying to the New York State Court of Appeals interpretation of a contract provision in certain Republic debt owned by NML and other plaintiffs)).

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the November 21 Orders and all associated Orders.

Dated: New York, New York
December 28, 2012

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: /s/ Carmine Boccuzzi
Jonathan I. Blackman (jblackman@cgsh.com)
Carmine D. Boccuzzi (cboccuzzi@cgsh.com)

Of Counsel:

Ezequiel Sanchez Herrera
Sara A. Sanchez
Michael M. Brennan
Mona M. Williams

One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for the Republic of Argentina

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i), because it contains 13,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: New York, New York
December 28, 2012

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: /s/ Carmine Boccuzzi
Carmine D. Boccuzzi (cboccuzzi@cgsh.com)

One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for the Defendant-Appellant Republic of Argentina