12-0105-cv(L), 12-0109-cv(con), 12-0111-cv(con), 12-0157-cv(con), 12-0158-cv(con), 12-0163-cv(con), 12-0164-cv(con), 12-0170-cv(con), 12-0176-cv(con), 12-0185-cv(con), 12-0189-cv(con), 12-0214-cv(con), 12-0909-cv(con), 12-0914-cv(con), 12-0916-cv(con), 12-0919-cv(con), 12-0920-cv(con), 12-0923-cv(con), 12-0924-cv(con), 12-0926-cv(con), 12-0939-cv(con), 12-0943-cv(con), 12-0951-cv(con), 12-0968-cv(con), 12-0971-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., 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,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR NON-PARTY APPELLANT THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE

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Plaintiffs-Appellees,

– v. –

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

THE BANK OF NEW YORK MELLON, as Indenture Trustee, EXCHANGE BONDHOLDER GROUP,

Non-Party Appellants,

FINTECH ADVISORY INC., EURO BONDHOLDERS,

Intervenors.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

The Bank of New York Mellon is a wholly owned subsidiary of The Bank of New York Mellon Corp., a Delaware corporation, which is a publicly held company. No publicly held company owns 10% or more of The Bank of New York Mellon Corp.'s stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

The injunctive power does not exist or act in the abstract. It is utilized only on proof of wrongful conduct by a party to a lawsuit and even then, only after specific requirements are met and the public interest is served. So it is with the contempt power as well. It is employed only on a proven violation of an injunction, against those who have violated—or affirmatively aided the wrongdoer in violating—the injunction. None of these safeguards was followed here as to non-party The Bank of New York Mellon ("BNY Mellon") and the injunctions entered against it below are a due process violation of the most basic sort. Accordingly, those injunctions should be vacated.

On November 21, 2012, the District Court issued amended injunctions in order to remedy the Republic of Argentina's breach of contract with Plaintiffs (the "Injunctions"). These Injunctions apply specifically and directly to non-party BNY Mellon. Under these Injunctions, if Argentina makes payments to BNY Mellon intended for certain of its bondholders (the "Exchange Holders"), without making "Ratable Payments" to the Plaintiffs, BNY Mellon is prohibited, on penalty of contempt, from receiving or distributing those funds to the Exchange Holders. That is so, even though (1) BNY Mellon is not a party to this case, (2) BNY Mellon is not a party to Argentina's contracts with the Plaintiffs, (3) BNY Mellon has no relevant relationship, contractual or otherwise, with Plaintiffs, (4)

BNY Mellon cannot help, assist, or otherwise influence Argentina's decision to make a Ratable Payment to the Plaintiffs, and (5) BNY Mellon is contractually obligated, as the indenture trustee, to distribute the funds received from Argentina to the Exchange Holders.

In other words, the District Court has directly enjoined non-party BNY Mellon from performing under a lawful contract where there is no proof that BNY Mellon can aid or abet the purportedly wrongful conduct—Argentina's refusal to make a Ratable Payment to Plaintiffs whenever it pays the Exchange Holders—which is the foundation of the District Court's Injunctions. Moreover, no such "aiding and abetting" proof exists. Argentina, alone, makes the decision on whether a Ratable Payment should be made and it does so without acting through or with BNY Mellon. Concomitantly, in performing its duties with respect to the funds it receives, BNY Mellon will have done nothing to further or advance any decision by Argentina not to make such a payment to Plaintiffs. As a result, the District Court has undertaken to punish the lawful conduct of a non-party, BNY Mellon, to try to coerce the alleged wrongdoer, Argentina, into compliance with the court's injunctive order. For multiple reasons, controlling law cannot tolerate that result.

At the threshold, the Due Process Clause forbids injunctions against non-parties, who lack the process and protections afforded to named parties. Settled

law likewise bars any attempt—such as undertaken by the District Court here—to use Rule 65(d)(2) of the Federal Rules of Civil Procedure to circumvent this fundamental prohibition and extend the injunction to a non-party which, like BNY Mellon, cannot conceivably be perceived as having aided or abetted a violation of an injunction. This Court therefore should vacate the Injunctions against BNY Mellon. Alternately, and at a minimum, the Court should clarify and confirm that BNY Mellon's attempts to comply with the Injunctions will not subject it to any liability if it does not distribute funds it receives from Argentina to the Exchange Holders.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction over the underlying action against Argentina under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1605(a)(1). On December 3, 2012, BNY Mellon filed a timely notice of appeal of the District Court's November 21, 2012 injunctive order and opinion. Supplemental Appendix ("SPE") 1429. This Court has jurisdiction over the District Court's injunctive order and opinion of November 21, 2012, under 28 U.S.C. § 1292(a)(1), and pursuant to its limited remand resulting in that order and opinion, *see NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 265 (2d Cir. 2012) (citing *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)).

STATEMENT OF THE ISSUES

1. Did the District Court err in issuing the Injunctions against non-party BNY Mellon where (a) BNY Mellon was not named as a party or served with process in the action below, (b) no claim was proven or judgment entered against BNY Mellon in the action below, and (c) Plaintiffs failed to prove the prerequisites for permanent injunctive relief against BNY Mellon in the action below?

2. Did the District Court err in issuing the Injunctions against non-party BNY Mellon, which enjoin BNY Mellon's lawful performance of its duties as indenture trustee, for the express purpose of effectuating the court's Injunctions against the purported wrongdoing defendant—Argentina?

3. Did the District Court err in issuing the Injunctions against non-party BNY Mellon based on its determination that BNY Mellon, in lawfully performing its duties as indenture trustee, is in "active concert" with Argentina under Federal Rule of Civil Procedure 65(d)(2)?

4. Did the District Court err in issuing the Injunctions against non-party BNY Mellon, which substantially disserve the public interest?

STATEMENT OF THE CASE

This appeal arises out of Plaintiffs' claims that Argentina breached the *pari passu* clause in their contracts by failing to make payments on Plaintiffs' bonds, while continuing to make payments on bonds held by other parties. The District Court (Honorable Thomas P. Griesa) granted partial summary judgment to Plaintiffs on their breach of contract claim and later ordered Argentina to specifically perform its contractual obligation by making "Ratable Payments" to Plaintiffs whenever it makes payments to certain other bondholders. *NML Capital*, 699 F.3d at 254. The District Court also issued injunctions providing that

"'whenever the Republic pays any amount due under the terms of the [exchange] bonds,' it must 'concurrently or in advance' pay plaintiffs the same fraction of the amount due to them…." *Id.*

Argentina appealed and in October 2012, this Court issued a decision affirming the District Court's partial summary judgment and specific performance rulings, but remanding for clarification on the scope of the injunctions. *NML Capital*, 699 F.3d at 265. After expedited proceedings, on November 21, 2012, the District Court (Honorable Thomas P. Griesa) issued an order and opinion clarifying that its injunctions applied to various non-parties, including BNY Mellon. *See NML Capital, Ltd. v. Republic of Argentina*, 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012) (order); *NML Capital, Ltd. v. Republic of Argentina*, 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (opinion). BNY Mellon filed a notice of appeal of this order and opinion, and the case returned to this Court automatically pursuant to *Jacobson*, 15 F.3d at 22. *NML Capital*, 699 F.3d at 265.

STATEMENT OF THE FACTS

I. Following This Court's Remand, Non-Party BNY Mellon Establishes That, As Indenture Trustee, It Neither Acts As Argentina's Agent Nor Could It Aid Or Abet Argentina's Breach Of Duties To Plaintiffs.

In the initial appeal of the District Court's February 23, 2012 injunctive order, this Court affirmed the District Court's interpretation of the *pari passu* provision, but found that the record was "unclear as to … how the injunctions

apply to third parties" that were involved in the process of Argentina's bond payments. *NML Capital, Ltd.*, 699 F.3d at 250, 264; *see also* Tr. of Oral Argument, *NML Capital Ltd., et al. v. Republic of Argentina*, 12-105(L), July 23, 2012, at 56:12-14 ("I'm not sure that courts [can] enter injunctions primarily for the purpose of taking action against such third parties.").

This Court specifically noted its "concerns about the Injunctions' application to banks acting as pure intermediaries in the process of sending money from Argentina to the holders of the Exchange Bonds." *NML Capital*, 699 F.3d at 264. But the Court also made clear that its "concerns about the Injunctions' application to third parties ***do not end here***." *Id.* (emphasis added). It therefore remanded with instructions that the District Court "more precisely determine the third parties to which the Injunctions will apply" so that this Court then could "decide whether the Injunctions' application to" those third parties "is reasonable" and otherwise consider the "merits of the remedy…." *Id.* at 264-65.

After this Court's remand, the District Court ordered a 10-day briefing schedule regarding, among other issues, the application of the injunctions to third parties, including BNY Mellon. BNY Mellon was not served with process, named as a party-defendant, or otherwise asked to participate. It did, however, submit a brief as a non-party, along with supporting and uncontradicted factual materials, which detailed the limits of its relationship with Argentina and the lack of any

relevant relationship with, or connection to, the Plaintiffs, Argentina's contracts with the Plaintiffs, or Argentina's performance of its obligations under its contracts with the Plaintiffs. Given these undisputed facts, as BNY Mellon argued, there was no colorable basis on which the court's injunctive power could or should be extended to it. Dkt. No. 396, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, et al. (TPG), pp. 7-15.

To that end, BNY Mellon also established that its relationship with Argentina's payments on the Exchange Holders' bonds is confined to its role as indenture trustee on those bonds. Unlike a common law trustee, which has duties beyond those set out in the trust agreement, the duties and conduct of an indenture trustee are governed exclusively by the terms of the indenture. Here, the indenture governing the Exchange Holders' bonds (the "Indenture") is explicitly intended for the benefit of the Exchange Holders only, and BNY Mellon's duties are owed directly to those Exchange Holders, not to Argentina or to the Plaintiffs.[1] Dkt. No. 396, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, et al. (TPG), pp. 3-6.

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

Thus, as indenture trustee, BNY Mellon acts "for the equal and proportionate benefit of the Holders . . . ." SPE-633. More specifically, BNY Mellon holds all moneys paid to it under the Indenture "in trust" for itself and the Exchange Holders, SPE-648, 650, 665, 683 [§§ 3.1, 3.5(a), 5.5, 11.2], and Argentina has "no interest whatsoever in such amounts," SPE-650 [§ 3.5(a)]. *Accord EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 423 (S.D.N.Y. 2012) (citing *NML Capital Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011); *Brown v. Morgan & Co., Inc.*, 40 N.Y.S.2d 229 (1943), *aff'd*, 295 N.Y. 867 (1946)). In addition, BNY Mellon alone has authority over any trustee paying agent as defined in the Indenture. SPE-650 [§ 3.5(a)] ("[A]ny trustee paying agents appointed pursuant to this Indenture shall be agents solely of the Trustee, and the Republic shall have no authority over or any direct relationship with any such trustee paying agent or agents.").

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

- declare the entire indebtedness under the Notes immediately due and owing, SPE-654 [§ 4.4(a)];
- institute proceedings "in its own name and as trustee of an express trust" for all amounts unpaid under the Notes and all costs of collection, SPE-655 [§ 4.4(c), (d)]; and

- pursue any available remedy to collect amounts owed by Argentina, SPE-656 [§ 4.6].

Against this backdrop, BNY Mellon explained that in its role as indenture trustee, it plainly was not acting as an "agent" of Argentina. Dkt. No. 396, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, et al. (TPG), pp. 9-11. Nor, in making its ministerial transfer of Argentina's payments to the *Exchange Holders*, could BNY Mellon be perceived as "aiding and abetting" Argentina's breach of its agreement with the *Plaintiffs*. *Id.* at pp. 11-15. What Argentina did or did not do with respect to Plaintiffs was solely Argentina's responsibility and BNY Mellon had no control over that conduct. BNY Mellon likewise had no relevant contractual or other legal relationship with Plaintiffs. *Id.* at 1-2.

Moreover, BNY Mellon pointed out that its receipt of funds under the Indenture was lawful and appropriate. Indeed, it explained, enjoining BNY Mellon from receiving those funds or making payments to the Exchange Holders conceivably could subject it to inconsistent claims because the Indenture required it to distribute the funds received. *Id.* at 16-18. BNY Mellon accordingly contended that, if the injunctions were applied to it, the District Court should provide guidance on how to reconcile its competing obligations under the Indenture and any injunctions.

II. Despite BNY Mellon's Non-Party Status And Limited Role, The District Court Issues Amended Injunctions, Which Extend To BNY Mellon And Provide That BNY Mellon Can Be Held In Contempt If Argentina Fails To Meet Its Obligations To Plaintiffs.

Despite the uncontradicted record reflecting the limited nature of BNY Mellon's role, on November 21, 2012, the District Court issued two opinions and multiple orders imposing injunctions against Argentina, BNY Mellon, and other non-parties. SPE-1360, 1378, 1386. The court ordered that, whenever Argentina pays any amount on the Exchange Bonds to BNY Mellon as trustee for the Exchange Holders, Argentina "shall concurrently or in advance make a 'Ratable Payment' to" the Plaintiffs. SPE-1381 [¶ 1(c)]. The court further concluded that non-party BNY Mellon and certain other non-parties—because of their ministerial role as participants in the "payment process of the Exchange Bonds" (SPE-1381 [¶ 2(e)])—were bound by the injunctions under Rule 65(d)(2) and prohibited from distributing payments to the Exchange Holders unless Argentina complied with the Injunctions.

In particular, according to the District Court, in order to ensure enforcement of the Injunctions directing Argentina to make "Ratable Payments" to the Plaintiffs, it was "necessary that the process for making payments on the exchange bonds be covered by the Injunctions, and that the parties participating in that process be covered…." SPE-1368 (emphasis in original). Although the court acknowledged that "[i]t is probably true that these parties are not all agents of

Argentina," it concluded—with little reasoning or evidence (other than the Indenture itself), and no citation to any authority—that "they surely are 'in active concert or participation' with Argentina in processing the payments from Argentina to the exchange bondholders." SPE-1369-70. The District Court thus determined that BNY Mellon and other third parties in the "chain" of payment "should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps." SPE-1371.

While the District Court expressly extended the Injunctions to BNY Mellon, it did not provide BNY Mellon with the requested guidance regarding how BNY Mellon should reconcile its competing duties under the injunctive orders with its contractual duties under the Indenture.

Pursuant to the procedure set forth in this Court's decision in October 2012, the mandate automatically returned to this Court upon the District Court's issuance of the Injunctions. *NML Capital*, 699 F.3d at 265. On November 28, the Court issued a stay pending its review of the Injunctions, and set forth a briefing schedule. Dkt. No. 490. On December 6, the Court issued an order granting BNY Mellon's motion for leave to appear and to submit briefs in this matter as a non-party appellant. Dkt. No. 544.

SUMMARY OF ARGUMENT

Fundamental due process principles bar the Injunctions against non-party BNY Mellon. Plaintiffs had the burden to establish the elements of the "drastic and extraordinary remedy"[2] of permanent injunctive relief against BNY Mellon. But they never filed a complaint against BNY Mellon, never served BNY Mellon with process, never made any claim or obtained any judgment against BNY Mellon, and never offered proof that a permanent injunction against BNY Mellon met the prerequisites for that relief. Accordingly, not only does the District Court's issuance of the permanent Injunctions against BNY Mellon depart from the fundamental rules of proof and process—it also violates both the central tenet of due process "'that everyone should have his own day in court'"[3] and the requirement that courts may only enjoin parties over whom they have *in personam* jurisdiction.[4]

Rule 65(d)(2), which authorizes the extension of an existing injunction to aiders and abettors of wrongdoing defendants, cannot, and does not, override these core due process limitations—putative non-party agents or aiders and abettors, no less than the putative wrongdoing party itself, must be named in a proceeding,

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[2] *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2761 (2010) (citation omitted).

[3] *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (citation omitted).

[4] *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969); *In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 270 (2d Cir. 2001).

served with process, and given their day in court before they can be found to be in "active concert" with the violator of an injunction.[5]

In any event, Rule 65(d)(2), by its terms, does not apply here. BNY Mellon has no power or control over whether Argentina pays the Plaintiffs and it cannot "aid or abet" Argentina in any decision Argentina might make in that regard—in short, it cannot affirmatively aid and abet Argentina's breach of its contract with Plaintiffs. Additionally, on receipt of a payment from Argentina, BNY Mellon's obligations run independently to the Exchange Holders. In such circumstances, Rule 65(d)(2) does not and cannot authorize the District Court's Injunctions, and accompanying contempt threat, against non-party BNY Mellon.

At bottom, the Injunctions against BNY Mellon enjoin precisely what BNY Mellon is obligated to do under the Indenture—pay the Exchange Holders—based solely on the District Court's expressed desire to enforce its order against Argentina. But courts cannot invoke their equitable or contempt powers to punish the lawful conduct of a non-party in an effort to try to compel a wrongdoer to act. Nor is there any basis for the District Court's finding that BNY Mellon's performance of its trustee obligations assists Argentina in accomplishing the purportedly unlawful conduct that gave rise to the Injunctions in the first instance. The Injunctions against non-party BNY Mellon should be vacated.

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[5] *See, e.g., Zenith Radio Corp.*, 395 U.S. at 110.

STANDARDS OF REVIEW

This Court reviews "the district court's issuance of a permanent injunction for abuse of discretion." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 142 (2d Cir. 2011) (citation omitted). "[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles….'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.)).

Thus, a "district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99-100 (2d Cir. 2012) (citation and internal quotations omitted). Error "in formulating the injunction" is a reversible abuse of discretion. *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 984 (2d Cir. 1997) (citations and internal quotations omitted).

This Court reviews *de novo* whether the Injunctions against BNY Mellon violate constitutional due process and other legal limits. *Oouch v. U.S. Dep't of Homeland Security*, 633 F.3d 119, 121 (2d Cir. 2011) (citation omitted); *McKithen*

v. Brown, 626 F.3d 143, 149 (2d Cir. 2010) (citation omitted). It also reviews *de novo* whether the District Court properly interpreted and applied Rule 65(d)(2) of the Federal Rules of Civil Procedure. *Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 229 (2d Cir. 2006) ("We review *de novo* a District Court's interpretation of the Federal Rules of Civil Procedure") (citation omitted).

ARGUMENT

I. The District Court's Injunctions Against Non-Party BNY Mellon's Lawful Performance Of Its Indenture Trustee Duties Exceed Constitutional And Other Fundamental Limits On Its Equitable Powers.

A. The Due Process Clause Bars The Injunctions Against Non-Party BNY Mellon, Which Was Not Named In Plaintiffs' Complaint, Not Served With Process, And Not Subjected To A Claim Or Judgment.

Permanent injunctions are "drastic and extraordinary" remedies (*Monsanto Co.*, 130 S.Ct. at 2761 (citation omitted)) that should only be used "in a 'clear and plain' case." *Reynolds v. Giuliani*, 506 F.3d 183, 198 (2d Cir. 2007) (citations omitted). Like any federal-court judgment, permanent injunctions can only issue after the plaintiff has filed its complaint, served it on the defendant sought to be enjoined, and proved its causes of action against the defendant. But then, the plaintiff also must prove the four elements for obtaining a permanent injunction:

> "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is

> warranted; and (4) that the public interest would not be disserved by a permanent injunction."

Monsanto Co., 130 S.Ct. at 2756 (citation omitted).

Plaintiffs met none of these prerequisites for obtaining a permanent injunction *against non-party BNY Mellon*: They did not (1) name BNY Mellon in their complaint, (2) serve BNY Mellon with process, (3) assert, attempt to prove, or obtain an underlying judgment on any claim against BNY Mellon, or (4) prove the four permanent injunction-specific requirements. Yet, the District Court dispensed with these essential predicates of proof and process and permanently enjoined BNY Mellon, just as it permanently enjoined Argentina—the party-defendant. This, plainly, was reversible error.

Of course, it is an "elementary requirement that the claimant allege and prove the substance of all essential elements in his case." *U.S. Indus./Federal Sheet Metal, Inc. v. Dir., Off. of Workers' Comp. Programs*, 455 U.S. 608, 613 n.7 (1982) (citations and internal quotation marks omitted). It is also "'a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor*, 553 U.S. at 884 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)); *see also Zenith Radio Corp.*, 395 U.S. 100, 110 (1969).

This principle, in turn, is grounded in the Due Process Clause and the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553 U.S. at 892–93 (citation omitted); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) ("[t]he due process clause requires that every man shall have the protection of his day in court"). And it precludes courts from issuing injunctions against non-parties who have not been named in a complaint or served with process and, as a consequence, are not within the courts' personal jurisdiction. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("'Before a ... court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.'") (quoting *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)); *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012) (procedurally proper service of process is one of the "three primary requirements" for the "lawful exercise of personal jurisdiction") (citations omitted).

Indeed, the law is clear that no judgment—injunctive or otherwise—can be entered against a non-party who has neither been named in a complaint nor received adequate service of process and, therefore, is not subject to the court's personal jurisdiction. *See, e.g., Zenith Radio Corp.*, 395 U.S. at 112 (holding that it is "error to enter [an] injunction against" a non-party "without having made this determination in a proceeding to which the [non-party] was a party"); *In re*

Rationis Enters., Inc. of Panama, 261 F.3d at 270 ("A court may not grant a final, or even an interlocutory, injunction over a party over whom it does not have personal jurisdiction.") (citing *Weitzman v. Stein*, 897 F.2d 653, 659 (2d Cir. 1990)); *Visual Sciences, Inc. v. Integrated Commc'ns Inc.*, 660 F.2d 56, 59 (2d Cir. 1981) ("A court must have *in personam* jurisdiction over a party before it can validly enter even an interlocutory injunction against him.") (citations omitted).

Thus, for example, in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), the Supreme Court reversed an injunction against named defendants who had not been "served with process…." 245 U.S. at 234. The Court explained that because "the injunction operates only *in personam*, it was erroneous to include" these unserved parties "as defendants" subject to the injunction. *Id.*

Similarly, in *Lake Shore Asset Management Ltd. v. Commodity Futures Trading Commission*, 511 F.3d 762 (7th Cir. 2007) (Easterbrook, C.J.), the Seventh Circuit vacated an injunction extending to other members of the same corporate group as the enjoined defendant, none of whom had "been served with process" or named as parties. 511 F.3d at 767 (reasoning that service of process is "essential" before one can be subjected to an injunction).

Numerous other controlling authorities are in accord. *See, e.g., Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 436 (1934) (Brandeis, J.) (reversing injunction against persons not "served with process"); *Scott v. Donald*, 165 U.S. 107, 117

(1897) ("The decree is also objectionable because it enjoins persons not parties to the suit."); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (L. Hand, J.) ("no court can make a decree which will bind any one but a party"); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed. Cir. 1996) ("courts of equity have long observed the general rule that a court may not enter an injunction against a person who has not been made a party to the case before it") (citation omitted).

Nevertheless, none of these fundamental due process safeguards was followed here. BNY Mellon was not named as a party or served with process in the proceeding below. No claim was made or underlying judgment entered against BNY Mellon in the proceeding below. And Plaintiffs did not demonstrate—or even attempt to show—that the four prerequisites for permanent injunctive relief were satisfied as to BNY Mellon in the proceeding below. The reasons for this are obvious—BNY Mellon has done nothing wrong, Plaintiffs have no claim against it, and Plaintiffs could not conceivably make the required showing for obtaining a permanent injunction against BNY Mellon.

The District Court ignored all of this, however, and in the process, it ran roughshod over the principles of proof, process and jurisdiction that implement the Constitution's promise of due process. This approach to requests for the extraordinary remedy of permanent injunctive relief is not defensible. The District

Court's Injunctions against non-party BNY Mellon go beyond established constitutional limits and should be vacated for this reason alone.

B. Settled Limits On Equitable Powers Preclude Enjoining BNY Mellon's Lawful Conduct.

Beyond the District Court's failure to insist that Plaintiffs provide the proper procedural and substantive foundation for injunctive relief, it ignored other fundamental limitations on its equitable powers. Consistent with the "drastic and extraordinary" nature of the injunctive power, *Monsanto Co.*, 130 S.Ct. at 2761 (citation omitted), there are "fundamental limitations on the remedial powers of the federal courts[,]" which permit their exercise "only on the basis of a violation of the law…." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 399 (1982) (quotations omitted); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (in "any equity case, the nature of the violation determines the scope of the remedy").

Indeed, the Due Process Clause also prohibits punishment for "lawful" conduct. *See State Farm Auto. Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort….") (citation omitted). This follows from "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing…." *St. Ann v. Palisi*, 495 F.2d 423, 426

(5th Cir. 1974); *see also Bennis v. Michigan*, 516 U.S. 442, 458 (1996) (Ginsburg, J., concurring) (rejecting any "experiment to punish innocent third parties"). Courts thus are duty-bound to ensure that injunctive relief does not extend to conduct not otherwise unlawful. *Mickalis Pawn Shop*, 645 F.3d at 144-45; *Shakhnes v. Berlin*, 689 F.3d 244, 257 (2d Cir. 2012) ("An injunction is overbroad when it restrains defendants from engaging in legal conduct.") (citation omitted); *cf. Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 315 (1999) (injunctive relief impermissible where it "was issued not to enjoin unlawful conduct, but rather to render unlawful conduct that would otherwise be permissible").[6]

There is no dispute that the Injunctions bar BNY Mellon from engaging in purely lawful conduct—the receipt of funds from Argentina and the distribution of those funds to the Exchange Holders. BNY Mellon's distribution of funds to the Exchange Holders is done independently of Argentina and is required by the Indenture's terms.

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[6] The need for restraint that accompanies the exercise of a court's injunctive authority applies equally to the companion contempt power—"a potent weapon" in its own right. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 444 (1974) (quoting *Int'l Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)). Accordingly, the contempt power, like the power to order injunctive relief in the first instance, is not "so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945).

The District Court's stated justification for enjoining non-party BNY Mellon—that it "need[ed]" to do so in order to carry out its specific performance remedy against Argentina (SPE-1368)—does not turn the purely lawful into the unlawful. And that is so even if BNY Mellon allegedly is aware that Argentina has decided, in violation of the court's injunctive order, not to make a Ratable Payment. A court's desire to enforce its own equitable remedy against a disobedient defendant is not a license to enjoin the purely lawful conduct of innocent *non-parties*. *See Mickalis Pawn Shop*, 645 F.3d at 145 ("An injunction is overbroad when it seeks to restrain the defendants from engaging in legal conduct") (citation omitted); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) (reasoning that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it" and stating that "it would be quite remarkable to hold that speech by a law-abiding [person] can be suppressed in order to deter conduct by a non-law-abiding third party").

There is nothing unlawful in BNY Mellon's receipt or distribution of funds from Argentina to the Exchange Holders. Argentina contractually is required to make such payments and the Exchange Holders are entitled to receive them. BNY Mellon has no contractual obligation to Argentina (or Plaintiffs, for that matter), that would require it to do anything other than distribute the funds on receipt. If Argentina independently elects not to make a Ratable Payment to Plaintiffs, that

decision does nothing to change the lawfulness of BNY Mellon's conduct in making the required distribution. If Argentina's failure is in breach of the Injunctions, then the court's coercive pressure must be directed at Argentina alone and not a third party, like BNY Mellon, who has done nothing wrong.

II. Rule 65(d)(2) Provides No Support For The District Court's Injunctions Against Non-Party BNY Mellon.

Recognizing that BNY Mellon was not a party to the proceeding, the District Court invoked Rule 65(d)(2) and enjoined BNY Mellon based on its supposed "active concert" with Argentina "in processing the payments from Argentina to the exchange bondholders." SPE-1370. Rule 65(d)(2) cannot be used in this fashion against a non-party, however, and even if it could, the District Court's "active concert" finding was a clear abuse of discretion.

A. Courts Cannot Use Rule 65(d)(2) To Circumvent Due Process And Enjoin A Non-Party.

The law is clear that courts cannot invoke Rule 65(d)(2) in order to name non-parties in injunctions based on an "agency" or "active concert" theory. Of course, no statute or rule of civil procedure can displace or negate in any way the safeguards provided by the Constitution concerning injunctions against non-parties, and Rule 65(d)(2) is no exception. *See United States v. Kirschenbaum*, 156 F.3d 784, 795 (7th Cir. 1998) ("Even if Congress intended to abrogate due process

by empowering a district court to enjoin parties over whom it had no jurisdiction, it could not.").

In *Zenith Radio Corp.*, for example, the named plaintiff ("HRI") sued Zenith for patent infringement, and Zenith counterclaimed solely against HRI, seeking an injunction against HRI and those "in privity" with HRI. Hazeltine, HRI's parent, "was not named as a party, was never served" with Zenith's counterclaim, "and did not formally appear at the trial[,]" though it did file a "special appearance" to contest the court's jurisdiction over it. *Zenith Radio Corp.*, 395 U.S. at 110. The district court entered judgment and an injunction against Hazeltine, but the court of appeals vacated them, and the Supreme Court affirmed. The Court made clear that a finding under Rule 65(d)(2) that one has aided or abetted the violation of an existing injunction—no less than naming one in an injunction in the first instance—can only be made in a proceeding to which the putative aider and abettor is a party:

> Although injunctions issued by federal courts bind not only the parties defendant in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," Fed. Rule Civ. Proc. 65(d), a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party.

Id. at 112. *See also Heyman v. Kline*, 444 F.2d 65, 66 (2d Cir. 1971) (reversing finding that non-party, who was not named or "served with process," and had only

appeared specially to challenge jurisdiction, was in "active concert" with defendant under Rule 65(d)); *Lake Shore Asset Mgmt.*, 511 F.3d at 767 (vacating injunction against non-parties, based on district court's finding of "active concert" under Rule 65(d)(2), because non-parties had not "been served with process" or named as parties); *Additive Controls & Measurement Sys.*, 96 F.3d at 1395-96 (vacating injunction naming non-parties as Rule 65(d)(2) aiders and abettors because that was "inconsistent with the general principle that a non-party to an action may not be enjoined in that action").

The same outcome obtains here. As noted above, BNY Mellon was neither named as a party nor served with process. Nor was any proof offered that came close to showing that BNY Mellon could be judged to be in "active concert" with Argentina as required by controlling law. Plaintiffs obtained their Injunctions without an evidentiary hearing of any kind. Yet, the District Court—like the district courts in *Zenith Radio Corp.*, *Heyman*, *Lake Shore Asset Management*, and *Additive Controls*—named BNY Mellon in its injunctive order based on its "finding" that BNY Mellon was in "active concert" with Argentina in the payments to the Exchange Holders. This was reversible error.

Even if there were some doubt, in light of *Zenith Radio Corp.* and the authorities discussed above, whether Rule 65(d)(2) could be used "to enter the injunction against" BNY Mellon "without [the District Court] having made this

determination in a proceeding to which [BNY Mellon] was a party" (*Zenith Radio Corp.*, 395 U.S. at 112), that doubt must be resolved in favor of a reading that forbids such a use. Controlling precedent confirms that fundamental due process principles prohibit judgments—injunctive or otherwise—against non-parties. No rule of procedure, or even statute, can override this constitutional safeguard, and an interpretation of a rule that accomplishes that improper result must be rejected. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999) (construing Rule 23 to avoid constitutional problems).

B. Rule 65(d)(2) Does Not Cover BNY Mellon's Performance Of Its Duties As Indenture Trustee, Which Does Not Aid Or Abet Argentina's Refusal To Pay The Plaintiffs.

The failure of process and proof should end any inquiry on whether the District Court potentially could extend the Injunctions' reach to BNY Mellon under Rule 65(d)(2). But the District Court also erred in its finding that BNY Mellon's lawful performance of its trustee duties "surely" was in "active concert" with—*i.e.*, aided and abetted—the *actual* wrongful conduct here: Argentina's failure to pay Plaintiffs concurrently with its payments to BNY Mellon for the benefit of the Exchange Holders.[7] SPE-1370. BNY Mellon cannot—as a matter of fact or law—aid and abet that wrongful conduct.

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[7] The District Court essentially conceded that its Injunctions could not be extended to BNY Mellon under Rule 65(d)(2) on an "agency" theory. SPE-1369-70. The law and the record make clear that BNY Mellon is not Argentina's agent.

The extension of an existing injunction against a wrongdoer to a non-party who has some relationship to that wrongdoer is an extraordinary exercise of judicial authority that, as shown above, can be done only with appropriate safeguards. When such an extension is undertaken, moreover, there must be proof that the non-party has the requisite affirmative relationship *to the wrongdoer and the wrong* to establish active participation in the wrongdoer's violation of the injunctive order. As far as that relationship is concerned, therefore, it is well-settled that such aiding and abetting of a violation requires a showing of "substantial assistance" in the undertaking of the wrongful conduct. *See Alemite Mfg.*, 42 F.2d at 832. In *Alemite*, Judge Learned Hand made clear that courts, lacking any "sovereign powers" simply "to declare conduct unlawful[,]" *id.* at 832, may only exercise their injunctive powers over the independent conduct of a

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Under New York law, "an agency relationship results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act." *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 122 (2d Cir. 2001) (quotation omitted). Even where an agency relationship is established, "[a]n injunction issued against a corporation or association binds the agents of that organization [only] to the extent they are acting on behalf of the organization." *People ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996) (citation omitted).

The Indenture demonstrates conclusively that no agency relationship exists here: Argentina did not consent to BNY Mellon's acting on Argentina's behalf, BNY Mellon did not agree to act on Argentina's behalf, and Argentina exercises no control over BNY Mellon in connection with its functions as indenture trustee. Indeed, the opposite is true. SPE 648, 650, 665, 683 [§§ 3.1, 3.5(a), 5.5, 11.2].

non-party when that conduct substantially aids the enjoined *wrongful act* of a party:

> [T]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party.

Id. at 833.

In the context of an injunction, a party thus is not an aider and abettor "simply because it performed its contracted-for services." *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 392-93 (S.D.N.Y. 2009); *see also Meridian Horizon Fund, LP v. KPMG (Cayman)*, 2012 WL 2754933, at *5 (2d Cir. July 10, 2012) (auditor not an aider and abettor because the required "'substantial assistance … means more than just performing routine business services'") (quoting *CRT Invs., Ltd. v. BDO Seidman, LLP*, 925 N.Y.S.2d 439, 441 (2011)); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 427 (S.D.N.Y. 2007) (bank not an aider and abettor because it was not "doing anything more than providing its usual banking services to a customer"). Rather, the requisite "[s]ubstantial assistance may only be found where the alleged aider and abettor 'affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.'" *In re Sharp Int'l Corp.*, 403 F.3d 43, 50 (2d Cir. 2005) (citations omitted).

Moreover, "[b]efore a party can be found guilty of aiding and abetting" the violation of an injunction, the party claiming aiding and abetting must prove that conduct "by clear and convincing evidence." *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) (citations and alterations omitted).

Measured against these standards and the governing burden of proof, there is no basis (let alone clear and convincing evidence) to support the finding that BNY Mellon could aid and abet Argentina's failure to pay Plaintiffs concurrently with its payments to the Exchange Holders—the purported wrongful conduct that led the District Court to issue equitable relief in the first place.

First, BNY Mellon's mere receipt of funds under the Indenture, on behalf of the *Exchange Holders*, is not clear and convincing evidence that it is in "active concert" with Argentina's failure to pay *Plaintiffs*. BNY Mellon's receipt, in fact, has nothing to do with Plaintiffs, but arises only from the Indenture's terms. And, once BNY Mellon receives payments from Argentina for the benefit of the Exchange Holders, there is no connection to Plaintiffs either. Rather, BNY Mellon holds those moneys "in trust" for itself and the Exchange Holders, and Argentina has "no interest whatsoever in those amounts." SPE-650 [§ 3.5(a)]; *EM Ltd.*, 865 F. Supp. 2d at 423. Thus, BNY Mellon's receipt of funds is not an action taken to help, benefit, or assist Argentina, *Alemite Mfg.*, 42 F.2d at 833, nor does it rise to

the level of "affirmative assistance" or "concealment" of Argentina's independent failure to pay Plaintiffs, *In re Sharp Int'l Corp.*, 403 F.3d at 50.

Second, BNY Mellon's distribution of those payments to the Exchange Holders after it receives them from Argentina is not clear and convincing evidence that it is in "active concert" with Argentina's failure to pay Plaintiffs either. As with receipt, BNY Mellon's distribution to the Exchange Holders has no influence or effect on whether Argentina does, or does not, pay the Plaintiffs on its separate contract with the Plaintiffs. In short, BNY Mellon's ministerial actions under the Indenture of receiving and distributing payments have nothing to do with whether Argentina complies with the Injunctions by making "Ratable Payments" to the Plaintiffs. These actions simply constitute BNY Mellon's performance of its "usual," "contracted-for" obligations under the Indenture. *Rosner*, 528 F. Supp. 2d at 427; *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d at 392-93. And this is entirely lawful conduct that this Court repeatedly has recognized as beyond the proper scope of injunctive relief. *Shakhnes*, 689 F.3d at 257 (citation omitted).

Third, where a non-party has an independent interest in the subject property, it cannot be punished for acting in furtherance of that interest. *Regal Knitwear*, 324 U.S. at 13. BNY Mellon indisputably is acting in furtherance of such an independent interest, as it has an independent contractual duty to the Exchange

Holders. *See, e.g.*, SPE-633, 648 [§ 3.1] (Argentina is to make all payments to BNY Mellon, and BNY Mellon is to hold such payments in trust for itself and the Holders). At the same time, Argentina retains no control over any funds paid to BNY Mellon, *see, e.g.*, *EM Ltd.*, 865 F. Supp. 2d at 423 (citations omitted). BNY Mellon acts solely for itself and the Exchange Holders in the subsequent distribution of funds to the Exchange Holders, and payment to the Exchange Holders has no impact on whether Argentina makes a concurrent payment to Plaintiffs. BNY Mellon thus cannot be in "active concert" with Argentina.

The District Court nevertheless determined that BNY Mellon's arguments "miss[ed] the point" because, if Argentina violates the Injunctions by making payments to the Exchange Holders without making "Ratable Payments" to the Plaintiffs, "this would not involve the normal and proper situation dealt with by BNY under the indenture…." SPE-1370. But distribution of payments from Argentina to the Exchange Holders is *precisely* the "normal and proper situation dealt with by BNY under the indenture." The District Court seemingly believes that its Injunctions against *Argentina* can alter the contractual relationship between *BNY Mellon and the Exchange Holders*, but that is not the case.

In any event, the District Court's desire to make its Injunctions against Argentina efficacious cannot provide a basis to dispense with due process safeguards, the legal standards for aiding and abetting the breach of an injunction,

or the need to produce clear and convincing proof of such conduct. An aider and abettor must be shown—by affirmative proof—to have materially assisted the enjoined wrongdoer in the wrongdoer's circumvention of the injunctive order. Plaintiffs made no attempt to prove that BNY Mellon acted in such a fashion and, by lawful receipt and distribution of funds pursuant to the Indenture, it most certainly did not do so. Argentina alone is responsible for its conduct and contract with Plaintiffs, and Argentina alone can breach that contract. Attempting to draw BNY Mellon into that dispute is unsustainable as a matter of law.

III. The Injunctions Against Non-Party BNY Mellon's Lawful Performance Of Its Indenture Trustee Duties Substantially Disserve The Public Interest.

Courts cannot exercise their injunctive power where it would disserve the public interest. A "court should be particularly cautious when contemplating relief that implicates public interests[,]" and "'courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction….'" *Salazar v. Buono*, 130 S.Ct. 1803, 1816 (2010) (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982)). Likewise, "'a plaintiff seeking a permanent injunction … must demonstrate … that the public interest would not be disserved by a permanent injunction.'" *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 694 F.3d 155, 160-61 (2d Cir. 2012) (quoting *eBay Inc. v.*

MercExchange, L.L.C., 547 U.S. 388, 391 (2006)); *see also Monsanto Co.*, 130 S.Ct. at 2756 (same).

Plaintiffs had the burden to demonstrate—and the District Court was required to find—that the Injunctions against non-party BNY Mellon would not disserve the public interest. No such showing or finding was made here, nor could it have been. Reversal is warranted for this independent reason as well.

A. The Public Interest Overwhelmingly Favors Protecting The Constitutional And Procedural Rights Of Non-Parties Such As BNY Mellon.

The Injunctions against non-party BNY Mellon substantially disserve the powerful public interest in protecting the constitutional and procedural rights of non-parties. Of course, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citations and internal quotation marks omitted); *see also Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) (same) (citation omitted); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (same) (internal citation and quotation omitted). But, as previously discussed (*see* Section I.A, *supra*), the District Court—by naming non-party BNY Mellon in the Injunctions and enjoining it from carrying out its lawful duties as indenture trustee—violated fundamental due process and equitable principles. This

substantial disservice of the public interest compels reversal of the Injunctions against BNY Mellon.

B. The Public Interest Strongly Favors Ensuring The Lawful Performance Of Indenture Trustee Duties Without Unwarranted Judicial Intrusion And Preventing Unrest In The Credit Markets.

The Injunctions also will inflict severe damage on indenture trustee relationships and, as a result, on the credit markets and those countries, corporations, and municipalities that depend on indentures to raise necessary capital. There is a strong public interest in preserving inviolate the critical role and duties of indenture trustees from disruptive injunctions like the one imposed against BNY Mellon.

This Court and Congress have recognized the "essential role" of trust indentures in servicing corporate debt and protecting the "national public interest and the interest of investors" in bonds. *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 815 (2d Cir. 1985); Trust Indenture Act ("TIA") § 302(a), 15 U.S.C. § 77bbb(a)(1). As this Court observed in *Meckel*, "[t]rust indentures are important mechanisms for servicing corporate debt and banks play an essential role in the process that brings corporate financings to the public market." 758 F.2d at 815; *see also Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) ("[I]t is no surprise that we have consistently rejected the imposition of additional duties on the trustee in light of the special relationship that the trustee already has

with both the issuer and the debenture holders under the indenture.") (citations omitted).[8]

If courts can interfere with the performance of an indenture trustee's duties in order to secure an issuer's unrelated obligations to unrelated third parties, indenture trustees will be exposed to additional and unforeseeable risks, and markets will be exposed to increased uncertainty. And this, in turn, will increase the costs of borrowing. Because the Injunctions against BNY Mellon could create precisely these results, it substantially disserves the public interest and should be vacated. *See Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) (cautioning against creating "uncertainties" in the context of trust indentures which "would vastly increase the risks and, therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice").

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

C. The Public Interest Strongly Favors A Restrained Use Of The Courts' "Drastic And Extraordinary" Equitable Powers That Avoids Injecting Unpredictability Into Commercial And Debtor-Creditor Relationships.

The Injunctions against BNY Mellon represent an extraordinary and unprecedented expansion of the injunctive and contempt powers. If left intact, they will set a dangerous precedent for similarly unwarranted expansions of those powers across a range of commercial disputes. This model is contrary to the Supreme Court's and this Court's repeated admonitions that the "drastic and extraordinary" equitable remedies be used only "sparingly and cautiously." *Monsanto Co.*, 130 S.Ct. at 2761; *Reynolds*, 506 F.3d at 198; *Granny Goose*, 415 U.S. at 444. It also is contrary to several public interests.

First, there is a strong public interest in ensuring that courts operate within statutory and procedural limits. In addition to violating BNY Mellon's due process rights, the Injunctions infringe upon BNY Mellon's substantive legal right to carry out its lawful obligations under the Indenture. Such an infringement is forbidden by the Rules Enabling Act, which proscribes the use of the Federal Rules of Civil Procedure—including Rule 65(d)(2)— to abridge a substantive right. *See* 28 U.S.C. § 2072(b). The Injunctions also stretch the boundaries of Rule 65(d)(2) beyond its text, enabling the District Court to improperly sweep in the lawful conduct of innocent non-parties.

Second, there is a strong public interest—reflected repeatedly in the Supreme Court's and this Court's precedents—in preventing overbroad injunctions that impinge on lawful conduct and, indeed, go a step further and effectively declare innocent conduct unlawful and punish it. *See, e.g.*, *Grupo Mexicano*, 527 U.S. at 315; *Shakhnes*, 689 F.3d at 257; *Mickalis Pawn Shop*, 645 F.3d at 145; *cf. Bartnicki*, 532 U.S. at 529-30. The Injunctions directly undermine this interest by enjoining BNY Mellon's lawful performance of its obligations under the Indenture.

This unwarranted expansion of equitable power, and the uncertainty and unpredictability it will create in the business community, is particularly disconcerting. *See Hertz Corp. v. Friend*, 130 S.Ct. 1181, 1193 (2010) ("Predictability is valuable to corporations making business and investment decisions.") (citation omitted). Adoption of the District Court's reasoning allowing lawful, independent actors to be coerced in an effort to force compliance by a wrongdoer has the potential to disrupt payments to trade creditors and others. These ramifications are decidedly contrary to the public interest.

For example, case law makes clear that there is a well-established "balance between debtor's and creditor's rights which has been developed over centuries…." *Grupo Mexicano*, 527 U.S. at 331; *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 551 (2000) (rejecting "judicial innovation" that could have "far-reaching impact on the existing balance between debtors' and

creditors' rights") (citation omitted). The District Court's reasoning extending its Injunctions to BNY Mellon threatens to upset that careful balance.

Outside of bankruptcy, the relationships between a debtor and its individual creditors are separate and discrete. Debtors treat creditors, and creditors pursue remedies, on an individual basis. As a general rule, equity does not permit a creditor to interfere with the relationship between its debtor and another creditor. Indeed, absent any contrary statute, a debtor is free to prefer one creditor over another. *See Grupo Mexicano*, 527 U.S. at 321-22 ("a debtor may prefer one creditor to another, in discharging his debts, whose assets are wholly insufficient to pay all the debts") (quoting Story, 1 Commentaries on Equity Jurisprudence § 12, pp. 14–15 (1836)).

Despite this well-settled law, the Injunctions enjoin BNY Mellon from making payments to the Exchange Holders for the sole benefit of selected creditors (the Plaintiffs). This remedy goes far beyond any statutory limitations on preferences. Neither the federal Bankruptcy Code nor any other statute authorizes a court to enjoin preferential payments. And as a matter of statute, preferences are merely voidable—provided that the plaintiff proves the statutory elements—but they are not void. *See, e.g.*, 11 U.S.C. § 547(b).

Adherence to the District Court's reasoning, however, potentially gives creditors a remedy far beyond anything existing under current debtor-creditor law.

It would empower a court to find preferences not voidable, but void. It would eliminate the fundamental requirement of bankruptcy jurisdiction under 28 U.S.C. § 1334. And it would enforce the prohibition on preferences by contempt sanctions. In short, the Injunctions would improperly unsettle—if not displace—well-established, statutory limits on the ability of a court to impair the rights of one creditor in order to benefit another. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) ("a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation'" or "override Congress policy choice, articulated in a statute, as to what behavior should be prohibited") (quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)).

Equity cannot limit, let alone prohibit, preferential transfers. *See Grupo Mexicano*, 527 U.S. at 321. Plaintiffs may argue that the facts of this case "call for a wrenching departure from past practice," but there is "absolutely nothing new about debtors" trying to avoid paying their debts, or seeking to favor some creditors over others—or even about their seeking to achieve these ends through "'sophisticated ... strategies.'" *Id.* at 322 (citations omitted). Emphasizing the need to avoid creating a remedy that "would create a precedent of sweeping effect," giving "[e]very suitor who resorts to chancery" a right to similar relief, the

Supreme Court, in *Grupo Mexicano*, refused to sanction injunctive relief. *Id.* at 327 (citation omitted). The public interest favors the same result in this case, too.

D. The Public Interest Strongly Favors The Use Of Injunctive Relief To Help Settle Disputes And Not To Promote Unwarranted Litigation.

Finally, there also is a strong "public stake in settling disputes by wholes" and a vital "social interest in the efficient administration of justice and the avoidance of multiple litigation." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 870 (2008) (quotations omitted); *see also United States v. Stirling*, 571 F.2d 708, 733 (2d Cir. 1978) (highlighting the public interest in avoiding "unnecessarily multiplicious litigation"). If the Injunctions against BNY Mellon are left in place, however, they could produce a new wave of lawsuits because they would restrain BNY Mellon from making payments to the Exchange Holders under the Indenture. The judicial and private resources expended to coordinate these disputes and resolve the parties' respective rights would be substantial. All of this can be avoided simply by adhering to the recognized limits on injunctive relief.

IV. If The Court Affirms The Injunctions Against Non-Party BNY Mellon, It Should Clarify—Or Direct The District Court, On Remand, To Clarify—That BNY Mellon Cannot Be Subjected To Any Liability For Complying With The Injunctions And Not Paying The Exchange Holders.

If the Court nevertheless concludes that BNY Mellon is bound by the Injunctions and Argentina subsequently fails to make a Ratable Payment, BNY

Mellon will face a potential conflict between its obligations to the Exchange Holders under the Indenture and its obligations to the Court. In that instance, BNY Mellon needs judicial guidance as to its duties and responsibilities.[9]

BNY Mellon should not be forced by Argentina's independent violation of the Injunctions to choose between exposing itself to the risk of contempt, on the one hand, and the risk of claims from Exchange Holders for breach of the Indenture, on the other. A path to avoid this conflict is charted by the Indenture, which provides that, in performing its duties under the Indenture, BNY Mellon should not undertake any act "illegal or contrary to applicable law or regulation." SPE-662 [§ 5.2(xx)]. Unless and until BNY Mellon receives a judicial determination that its compliance with the Injunctions will not expose it to any liability, that compliance will expose it to enormous potential claims. Given the potential consequences for BNY Mellon if this Court affirms the Injunctions, BNY Mellon respectfully requests that this Court clarify that BNY Mellon's compliance with the Injunctions will not result in any liability to BNY Mellon.[10]

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[9] BNY Mellon sought that guidance below, but the District Court did not supply it. Dkt. No. 396, *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, *et al.* (TPG), pp. 15-18.

[10] In the District Court, Plaintiffs expressed their general agreement that BNY Mellon could not be liable under the Indenture for complying with the Injunctions. Dkt. No. 420, *NML Capital Ltd., et al. v. Republic of Argentina*, 08-cv-6978, *et al.* (TPG), p. 14 ("Even if Argentina defies this Court's Orders, because BNY must obey a lawful order of this Court, it has no potential liabilities or conflicting duties arising out of its compliance with such an order.").

In this regard, the Indenture contains a wide range of exculpatory provisions, which are designed to protect BNY Mellon from being exposed to such liability. For example, the Indenture provides that BNY Mellon cannot be liable for any actions taken in good faith absent gross negligence, SPE-659, 660 [§§ 5.1(c), 5.2(vi)], and that BNY Mellon is not required to incur personal financial liability in the performance of its duties, SPE-659 [§ 5.1(g)]. Of particular importance here is Section 5.2(xx), which states:

> no provision in this Indenture shall require the Trustee to do anything which may (i) be illegal or contrary to applicable law or regulation; or (ii) cause it to expend or risk its own funds or otherwise incur any liability in the performance of any of its duties or in the exercise of any of its rights, powers or discretions, if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not assured to it.

SPE-662 [§ 5.2(xx)]. Additionally, BNY Mellon has "absolute and uncontrolled discretion as to the exercise of its functions," SPE-662 [§ 5.2(xxi)], and "as between itself and the Holders, the Trustee may determine all questions and doubts arising in relation to any of the provisions of this Indenture," SPE-663 [§ 5.2(xxvi)].

Consistent with the foregoing, if the Court affirms the Injunctions against BNY Mellon, it should make clear that BNY Mellon is under no obligation under the Indenture or otherwise to expose itself to contempt sanctions by paying out any funds delivered by Argentina in the event that Argentina violates the Injunctions.

BNY Mellon also requests clarification that, consistent with Sections 5.2(vii) and 5.7 of the Indenture (SPE-660, 661, 666), it may rely upon any certificate received from Argentina pursuant to the Injunctions, and it has no extra-contractual duty to monitor Argentina's compliance with any orders of this Court or the District Court. Finally, the Court should clarify that the Injunctions apply only to Argentina's payments of debt service, *i.e.*, principal and interest, to the Exchange Holders, and that they do not alter or affect any other rights that BNY Mellon may have under the Indenture or applicable law.

CONCLUSION

For the foregoing reasons, this Court should vacate the Injunctions against non-party BNY Mellon. Alternately, if the Court affirms the Injunctions against BNY Mellon, it should clarify that BNY Mellon is exculpated from any liability arising from its compliance with the Injunctions.

Dated: December 28, 2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,385 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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STATE OF NEW YORK)
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I, Mariana Braylovskiy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On December 28, 2012

deponent served the within: **Brief for Non-Party Appellant The Bank of New York Mellon, as Indenture Trustee**

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