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.,

(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 APPELLANTS EXCHANGE BONDHOLDER GROUP

O'SHEA PARTNERS LLP
521 Fifth Avenue, 25th Floor
New York, New York 10175
(212) 682-4426

– and –

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
(212) 446-2300

Attorneys for Non-Party Appellants Exchange Bondholder Group

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,

– 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

1. **Gramercy Funds Management LLC**, a member of the group of the interested non-parties-appellants known collectively as the "Exchange Bondholder Group" or the "EBG," is a Delaware limited liability company. It is a wholly-owned subsidiary of Gramercy Financial Group LLC. No publicly traded corporation owns 10% or more of Gramercy Financial Group LLC's stock.

2. **Gramercy Argentina Opportunity Fund, Ltd.,** a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Argentina Opportunity Fund, Ltd.'s stock.

3. **Gramercy Distressed Debt Master Fund,** a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Distressed Debt Master Fund's stock.

4. **Gramercy Distressed Opportunity Fund, Ltd**., a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Distressed Opportunity Fund, Ltd.'s stock.

5. **Gramercy Distressed Opportunity Fund II, L.P.,** a member of the EBG, is a Cayman Islands limited partnership. No publicly traded corporation owns 10% or more of Gramercy Distressed Opportunity Fund II, L.P.'s stock.

6. **Gramercy Emerging Markets Fund,** a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Emerging Markets Fund's stock.

7. **Gramercy Local Currency Emerging Market Debt Master Fund**, a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Local Currency Emerging Market Debt Master Fund's stock.

8. **Gramercy Master Fund,** a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Master Fund's stock.

9. **Gramercy Opportunity Fund – Special Opportunities II Offshore SP**, a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Opportunity Fund – Special Opportunities II Offshore SP's stock.

10. **Gramercy Opportunity Fund – Special Opportunities II SP**, a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Opportunity Fund – Special Opportunities II SP's stock.

11. **Gramercy Opportunity Fund – Special Opportunities SP**, a member of the EBG, is a Cayman Islands exempted company. No publicly traded

corporation owns 10% or more of Gramercy Opportunity Fund – Special Opportunities SP's stock.

12. **Gramercy U.S. Dollar Emerging Market Debt Master Fund**, a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy U.S. Dollar Emerging Market Debt Master Fund's stock.

13. **Gramercy Select Master Fund**, a member of the EBG, is a Cayman Islands exempted company. No publicly traded corporation owns 10% or more of Gramercy Select Master Fund's stock.

14. **MFS Diversified Income Fund**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

15. **MFS Emerging Markets Debt Fund**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

16. **MFS High Yield Opportunities Fund**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

17. **MFS Emerging Markets Debt Local Currency Fund**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for

purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

18. **MFS Global Bond Fund**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

19. **MFS Multimarket Income Trust**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

20. **MFS Charter Income Trust**, a member of the EBG, is a Massachusetts business trust. It operates as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

21. **MFS Meridian Funds – Emerging Markets Debt Fund**, a member of the EBG, is a compartment of a Luxembourg *societe d'investissement a capital variable* (investment company with variable capital), operating as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

22. **MFS Meridian Funds – High Yield Fund**, a member of the EBG, is a compartment of a Luxembourg *societe d'investissement a capital variable* (investment company with variable capital), operating as a mutual fund for

purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

23. **MFS Meridian Funds – Global Bond Fund**, a member of the EBG, is a compartment of a Luxembourg *societe d'investissement a capital variable* (investment company with variable capital), operating as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

24. **MFS Meridian Funds – Emerging Markets Debt Local Currency Fund**, a member of the EBG, is a compartment of a Luxembourg *societe d'investissement a capital variable* (investment company with variable capital), operating as a mutual fund for purposes of the exception set forth in 28 U.S.C. § 455(d)(4)(i), and has no parent corporation.

25. **MFS Investment Funds – Emerging Markets Debt Fund**, a member of the EBG, is a subfund of MFS Investment Funds, a Luxembourg *fond commun de placement* (mutual fund), whose investment manager is MFS Investment Management Co. (Lux), S.a.r.l, a Luxembourg *société à responsabilité limitée* (limited liability partnership) and a wholly owned subsidiary of Massachusetts Financial Services Company. Over 10% of the stock of Massachusetts Financial Services Company is owned by Sun Life of Canada (U.S.)

Financial Services Holdings, Inc., which is an indirect subsidiary of Sun Life Financial, Inc.

26. **MFS Investment Funds – Emerging Markets Debt Local Currency Fund II**, a member of the EBG, is a subfund of MFS Investment Funds, a Luxembourg *fond commun de placement* (mutual fund), whose investment manager is MFS Investment Management Co. (Lux), S.a.r.l, a Luxembourg *société à responsabilité limitée* (limited liability partnership) and a wholly owned subsidiary of Massachusetts Financial Services Company. Over 10% of the stock of Massachusetts Financial Services Company is owned by Sun Life of Canada (U.S.) Financial Services Holdings, Inc., which is an indirect subsidiary of Sun Life Financial, Inc.

27. **MFS Heritage Trust Company Collective Investment Trust – Emerging Markets Debt Fund**, a member of the EBG, is a trust. No publicly traded corporation owns 10% or more of MFS Heritage Trust Company Collective Investment Trust's stock.

28. **MFS Emerging Markets Debt LLC**, a member of the EBG, is a Delaware limited liability company. The sole members of MFS Emerging Markets Debt LLC are MFS Institutional Advisors, Inc. and Permanent Fund Investors, LLC.

29. **Brevan Howard Asset Management LLP**, a member of the EBG, is an English limited liability partnership. More than 10% of the voting rights of the partnership are held by Swiss Re Asset Management Geneva Ltd., a subsidiary of the publicly held Swiss company Swiss Re Ltd.

30. **Brevan Howard Master Fund Limited**, a member of the EBG, is a Cayman Islands exempted limited liability company. Its shareholders are Brevan Howard Fund Limited, a Cayman Islands corporation, which holds 71%; Brevan Howard L.P., a Delaware limited partnership, which holds 13%, and BH Macro Ltd., a Guernsey corporation listed in London, which holds 8%, and Brevan Howard Multi-Strategy Master Fund Limited, a Cayman Islands corporation, and BH Global Limited, a Guernsey corporation listed in London, which together hold 8%. No underlying investor in any of the foregoing feeder funds holds more than 8% of such vehicle and, therefore, no publicly traded corporation owns 10% or more of the stock of Brevan Howard Master Fund Limited.

31. **SW Asset Management, LLC**, a member of the EBG, is a Delaware limited liability company. No publicly traded corporation owns 10% or more of its stock.

32. **SWGCO Master Fund, Ltd**, a member of the EBG, is a Cayman Islands exempted company No publicly traded corporation owns 10% or more of its stock.

33. **AllianceBernstein L.P.,** a member of the EBG, is a Delaware limited partnership. The publicly traded French *société anonyme* (limited liability company) AXA S.A. is AllianceBernstein L.P.'s indirect corporate parent, and owns 10% or more of its stock.

34. **Transamerica Partners Core Bond,** a member of the EBG, is a series of Transamerica Partners Funds Group. Transamerica Partners Core Bond has no corporate parent. The following entities directly or indirectly own 10% or more of Transamerica Partners Core Bond: (i) Transamerica Institutional Asset Allocation-Intermediate Horizon Fund; (ii) University Hospital of Augusta, Georgia; (iii) Transamerica Financial Life Insurance Company, Inc.; and (iv) Diversified Investment Advisors Collective Trust.

35. **Transamerica Partners Institutional Core Bond**, a member of the EBG, is a series of Transamerica Partners Funds Group II. Transamerica Partners Institutional Core Bond has no corporate parent. The following entities directly or indirectly own 10% or more of Transamerica Partners Core Bond: (i) Transamerica Financial Life Insurance Company, Inc.; and (ii) Diversified Investment Advisors Collective Trust.

36. **Transamerica Partners Balanced**, a member of the EBG, is a series of Transamerica Partners Funds Group. It has no corporate parent. The following entities directly or indirectly own 10% or more of Transamerica Partners Balanced:

(i) State Street Bank & Trust; and (ii) Transamerica Financial Life Insurance Company.

37. **Transamerica Partners Institutional Balanced**, a member of the EBG, is a series of Transamerica Partners Funds Group II. It has no corporate parent. The following The following entities directly or indirectly own 10% or more of Transamerica Partners Institutional Balanced: (i) The Halton Company; (ii) Roman Catholic Archbishop of San Francisco; Island Peer Review Organization, Inc.; and (iii) Transamerica Financial Life Insurance Company, Inc.

38. **Transamerica Multi-Managed Balanced VP**, a member of the EBG, is a series of Transamerica Series Trust. It has no corporate parent. The following entities directly or indirectly own 10% or more of Transamerica Multi-Managed Balanced VP: (i) TCM Division; and (ii) AEGON Financial Partners – Florida.

39. **Transamerica Multi-Managed Balanced Portfolio**, a member of the EBG, is a series of Transamerica Funds. It has no corporate parent. The following entities directly or indirectly own 10% or more of Transamerica Multi-Managed Balanced Portfolio: (i) Pershing LLC; Morgan Stanley Smith Barney; (ii) First Clearing LLC; (iii) Pershing LLC; (iv) NFS LLC FEBO; and (v) Charles Schwab & Co.

40. **BlackRock Balanced Capital Portfolio of BlackRock Series Fund, Inc.**, is a member of the EBG. It has no corporate parent. The following entities

directly or indirectly own 10% or more of BlackRock Balanced Capital Portfolio of BlackRock Series Fund, Inc.: (i) Transamerica Advisors Life Ins. Co. Life Product Q; (ii) Transamerica Advisors Life Insurance Co. of New York FBO Life Product R; and (iii) Transamerica Advisors Life Ins. Co. Monarch Life Product A.

41. **BlackRock Balanced Capital Fund, Inc.**, is a member of the EBG. It has no corporate parent. The following entities directly or indirectly own 10% or more of BlackRock Balanced Capital Fund, Inc.: (i) Merrill Lynch Pierce Fenner & Smith Inc.; and (ii) State Street Bank TTEE Cust (FBO) ADP Access.

42. **BlackRock Strategic Income Opportunities Portfolio**, a member of the EBG, is a series of BlackRock Funds II. It has no corporate parent. The following entities directly or indirectly own 10% or more of BlackRock Strategic Income Opportunities Portfolio: (i) UBS WM USA; (ii) Merrill Lynch Pierce Fenner & Smith Inc.; (iii) American Enterprise Investment Svc.; and (iv) Charles Schwab & Co. Inc.

43. **BlackRock Balanced Capital V.I. Fund**, a member of the EBG, is a series of BlackRock Series Fund, Inc. It has no corporate parent. The following entity directly or indirectly owns 10% or more of BlackRock Balanced Capital V.I. Fund: (i) Transamerica Advisors Life Insurance Company Retirement Plus A.

44. **BlackRock Total Return Portfolio**, a member of the EBG, is a series of BlackRock Series Fund, Inc. It has no corporate parent. The following entities

directly or indirectly own 10% or more of BlackRock Total Return Portfolio: (i) Transamerica Advisors Life Ins. Co. Life Product Q; and (ii) Transamerica Advisors Life Ins. Co. Life Product V.

45. **BlackRock Total Return V.I. Fund**, a member of the EBG, is a series of BlackRock Variable Series Funds, Inc. It has no corporate parent. The following entity directly or indirectly owns 10% or more of BlackRock Total Return V.I. Fund: (i) Transamerica Advisors Life Insurance Company Retirement Plus A.

46. **iShares Emerging Markets High Yield Bond Fund**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

47. **iShares J.P. Morgan USD Emerging Markets Bond Fund**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

48. **BlackRock Emerging Markets Bond Fund**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

49. **BlackRock Emerging Markets Fund**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

50. **BGF Emerging Markets Bond Fund**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

51. **Emerging Markets Fixed Income Fund B**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

52. **Strategic Income Opportunities Bond Fund**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

53. **Fixed Income Fundamental Trading Fund Three**, a member of the EBG, has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS xiii

TABLE OF AUTHORITIES xv

PRELIMINARY STATEMENT 1

JURISDICTIONAL STATEMENT 3

ISSUES PRESENTED 5

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 10

SUMMARY OF ARGUMENT 15

ARGUMENT 17

I. THE INJUNCTION IMPERMISSIBLY INFRINGES THE PROPERTY RIGHTS OF INNOCENT THIRD PARTIES IN VIOLATION OF FUNDAMENTAL PRINCIPLES OF EQUITY. 17

A. The Law Prohibits Injunctions that Unduly Burden the Property of Third-Parties. 17

B. The Injunction Is Unlawful Because It Intentionally Burdens the Property of the Innocent Non-Party Exchange Bondholders to Enforce NML's Rights 19

C. The Injunction Inequitably Fails to Account for the Losses Already Suffered by the Innocent Exchange Bondholders as a Result of the Republic's Default 27

II. THE INJUNCTION VIOLATES THE FIFTH AMENDMENT BY SUBSTANTIALLY BURDENING THE PROPERTY RIGHTS OF INNOCENT NON-PARTIES. 29

A. The Injunction Violates the Due Process Clause. 29

B. The Injunction Effects an Unconstitutional Taking. 34

III. THE INJUNCTION MUST BE VACATED PURSUANT TO FED. R. CIV. P. 60(b)(4) FOR FAILURE TO PROVIDE THE EXCHANGE BONDHOLDERS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD. 36

IV. THE INJUNCTION MUST BE VACATED FOR FAILURE TO JOIN THE EXCHANGE BONDHOLDERS AS NECESSARY PARTIES. 40

CONCLUSION 45

TABLE OF AUTHORITIES

Cases

Alemite Mfg. Corp. v. Staff,
42 F.2d 832 (2d Cir. 1930).....19

Amchem Products, Inc. v. Costle,
481 F. Supp. 195 (S.D.N.Y. 1979).....34

Aurelius Capital Partners, LP v. Republic of Argentina,
584 F.3d 120 (2d Cir. 2009).....4

Capital Ventures Int'l v. Republic of Argentina,
282 Fed. Appx. 41 (2d Cir. 2008).....26

Century Exploration New Orleans, Inc. v. United States,
103 Fed. Cl. 70 (2012).....35

Chi., St. Paul, Minn. & Omaha Ry. Co. v. Holmberg,
282 U.S. 162 (1930).....31

Cienega Gardens v. United States,
331 F.3d 1319 (Fed. Cir. 2003).....35

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991).....32

Cook Inc. v. Boston Sci. Corp.,
333 F.3d 737 (7th Cir. 2003).....18

Crouse-Hinds Co. v. InterNorth, Inc.,
634 F.2d 690 (2d Cir. 1980).....41

Dial Corp. v. MG Skinner & Assocs.,
180 F. App'x. 661 (9th Cir. 2006).....37

Doctor's Assocs., Inc. v. Reinert & Dupree, P.C.,
191 F.3d 297 (2d Cir. 1999).....41

Edward G. Bashian & Sons v. Am. Nat'l. Bank & Trust Co. of Chi.,
No. 96-CV- 6021, 1997 WL 337434 (N.D. Ill. June 16, 1997).....43

Edwards v. Habib,
397 F.2d 687 (D.C. Cir. 1968).....32

Fengler v. Numismatic Am., Inc.,
832 F.2d 745 (2d Cir. 1987).....38

FG Hemisphere Assocs., LLC v. Dem. Rep. Congo,
637 F.3d 373 (D.C. Cir. 2011).....27

First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.,
482 U.S. 304 (1987).....35

Freedom N.Y., Inc. v. United States,
No. 86-CV-1363, 1986 WL 6163 (S.D.N.Y. May 27, 1986).....42

Gen. Bldg. Contractors Assoc., Inc. v. Pennsylvania,
458 U.S. 375 (1982).....19

Grace v. Bank Leumi Trust Co. of N.Y.,
443 F.3d 180 (2d Cir. 2006).....36

Hawaii Housing Auth. v. Midkiff,
467 U.S. 229 (1984).....30

In re Aztec Supply Corp.,
399 B.R. 480 (N.D. Ill. 2009).....37

In re Center Wholesale, Inc.,
759 F.2d 1440 (9th Cir. 1985).....38

In re Metzger,
346 B.R. 806 (Bankr. N.D. Cal. 2006).....39

Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.,
458 F. Supp. 1197 (S.D.N.Y. 1978)..... 18, 29

Jonesfilm v. Lion Gate Int'l,
299 F.3d 134 (2d Cir. 2002).....40

Kaplan v. Rand,
192 F.3d 60 (2d Cir. 1999).....4

Karaha Bodas Co. L.L.C. v. Pertamina,
313 F.3d 70 (2d Cir. 2002).....4

Karaha Bodas Co. v. Perusahaan Pertambangam Minyak Dan Gas Bumi Negara,
500 F.3d 111 (2d Cir. 2007).....17

Kelo v. City of New London,
545 U.S. 469 (2005).....30

Kimball Laundry Co. v. United States,
338 U.S. 1 (1949).....35

Klaus v. Hi-Shear Corp.,
528 F.2d 225 (9th Cir. 1975).....43

Leblanc-Sternberg v. Fletcher,
763 F. Supp. 1246 (S.D.N.Y. 1991) 41

Local 78 v. Termon Constr., Inc., No. 01-CV-5589 (JGK),
2003 WL 22052872 (S.D.N.Y. Sept. 2, 2003).....37

Lynch v. United States,
292 U.S. 571 (1934).....30

McGraw-Hill Broad. Co., Inc. v. MGM/USA Entm't Co.,
537 F. Supp. 954 (S.D.N.Y. 1982).....25

Me. Educ. Ass'n Benefits Trust v. Cioppa,
695 F.3d 145 (1st Cir. 2012).....34

Mo. Pac. Ry. Co. v. Nebraska,
164 U.S. 403 (1896).....31

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950).....36

Museum of Modern Art v. Schoeps,
549 F. Supp. 2d 543 (S.D.N.Y. 2008) 43

N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.,
799 F.2d 265, 280 (7th Cir. 1986) 18

Nat'l Dev. Co. v. Triad Holding Corp.,

930 F.2d 253 (2d Cir. 1991).....39

Nature's First Inc. v. Nature's First Law, Inc.,
436 F. Supp. 2d 368 (D. Conn. 2006).....37

Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.,
992 F.2d 430 (2d Cir. 1993).....18

Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.,
467 F.3d 73 (2d Cir. 2006).....4

Orix Fin. Servs. v. Phipps,
No. 91-CV-2523, 2009 WL 2486012 (S.D.N.Y. Aug. 14, 2009) 38

Palazzolo v. Rhode Island,
533 U.S. 606 (2001).....34

Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.,
364 F.3d 925 (8th Cir. 2004) 41

Penn. Coal Co. v. Mahon,
260 U.S. 393 (1922).....27

Rockland Exposition, Inc. v. Alliance of Auto. Serv. Providers of N.J.,
Nos. 08-CV-7069 (KMK), 08-CV-11107 (KMK),
2009 WL 1154094 (S.D.N.Y. Mar. 19, 2009) 19

S.E.C. v. Mgmt. Dynamics, Inc.,
515 F.2d 801 (2d Cir. 1975) 28

Shelly v. Kraemer,
334 U.S. 1 (1948) 32

Stahl v. Gibralter Fin. Corp.,
967 F.2d 335 (9th Cir. 1922) 43

Steel Valley Auth. v. Union Switch & Signal Div.,
809 F.2d 1006 (3d Cir. 1987) 41

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection,
130 S. Ct. 2592 (2010) 32, 33, 34

Texas v. New Mexico,
482 U.S. 124 (1987) 28

Thompson v. Consol. Gas Utils. Corp.,
300 U.S. 55 (1937) 31

Triad Energy Corp. v. McNell,
110 F.R.D. 382 (S.D.N.Y. 1986) 39

U.S. Trust Co. of N.Y. v. New Jersey,
431 U.S. 1 (1977) 30

United States v. Ambrosio,
575 F. Supp. 546 (E.D.N.Y. 1983) 31

United States v. Bajakajian,
524 U.S. 321 (1998) 29

United States v. Davis,
648 F.3d 84 (2d Cir. 2011).....29

United States v. Jacobson,
15 F.3d 19 (2d Cir. 1994).....2, 3

United States v. Philip Morris USA Inc.,
566 F.3d 1095 (D.C. Cir. 2009).....19

United States v. Zang,
703 F.2d 1186 (10th Cir. 1982).....18

Virginia v. Rives,
100 U.S. 313 (1879).....32

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982).....18

Wesley v. Eells,
177 U.S. 370 (1900).....28

Willard v. Tayloe,
75 U.S. 557 (1869).....18

Statutes

28 U.S.C. § 1291.....4

28 U.S.C. § 1292(a).....4

28 U.S.C. § 1330.....3

28 U.S.C. § 1605(a)(1).....3

Rules

Fed. R. App. P. 8(a)(2).....10

Fed. R. Civ. P. 19.....17

Fed. R. Civ. P. 19(a).....40

Fed. R. Civ. P. 60(b) 9

Fed. R. Civ. P. 60(b)(4).....36

Other Authorities

Restatement (Second) of Contracts § 346(1)(b)……..18

PRELIMINARY STATEMENT

This appeal arises out of a well-intentioned but misguided attempt by the district court (Hon. Thomas P. Griesa) to assist Plaintiffs-Appellees (collectively, "NML" or "Plaintiffs") in enforcing a judgment against the Republic of Argentina (the "Republic") through an "Amended February 23, 2012 Order" issued on November 21, 2012 (the "Injunction"). The Injunction seeks to leverage the Republic's need for access to international capital markets by prohibiting it from making periodic payments on bonds held by Interested Non-Party Appellants the Exchange Bondholder Group ("EBG")[1] unless the Republic concurrently pays NML 100% of the principal, penalties and interest sought in this litigation. The Injunction further prohibits the trustee for the EBG's bonds, The Bank of New York Mellon ("BNYM"), as well as all banks and clearinghouses that process payment funds, from remitting any payments from the Republic to the EBG absent payments from the Republic to NML. In effect, the Injunction holds hostage the innocent EBG's right to receive payments in an attempt to force the Republic to pay NML.

The Republic defaulted on all of its bonds eleven years ago and has never since made a single payment on them. In 2005 and again in 2010, the Republic

[1] The EBG's members are listed in the annexed Corporate Disclosure Statement.

restructured approximately 92% of the defaulted bonds, offering aggrieved creditors between 25 and 29 cents on the dollar. NML refused to participate in those exchanges. The Republic has declared publicly that it has no intention of ever paying holdout bondholders like NML, and indeed is expressly prohibited from doing so by domestic Argentine law. Thus, if the Injunction is not vacated, it is a near certainty that the Republic will find itself prohibited from making payments on ***any*** of its bonds, including over $1.5 billion of exchange bonds held by the EBG.

However understandable the district court's frustration with the Republic, it is unlawful and unconstitutional for an injunction to infringe the rights of innocent third party creditors in this way. The Injunction inequitably prioritizes the interests of NML—a group of private litigants holding a tiny fraction of the Republic's total debt—over those of innumerable other bondholders. It also violates the innocent EBG's constitutional rights under the Fifth Amendment by substantially burdening their rights to receive lawful payments on their bonds.

The district court compounded its disregard for the Injunction's effects on third parties by failing to afford them fair notice and an opportunity to be heard. On October 26, 2012, this Court expressed "concerns" about a prior version of the Injunction, particularly its "application to third parties," and remanded under *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), for further development of

the record. Supplemental Appendix ("SPE")-294-95; *NML Capital, Ltd. v. Republic of Argentina,* 699 F.3d 264, 264-65 (2d. Cir. 2012). Rather than engage in further factual development, however, the district court acquiesced in NML's demands for an accelerated schedule despite the absence of exigent circumstances, setting a ten-day briefing schedule that gave the EBG (which previously had no involvement in the case) just ***three days*** to respond to NML's submission. The district court then issued the Injunction two days after the close of briefing, without oral argument or an evidentiary hearing. In doing so, the district court essentially ignored the EBG's arguments, as well as those raised by other interested third parties. It also failed to comply with this Court's *Jacobson* instruction to further develop the factual record.

The district court also denied the EBG's motion for leave to appear in the action below, as well as its motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(4). Individually, these actions would have severely undermined the EBG's rights. Taken together, they effectively deprived the EBG of any meaningful due process.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the underlying actions against the Republic, a sovereign state, pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1605(a)(1).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a). The EBG timely filed a Notice of Appeal on November 27, 2012.

In addition, on November 26, 2012 the EBG moved this Court for leave to appear as Interested Non-Parties for the purpose of appealing certain orders of the district court and seeking a stay pending appeal.[2] Emergency Motion of the Exchange Bondholder Group for Leave to Appear as Interested Non-Parties, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Nov. 26, 2012); Emergency Motion for Stay Pending Appeal, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Nov. 26, 2012). On November 28, 2012, this Court granted the EBG's motion and appeal No. 12-4694 was created. On December 12, 2012, the EBG moved for consolidation of its appeal No. 12-4694 with the lead case, No. 12-105(L) and related appeals. On December 13, 2012, this Court granted the consolidation request and ordered that the EBG be designated Interested Non-Party Appellants. Order Granting Motion to Consolidate, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Dec. 13, 2012).

---

[2] *See, e.g.*, *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77 (2d Cir. 2006); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127-28 (2d Cir. 2009); *Karaha Bodas Co. L.L.C. v. Pertamina*, 313 F.3d 70, 82 (2d Cir. 2002); *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999).

ISSUES PRESENTED

1. Did the district court err by granting an injunction that seeks to vindicate NML's rights by substantially burdening the property interests of innocent non-parties, in violation of fundamental principles of equity?

2. By imposing a substantial burden on the property rights of innocent non-parties to receive lawful payments on their bonds, solely for the private benefit of NML, did the district court's Injunction violate the Due Process and Takings Clauses of the Fifth Amendment?

3. Was the EBG entitled to relief from judgment under Federal Rule of Civil Procedure 60(b)(4) when the EBG's members have substantial property interests that were directly affected by the proceedings before the district court, but were not given notice or an opportunity to be heard?

4. Did the district court err by issuing an injunction that substantially burdened the property interests of the EBG's members without their having been joined as necessary parties under Federal Rule of Civil Procedure 19?

STATEMENT OF THE CASE

This appeal arises from a series of Orders and Opinions entered by the district court (Hon. Thomas P. Griesa) enjoining the Republic from making contractually required payments to the EBG except on certain specified conditions and denying the EBG's related applications for relief.

On December 7, 2011, the district court granted partial summary judgment to NML, finding that the Republic's failure to honor its debt obligations to Plaintiffs violated the *pari passu* clause in their bond indenture (the "December 7 Order"). On February 23, 2012, the district court sought to enforce the December 7 Order by requiring specific performance of the Republic's payment obligations and enjoining it from paying the holders of exchange bonds (the "Exchange Bondholders") (who were not parties to the district court proceedings) without previously or concurrently making "Ratable Payments" to NML (the "February 23 Order"). The Republic appealed both the December 7 and February 23 Orders.

On October 26, 2012, this Court issued an opinion (the "October 26 Opinion") partially affirming the district court's Orders, but retaining jurisdiction while directing the district court to (i) supplement the record regarding the effects of the Injunctions on third parties; and (ii) clarify the "Ratable Payment Formula" under which the Republic was ordered to pay NML. This Court stated:

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

SPE-295; *NML Capital*, 699 F.3d at 264 (emphasis added). In addition, this Court directed further proceedings to address the impact of the injunction on "third parties ***and*** intermediary banks." SPE-296; *NML Capital*, 699 F.3d at 265 (emphasis added).

In response to this Court's directives, on November 9, 2012, the district court held a scheduling conference. SPE-446-478 (11/9/12 Hearing Tr.) Adopting NML's insistence on expedition, *see* SPE-449 (11/9/12 Hearing Tr., T4:19-20) the district court directed NML to submit its papers by November 13, 2012.[3] Despite requesting additional time, the Republic and third parties (including the EBG) were directed to submit responses by November 16, 2012; and NML was directed to submit any reply by November 19, 2012. SPE-449, 464, 472 (11/9/12 Hearing Tr., T4:5-22, T19:2-4, T27:16-20).

On November 13, 2012, the Republic filed a petition for rehearing and rehearing *en banc* of the issues determined in this Court's October 26 Opinion, thereby staying the mandate pursuant to Federal Rule of Appellate Procedure 41(d)(1). SPE-766-785. That petition remains pending, and the United States has

[3] There was absolutely no need for expedited proceedings. The fact that the Republic was due to make payments of over $3 billion to the Exchange Bondholders in December 2012 was merely an excuse seized upon by NML to create a sense of urgency. The Republic is required to make many billions of dollars in payments on the Exchange Bonds in 2013 and for decades thereafter. If the Injunction is found to be a proper remedy, there will be many years to enforce it.

requested leave to file an *amicus* brief in support of the petition. Petition for Panel Rehearing and Rehearing En Banc of Defendant-Appellant The Republic of Argentina, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Nov. 14, 2012); The United States of America's Motion for Leave to File Brief as Amicus Curiae, if Authorized by the Solicitor General, in Support of the Republic of Argentina's Petition for Panel Rehearing and Rehearing En Banc, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Dec. 13, 2012).

On November 16, 2012, as required by the district court, the EBG submitted a memorandum and supporting papers setting forth numerous reasons that the relief sought by NML unlawfully infringed its members' rights, and those of other third parties, and requesting vacatur of the Injunctions.[4] Memorandum of Law of Exchange Bondholder Group Regarding Issues Remanded by the Second Circuit and in Support of Motion to Vacate Pursuant to Rule 60(b), *NML Capital Ltd. v. Republic of Argentina*, No. 1:08-cv-06978-TPG (S.D.N.Y. Nov. 16, 2012) ("EBG Remand Memorandum"). The EBG also moved the district court for leave to

[4] Notwithstanding this Court's instruction that the district court should consider the effects of the February 23 Order on third parties, NML urged the Court to disregard the EBG's submissions. *See* Brief of Plaintiffs in Response to the Remand from the Court of Appeals, at 24-26, *NML Capital Ltd. v. Republic of Argentina*, No. 1:08-cv-06978-TPG (S.D.N.Y. Nov. 13, 2012) ("NML Remand Response Brief"); SPE-1154-1155; SPE-446-447 (11/9/12 Hearing Tr., T31:24-32:9).

appear as interested non-parties and for relief from judgment pursuant to Fed. R. Civ. P. 60(b). SPE-1123-1125.

Without the benefit of either an evidentiary hearing or oral argument, on November 21, 2012, the district court issued two Opinions and the Injunction (collectively, the "November 21 Orders"). The November 21 Orders ***expanded*** the application of the February 23 Order to third parties by adopting amendments proposed by NML; ordered the Republic to escrow a payment of approximately $1.33 billion (the full amount claimed by NML); and lifted a stay pending appeal of the Injunction that had been in place since March 5, 2012.[5] SPE-1360-1385. The November 21 Orders contained no analysis or factual findings regarding the Orders' effects on third parties, only stating in conclusory fashion that the district court had considered arguments raised by third parties and *amicus curiae* and rejected them. SPE-1361. On November 27, 2012, the district court entered two additional Orders, denying without explanation the EBG's Rule 60(b) motion to vacate the Injunction and its motion to appear as interested non-parties (the "November 27 Orders"). SPE-1425-1426.

---

[5] The district court issued another Order on November 21, 2012, modifying provisions of the March 5, 2012 stay consistent with the rulings in the other November 21 Orders. SPE-1386-SPE-1389.

On November 26, 2012, the EBG filed an Emergency Motion to Appear as Interested Non-Parties in this Court for the purpose of appealing the district court's Orders and seeking a stay pending appeal. The same day, the EBG filed an Emergency Motion to Stay the Injunctions Pending Appeal pursuant to Fed. R. App. P. 8(a)(2). The Republic and interested non-party Fintech Advisory, Inc. also sought a stay of the Injunctions pending appeal. On November 27, 2012, the EBG timely filed a Notice of Appeal from the district court's November 21 and November 27 Orders. On November 28, 2012, this Court entered orders that (i) granted the EBG's motion to appear as interested non-parties for the purpose of appealing the district court's orders; and (ii) entered a stay of the November 21 Orders pending appeal. This Court further ordered that the appeal be heard on an expedited basis, with argument on February 27, 2013.

STATEMENT OF FACTS

A. The FAA Bonds and the Republic's Default

Between 1994 and 2001, the Republic issued debt securities in the aggregate amount of approximately $82 billion pursuant to a Fiscal Agency Agreement (the "FAA Bonds"). SPE-272; *NML Capital*, 699 F.3d at 251. The Republic defaulted on the FAA Bonds in 2001. SPE-272; *NML Capital*, 699 F.3d at 251. In the eleven years since its default, the Republic has not made payments under the FAA Bonds. Moreover, in 2005 the Republic enacted Law 26,017 (the "Lock Law"),

which expressly prohibited any further payments under the FAA Bonds.[6] SPE-273-274; *NML Capital*, 699 F.3d at 252. The Lock Law has prohibited the Republic's courts from enforcing numerous judgments entered in respect of the FAA Bonds, and the holders of the bonds have had difficulty attaching the Republic's foreign assets to satisfy such judgments. SPE-276; *NML Capital*, 699 F.3d at 253 n. 5. Numerous Argentine officials, including President Cristina Fernández de Kirchner, have stated publicly that they will not pay "one dollar" to FAA Bondholders such as NML. SPE-1151.

B. The Exchange Offers

In 2005 and 2010, the Republic initiated exchange offers pursuant to which the holders of FAA Bonds, including the Plaintiffs, were permitted to replace them with new, unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar (the "Exchange Bonds"). SPE-273-274; *NML Capital*, 699 F.3d at 252-53. The vast majority of FAA Bondholders elected to participate in these exchange offers and become Exchange Bondholders. SPE-273-274; *NML Capital*, 699 F.3d at 252-53. By the conclusion of the 2010 exchange offer, holders of over 91% of the par value of the original FAA Bonds (i.e., the Exchange Bondholders or their predecessors in interest) had agreed to enable the Republic to restructure

[6] The Lock Law was briefly suspended in 2010 to enable Argentina to make a second exchange offer, but it has since been reinstated. SPE-274; *NML Capital*, 699 F.3d at 252-53.

approximately $74.5 billion worth of debt, thereby incurring discounts of over 70 cents on the dollar. SPE-275; *NML Capital*, 699 F.3d at 253. To date, the Republic has fully honored its obligations under the Exchange Bonds. SPE-275; *NML Capital*, 699 F.3d at 253. There is, moreover, overwhelming political and scholarly consensus that voluntary sovereign debt restructurings of this kind are critical to the stability of the global economy. Appendix ("A")-1767-1771; SPE-936-937; SPE-957-961; SPE-1090; SPE-1132-1133.

C. The Republic's Payment Mechanism

The mechanism that the Republic uses to make payments on the Exchange Bonds is set forth in the Trust Indenture between the Republic and The Bank of New York as Trustee dated June 2, 2005 (the "Indenture").[7] SPE-627-759. The Trustee is a fiduciary of the Exchange Bondholders and is ***not*** an agent of the Republic. A-2288 (Declaration of Matias Isasa dated Feb. 1, 2012 ("Isasa Dec.") ¶ 4). Pursuant to the Indenture, the Republic makes principal and interest payments on the Exchange Bonds to the Trustee, which receives them ***in trust for the Exchange Bondholders***. SPE-648 (Indenture § 3.1). Once money has been paid to the Trustee, ***it is the property of the Exchange Bondholders***, "and the Republic

[7] The Trustee was originally The Bank of New York ("BNY"), later BNYM. A-2288 (Isasa Dec. ¶ 3).

shall have no interest whatsoever in such amounts." SPE-650 (Indenture § 3.5); *see also* A-2288 (Isasa Dec. ¶ 4).

D. The Exchange Bondholders

Beginning with its launch in 1999, Gramercy Emerging Markets Fund has, at various times, held an interest in FAA Bonds. SPE-1139 (Declaration of Robert S. Koenigsberger dated Nov. 16, 2012 ("Koenigsberger Dec.") ¶ 2). Gramercy organized the 2010 Argentine debt restructuring, and tendered approximately $2.7 billion in face value of debt in connect therewith. SPE-1140 (Koenigsberger Dec.¶ 3). In agreeing to accept a significant discount on the face value of its FAA Bonds in 2010, Gramercy relied on the Republic's willingness and ability to make payments on the Exchange Bonds. SPE-1140 (Koenigsberger Dec.¶ 4). Currently, various Gramercy entities hold interests in Exchange Bonds with total par values exceeding $400 million. SPE-1140-1141 (Koenigsberger Dec.¶¶ 8-9).

Other large Exchange Bondholders are members of the EBG. MFS-advised members of the EBG hold nearly $392 million in Exchange Bonds; Brevan Howard and its affiliates hold nearly $237 million in Exchange Bonds; and SW and its affiliates hold approximately $12 million in Exchange Bonds. *See* SPE-1144 (Declaration of Robin A. Stelmach dated Nov. 16, 2012 ¶¶ 1-3); SPE-1146 (Declaration of James P. Taylor dated Nov. 16, 2012 ¶ 3); SPE-1138 (Declaration of David C. Hinman dated Nov. 16, 2012 ¶ 2). More generally, the Exchange

Bondholders comprise a wide swath of the investing public, including such diverse organizations as pension funds, charitable foundations, and endowments. *See* SPE-1140 (Koenigsberger Dec. ¶ 7). The outstanding Exchange Bonds have par values totaling over ***$50 billion***. SPE-621-622 (Declaration of Kevin F. Binnie dated Nov. 16, 2012 ¶¶ 5-6).

E. The Injunction

The Injunction entered by the district court on November 21, 2012 prohibits the Republic from making payments to the Exchange Bondholders under the Exchange Bonds unless it "concurrently or in advance" makes a "Ratable Payment" to NML. SPE-1381-1382, 1384 (Injunction ¶¶ 2(a), 2(d), 2(i)). The district court interpreted "Ratable Payment" to mean the payment of all principal, interest and penalties owed on NML's FAA Bonds—an amount Plaintiffs claim exceeds $1.3 billion.[8] SPE-858 (7/23/12 Hearing Tr., T42:11-22). Moreover, the Injunction does not bind just the Republic, but rather all "persons or entities who . . . assist the Republic in fulfilling its payment obligations under the Exchange Bonds," including BNYM, the Depository Trust Company, Clearstream Banking S.A, Euroclear Bank S.A., and any other transfer or paying agents. SPE-1382-1383 (Injunction ¶¶ 2(e), 2(f)). All such persons or entities are enjoined from

[8] The district court did not make precise findings about the actual principal, interest and penalties owed on NML's FAA Bonds, but instead directed the parties' counsel to confer and agree on the correct amount. SPE-1376.

taking any action to "aid[] and abet[] any violation" of the Injunction—i.e., taking any steps to facilitate the delivery of payments under the Exchange Bonds unless the Republic makes a Ratable Payment to NML. SPE-1382 (Injunction ¶ 2(e)).

Further, the Injunction prohibits the Republic from "taking any action to evade" its obligations thereunder, "including, but not limited to, altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without obtaining prior approval [from] the Court." SPE-1384 (Injunction ¶ 4).

SUMMARY OF ARGUMENT

The Injunction and related Orders of the district court unlawfully infringe the rights of innocent non-parties and must be vacated. *First,* the Injunction substantially burdens the Exchange Bondholders' property rights ***solely*** to coerce specific performance by the Republic for the benefit of NML. The Injunction is intended to leverage the Republic's need for foreign capital by making it impossible for it to honor obligations under the Exchange Bonds unless the Republic also pays NML the full amount it claims it is owed under the FAA Bonds. However, based on the Argentine Lock Law and repeated declarations from the Republic's highest officials, there is no chance that will ever happen. Thus, if the Injunction is not vacated, it is certain that either (i) the Republic will default on the Exchange Bonds; or (ii) payments to the Exchange Bondholders will

be frozen at BNYM. Shifting the burden of the Republic's default to innocent third parties in this way is contrary to established law and basic principles of equity. It is particularly inequitable because the only reason the Republic has the financial ability to pay ***any*** bondholders today is that the Exchange Bondholders (or their predecessors-in-interest) previously agreed to accept discounts of over 70 cents on the dollar. Moreover, the harm to the Exchange Bondholders would be for naught, because the Injunction will never succeed in accomplishing the district court's objectives.

Second, the Injunction violates the Exchange Bondholders' rights under the Fifth Amendment, which prohibits the deprivation of private property for private purposes. Yet the Injunction imposes an onerous condition on the Exchange Bondholders' otherwise unencumbered rights, thereby depriving them of valuable property interests—all in an attempt to enforce a private contract between the Republic and NML. Such judicial action violates the Due Process Clause or, in the alternative, constitutes a prohibited taking under the Fifth Amendment.

Third, the Injunction must be voided under Fed. R. Civ. P. 60(b)(4) for failure to afford the Exchange Bondholders due process of law. Although the district court expressly recognized that the rights of third parties, including the Exchange Bondholders, would be adversely affected by the Injunction, it nonetheless failed to give them notice or an opportunity to be heard before it was

first entered. Nor did the district court's later willingness to allow the EBG to file a brief concerning the remand issues raised by this Court cure the due process violation—both because the subject matter of that submission was limited to the remand issues and because the EBG was given only ***three days*** to respond to NML's arguments. In the process, the district court ignored this Court's directive to consider and develop the record regarding the Injunction's impact on third parties.

Finally, the Injunction must be vacated because the Exchange Bondholders were not joined as indispensable parties pursuant to Fed. R. Civ. P. 19. The Injunction purports to adjudicate the Exchange Bondholders' rights to their property and, accordingly, they were necessary parties to the proceedings below.

ARGUMENT

I. THE INJUNCTION IMPERMISSIBLY INFRINGES THE PROPERTY RIGHTS OF INNOCENT THIRD PARTIES IN VIOLATION OF FUNDAMENTAL PRINCIPLES OF EQUITY.

The district court's grant of the Injunction is reviewed for abuse of discretion. *Karaha Bodas Co. v. Perusahaan Pertambangam Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 118-19 (2d Cir. 2007).

A. The Law Prohibits Injunctions that Unduly Burden the Property of Third-Parties.

"The discretion which may be exercised in [specific performance] cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court,

but one which is controlled by the established doctrines and settled principles of equity." *Willard v. Tayloe*, 75 U.S. 557, 567 (1869). One such principle is that an injunction may not place unreasonable burdens on third parties. *See, e.g.*, *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993) (citing Restatement (Second) of Contracts § 346(1)(b) ("Specific performance or an injunction will be refused if such relief would be unfair because …(b) the relief would cause unreasonable hardship or loss to… third persons.")); *Cook Inc. v. Boston Sci. Corp.*, 333 F.3d 737, 743-44 (7th Cir. 2003) (modifying injunction in contract case because it "violate[d] the principle that in determining the appropriate scope of an injunction the judge must give due weight to the injunction's possible effect on third parties"); *United States v. Zang*, 703 F.2d 1186, 1195 (10th Cir. 1982) ("[T]he interests of innocent third parties should be protected").

"[T]he consequences to third parties of granting an injunctive remedy, such as specific performance, ***must be considered***, and in some cases may require that the remedy be withheld." *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 280 (7th Cir. 1986) (Posner, J.) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)) (emphasis added); *see also Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197, 1200 (S.D.N.Y. 1978) (refusing to order defendant to specifically perform promise to deliver 600 sculptures to plaintiff where doing so would require additional production of a "limited edition" product,

"violating the rights of [defendant's] good faith purchasers to [sculptures] of a limited edition."); *Rockland Exposition, Inc. v. Alliance of Auto. Serv. Providers of N.J.*, Nos. 08-CV-7069 (KMK), 08-CV-11107 (KMK), 2009 WL 1154094 at *13-15 (S.D.N.Y. Mar. 19, 2009) (noting that "the Court should consider the harm to third parties if the Court grants the Plaintiff the [specific performance] it seeks," and refusing to enter such order because "third-parties would sustain considerable losses").[9]

B. The Injunction Is Unlawful Because It Intentionally Burdens the Property of the Innocent Non-Party Exchange Bondholders to Enforce NML's Rights

In light of the foregoing standards, the district court abused its discretion in entering an Injunction that was intentionally designed to conscript the ***Exchange Bondholders'*** property to enforce ***NML's*** rights.

1. The District Court Knew the Injunction Would Violate the Exchange Bondholders' Rights, and Entered It for Precisely That Reason.

---

[9] *See also United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1141-42, 1144 (D.C. Cir. 2009) (vacating injunction in RICO context because it caused "a potentially serious detriment to innocent persons not parties to or otherwise heard" by threatening them with the loss of substantial revenue); *Gen. Bldg. Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 399-400 (1982) (invalidating injunction requiring co-defendants who were not found liable to incur expenses); *cf. Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832-33 (2d Cir. 1930) (L. Hand, J.) (injunction cannot bind third party not legally identified with enjoined party that does not seek to abet enjoined party in committing an act forbidden under injunction).

It is undisputed that the Exchange Bondholders are entitled to full and timely payments under the Exchange Bonds, and that those payments, once transferred from the Republic to BNYM in Argentina, are the legal and exclusive property of the Exchange Bondholders.[10] *See supra* at 12-13. At the hearing on February 23, 2012, the district court's initial reaction to NML's injunction request—which sought to leverage the Exchange Bondholders' rights to their detriment and for the sole benefit of Plaintiffs—properly went beyond deep skepticism, to outright rejection:

> - THE COURT: Now, look, [the proposed injunction] would indeed be a mechanism for enforcement but it also presents a ***very serious problem***. So let me ask you this. Is there any legal authority, is there any legal basis for me to ***use the pari passu clause to interfere with the payment to the exchangers***? . . . Now, if I entered this order, this would impose an obligation on the banks and it might ***impose an impediment*** upon the banks ***with respect to the exchange offer people which does not exist now***. They get the money and presumably they pay the exchangers. There is no condition, no impediment. ***This would obviously present an impediment, a condition. Is there any legal basis for doing that?*** A-2296-2297 (2/23/12 Hearing Tr., T7:2-6, T7:24-8:5) (emphasis added).

[10] NML and the Republic dispute whether the Exchange Bondholders are paid via transfers to BNYM in Argentina or in New York. NML Remand Response Brief, at 11 n.6, No. 1:08-cv-06978-TPG (S.D.N.Y. Nov. 13, 2012); Memorandum of Law of The Republic of Argentina in Response to Plaintiffs' Brief on Remand, at 17 n.8, *NML Capital Ltd. v. Republic of Argentina*, No 1:08-cv-06978-TPG (S.D.N.Y. Nov. 16, 2012). This dispute is irrelevant, however, because irrespective of the location, the payments belong to the Exchange Bondholders the instant they are received by BNYM. SPE-650 (Indenture § 3.5); A-2288 (Isasa Dec. ¶ 4).

- THE COURT: ***[T]he exchange offers were lawful, people subscribed to them and have rights under them, the exchange offer provides for payments . . . .*** A-2300 (2/23/12 Hearing Tr., T11:2-4) (emphasis added).

- THE COURT: ***I don't understand the pari passu clause or my order to mean that the Republic is forbidden to pay the exchange offers unless they pay NML***. A-2300-2301 (2/23/12 Hearing Tr., T11:25-12:2) (emphasis added).

- MR. OLSEN [NML's counsel]: So we are saying to Argentina you must, if you are going to pay the one, you have to pay the other, and we are telling you in an order from this court that you must do that and your agents and subordinates and people acting with you must not assist in evading that order.
  THE COURT: ***I really don't agree with that. The rights of the exchangers were not conditional on NML getting paid under the pari passu clause***. A-2302 (2/23/12 Hearing Tr., T13:5-12) (emphasis added).

- THE COURT: If you had a normal law-abiding, asset-holding [debtor], that would be enforceable; ***you wouldn't have to interfere with the rights of the first people***. A-2304 (2/23/12 Hearing Tr., T15:1-4) (emphasis added).

- THE COURT: ***I am sticking to my position. I think that I cannot interfere with the rights of the exchange offers by putting conditions on them or impediments on them.*** A-2304-2305 (2/23/12 Hearing Tr., T15:25-16:2) (emphasis added).

Although correct in its expectation that the Republic would not pay the Plaintiffs, and without citation to any authority supporting NML's proposed injunction, the district court nonetheless did a precipitous *volte face*, ignoring its prior recognition of the Exchange Bondholders' rights in favor of NML's interests.

Despite the obvious infirmity of the Injunction, the district court voiced the hope that entering it would finally force the Republic to make payments on the FAA Bonds:[11]

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

[11] NML falsely suggested to the district court that the Exchange Bondholders can compel the Republic to make payments on the FAA Bonds simply by demanding it. NML Remand Response Brief, at 26, No. 1:08-cv-06978-TPG (S.D.N.Y. Nov. 13, 2012). The Exchange Bondholders have ***no control whatsoever*** over the actions of the Republic, which is a sovereign nation with an elected government. SPE-1140 (Koenigsberger Dec., ¶ 6).

> ***are problems.*** . . . A-2337-2338 (2/23/12 Hearing Tr., T48:12-49:10) (emphasis added).

Thus, the express purpose of the Injunction is to coerce the Republic into paying NML by forcing it to choose between the loss of market standing and paying NML.[12] This imposes conditions on the Exchange Bondholders' otherwise unconditional rights to payment, leaving them at the mercy of the Republic's decision whether to pay NML.[13]

2. The Injunction Will Have the Inevitable and Unlawful Effect of Depriving the Exchange Bondholders of Their Property Rights.

Given the Republic's frequently and emphatically stated refusal to pay NML,[14] one of two results will inevitably follow from the Injunction. In either

---

[12] A-2320 (2/23/12 Hearing Tr., T31:1-3) (noting that after ten years of the Republic's disregard of judgments entered against it, "nobody really has any hope that the Republic will honestly honor its obligations without some *unusual mechanisms*. That's why this is being done.") (emphasis added); A-2321 (2/23/12 Hearing Tr., T32:1-2) (recognizing that the Injunction was designed to help NML "finally get some leverage"); A-2333 (2/23/12 Hearing Tr., T44:13-19) ("[I]f [the district court] sign[s] this order . . . Argentina is going to pay the exchange bondholders because it cannot afford not to . . . and when it does so, it will pay the NML bondholders.").

[13] Even NML's counsel has admitted that the injunction engrafts a "condition" on the Exchange Bondholders' ability to enjoy their own property that otherwise does not exist. A-2294 (2/23/12 Hearing Tr., T5:12-17). And as the district court itself observed, the Exchange Bondholders' "right to be paid," A-2300 (2/23/12 Hearing Tr., T11:10-11), is "***not*** conditional on NML getting paid." A-2302 (2/23/12 Hearing Tr., T13:10-12) (emphasis added); A-2333 (2/23/12 Hearing Tr., T44:15-17) (the Republic "cannot exist in the marketplace in the world today if it reneges on [the Exchange Bonds]").

instance, the Injunction will be ineffectual in achieving its intended goal, but the property rights of innocent third-parties will be destroyed. First, the Republic may pay the Trustee amounts due to the Exchange Bondholders, but refuse to make Ratable Payments to NML. Should this occur, the Injunction would indefinitely freeze the Exchange Bondholders' funds—their ***undisputed*** property—at BNYM, despite the fact that the Exchange Bondholders (i) are plainly without fault; (ii) owe no obligation of any kind to NML; and (iii) have already absorbed a massive discount on their original investment in order to facilitate the Republic's debt restructuring and ensure greater certainty of payment. SPE-1382-1383 (Injunction ¶¶ 2(e), 2(f)).

Second, the Republic could attempt to comply with ***both*** the district court's Injunction and the Lock Law by defaulting on the Exchange Bonds. Should that occur, not only will the Exchange Bondholders have been deprived of their property, but the Injunction will have turned a relatively minor, decade-old default on several hundred million dollars of FAA Bonds owed to fewer than one percent of FAA Bondholders into a ***cataclysmic*** default on over $50 billion in Exchange Bonds, with potentially devastating consequences for international sovereign debt

---

[14] *See* SPE-455-461 (11/9/12 Hearing Tr., T10-16); A-2293, 2304, 2320, 2337-2338 (2/23/12 Hearing Tr., T3-4, 15, 31, 48-49); SPE-829-830, 839, 842-843, 894-895 (7/23/12 Hearing Tr., T13-14, 23, 26-27, 78-79); NML Remand Response Brief, at 1-2, No. 1:08-cv-06978-TPG (S.D.N.Y. Nov. 13, 2012).

markets and the global economy. *See* SPE-1128-1132 (Declaration of Stephen Choi dated Nov. 16, 2012 ("Choi Dec.") ¶¶ 8-22); A-2315 (2/23/12 Hearing Tr., T26:5-8). A default on this scale would spur an avalanche of follow-on litigation involving the Exchange Bondholders, multiple banks, and the Republic—which indeed may be NML's objective.[15]

To be sure, a judicial mousetrap designed to secure a remedy for NML may be appropriate. But as the numerous authorities discussed in Point I.A, *supra*, attest, the Exchange Bondholders' property rights cannot be used as the bait. *See also McGraw-Hill Broad. Co., Inc. v. MGM/USA Entm't Co.*, 537 F. Supp. 954, 955-56 (S.D.N.Y. 1982) (denying plaintiff preliminary injunction preventing alleged violation of exclusive broadcasting license where defendant had granted conflicting license to third-party; court reasoned that even if breach would cause plaintiff irreparable harm, injunction would instead inflict identical injury on innocent third-party). Indeed, this Court has admonished the district court to "take care to craft attachment orders so as to avoid interrupting Argentina's regular

[15] As the EBG has pointed out in prior submissions, NML has reportedly purchased credit default swaps that would enable it to profit from the Republic's default on the Exchange Bonds—a fact that casts doubt on the good faith of NML's assertions to the district court that the November 21 Order is likely to compel the Republic to make payments on the FAA Bonds. *See* SPE-1130-1131 (Choi Dec. ¶ 18); SPE-1157. Although the EBG first raised this issue in its November 16, 2012 submission to the district court, NML has not denied purchasing such swaps, which amount to a bet that this case will trigger a default.

payments to [exchange] bondholders." *Capital Ventures Int'l v. Republic of Argentina*, 282 Fed. Appx. 41, 42 (2d Cir. 2008). Yet the Injunction ignores this clear directive.

3. To the Extent That NML Is Left Without a Remedy Absent the District Court's Injunction, that Is the Consequence Prescribed by Law.

While this litigation has caused the district court understandable frustration, NML is, at base, an ordinary civil litigant with an ordinary judgment on an ordinary contract. SPE-283; *NML Capital*, 699 F.3d at 257. Its debtor happens to be a sovereign nation (a fact obviously known to NML when it acquired its FAA Bonds, and reflected in the price it paid for those bonds), and that status has—by purposeful design of Congress in the FSIA—frustrated NML's efforts to pursue successfully the usual methods of collection. Consequently, like thousands of other civil litigants, NML has a judgment that is difficult to enforce. Although that is unfortunate, it is also consistent with the hard realities of our legal system.[16] *See FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373, 377 (D.C. Cir.

[16] Although it has not yet been forced to pay judgments on the FAA Bonds, the Republic has suffered serious economic consequences as a result of its continued failure to pay NML and other holdout, including substantially increased borrowing costs and limited access to foreign capital. For example, the current yield on Argentine bonds with a 5-year maturity is 12.35%, while longer-term bonds of neighboring countries have far lower yields, ranging from around 2% (Peru – 1.78% 7-years; Brazil – 2.08% 9-years; Colombia – 2.30% 9-years; Chile – 2.35% 10-years) to 5.11% for 10-year bonds of Bolivia.

2011) (noting that "a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment" and further finding that absent certain exceptions, plaintiffs in such cases "must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment").

The proper solution to NML's problem is not to shift it onto the vast majority of heavily discounted Exchange Bondholders. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.") (Holmes, J.). Rather, the correct approach is the one the district court understood at the outset—to pursue all remedies available ***without compromising the property rights of innocent non-parties***. At the November 9, 2012 hearing, the district court repeatedly asserted that it had ample means available to enforce its judgments. SPE-463 (11/9/12 Hearing Tr., T18:3-14). NML is certainly free to pursue those remedies, but not at the expense of the innocent Exchange Bondholders.

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

In addition, basic considerations of fairness and equity require reversing the Injunction because it requires the Republic immediately to pay 100% of the face value of NML's FAA Bonds, plus interest and penalties totaling approximately

200% of their face value, before it can make payments due to the Exchange Bondholders under the Exchange Bonds. NML Remand Response Brief, at 12, No. 1:08-cv-06978-TPG (S.D.N.Y. Nov. 13, 2012); *see S.E.C. v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975) ("[I]n deciding whether to grant injunctive relief, a district court is called upon to assess all those considerations of fairness that have been the traditional concern of equity courts."). The Injunction ignores that the Exchange Bondholders hold securities derived from FAA Bonds that have already suffered discounts of over 70 cents on the dollar. *Supra* at 11-12; *see also Texas v. New Mexico*, 482 U.S. 124, 131 (1987) ("Specific performance will not be compelled 'if under all the circumstances it would be inequitable to do so'.") (quoting *Wesley v. Eells*, 177 U.S. 370, 376 (1900)). These discounts—which were accepted by the holders of approximately 92% of all FAA Bonds and provided tens of billions of dollars in debt relief to the Republic—are a major reason the Republic has sufficient foreign currency reserves to honor its obligations to anyone, including NML.[17]

Moreover, a significant fraction of the Exchange Bondholders are not only successors in interest to the FAA Bondholders, but participated in the 2005 and

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

2010 exchange offers and individually incurred large discounts. *See supra* at 11-12. While NML was within its rights in refusing to accept discounts on the FAA Bonds, it stands equity on its head to force the Republic to reallocate the sacrifices made by the Exchange Bondholders so that the most aggressive and litigious holdouts can receive approximately 300 cents on the dollar—and many multiples of what they actually paid for their FAA Bonds. Such an inherently unfair remedy is an abuse of the district court's discretion. *See Joneil Fifth Ave. Ltd.*, 458 F. Supp. at 1200 (denying specific performance of sales contract where it could not be ordered "without violating the rights of [third-party] good faith purchasers").

II. THE INJUNCTION VIOLATES THE FIFTH AMENDMENT BY SUBSTANTIALLY BURDENING THE PROPERTY RIGHTS OF INNOCENT NON-PARTIES.

The district court's determination of constitutional questions is reviewed *de novo*. *United States v. Davis*, 648 F.3d 84, 96 (2d Cir. 2011) (citing *United States v. Bajakajian*, 524 U.S. 321, 336 n. 10 (1998)).

A. The Injunction Violates the Due Process Clause.

Even if equity could abide the district court's unprecedented Injunctions (and it cannot), the relief granted below is prohibited by the Constitution. As demonstrated in Point I, *supra*, the Injunction seeks to use the Exchange

Bondholders' property for the private benefit of the Plaintiffs.[18] Accordingly, it violates the Due Process Clause of the Fifth Amendment.

1. The Due Process Clause Prohibits Deprivation or Infringement of Private Property for a Private Use.

Like all contractual rights, the Exchange Bondholder's rights under the 2005 and 2010 Indentures constitute "property" for Fifth Amendment purposes. *See U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n. 16 (1977) ("Contract rights are a form of property."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."). And "it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B,* even though *A* is paid just compensation." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); s*ee also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand . . . scrutiny . . . .; it would serve no legitimate purpose of government and would thus be void.").

Indeed, the Supreme Court has held that state action placing any significant imposition on the private property of one person for the private use of another is a

[18] The Injunction also improperly burdens and restrains the Exchange Bondholders' property by, *inter alia*, enjoining them from exercising bargained-for contractual rights to modify the Republic's payment mechanism under the Exchange Bonds. SPE-1384 (Injunction ¶ 4); SPE-651-652 (Indenture § 3.5(d)).

core violation of fundamental due process rights.[19] *See Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 76-80 (1937) (invalidating administrative order requiring majority of private gas producers to curtail desired production and purchase shortfall from minority of private gas producers with no available market); *Chi., St. Paul, Minn. & Omaha Ry. Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (vacating on due process grounds order requiring railroad to build underground pass for benefit of private landowners); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (vacating on due process grounds order requiring railroad to allow private party to construct elevator on its property for private use); *United States v. Ambrosio*, 575 F. Supp. 546, 551-52 (E.D.N.Y. 1983) (assets of defendant corporation not accused of RICO violations could not be restrained, though 30% interest was owned by co-defendant facing RICO charges, because restraint would unconstitutionally deprive corporation of property rights under due process principles).

2. The Injunction Is Judicial State Action that Violates the Due Process Clause.

Judicial orders can (and often do) constitute "state action" for purposes of

[19] The market's reaction proves that the Exchange Bondholders' property is encumbered by the injunction – Exchange Bond prices have plummeted in the wake of the Second Circuit's decision. SPE-1128-1130 (Choi Dec. ¶¶ 15-18); Supplemental Declaration of Robert S. Koenigsberger ¶¶ 5-7, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Dec. 3, 2012).

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

lawsuit between private parties, may constitute state action which must conform to the constitutional strictures which constrain the government.") (Skelly Wright, J).

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

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

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

The district court recognized the inevitable impact of the Injunction on the Exchange Bondholders' property rights, as well as the lack of supporting legal authority. *See supra* at 20-22. Nonetheless, apparently out of sheer frustration, it

sought to use the Exchange Bondholders' property as a fulcrum to collect an ordinary contract debt for the Plaintiffs. The Injunction thus constitutes a deprivation of private property for ***private***, not public, purposes—a result forbidden by the Constitution as "arbitrary and irrational" under long-standing due process principles. *Stop the Beach*, 130 S. Ct. at 2614.

B. The Injunction Effects an Unconstitutional Taking.

Alternatively, the Injunction violates the Takings Clause of the Fifth Amendment. In *Stop the Beach*, a plurality of the Supreme Court expressly recognized a cause of action for a "judicial taking." 130 S. Ct. at 2601-02. None of the justices rejected such a concept. *Id*. at 2614-15 (Kennedy, J., concurring), 2618-19 (Breyer, J., concurring). Although the Exchange Bondholders' property is not being seized outright by the government, the practical outcome of the Injunction will inevitably be, at a minimum, a "significant restriction … placed upon [the Exchange Bondholders'] use of [their] property," *Me. Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) – clearly a "taking." *See Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions . . . affect and limit [property] use to such an extent that a taking occurs."); *Amchem Products, Inc. v. Costle*, 481 F. Supp. 195, 199 (S.D.N.Y. 1979) (disclosure of company's research data mandated by federal

statute stated claim for taking that was "not absolute but consist[ed] instead of a severe diminution of the value of plaintiff's property").

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

III. THE INJUNCTION MUST BE VACATED PURSUANT TO FED. R. CIV. P. 60(b)(4) FOR FAILURE TO PROVIDE THE EXCHANGE BONDHOLDERS WITH NOTICE AND AN OPPORTUNITY TO BE HEARD.

The district court's refusal to void a judgment under Rule 60(b)(4) is subject to *de novo* review. *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 187, n.7 (2d Cir. 2006).

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

Although the district court repeatedly recognized that the Exchange Bondholders' rights were at stake (*see supra* at 20-21), it took no steps to give them notice or an opportunity to be heard prior to entering the December 7 or February 23 Orders. This failure to provide the Exchange Bondholders with notice

and an opportunity to be heard is error that renders the injunction void.[20] *See Dial Corp. v. MG Skinner & Assocs.*, 180 F. App'x. 661, 664 (9th Cir. 2006) (holding judgment based on defendant's indemnification claim against co-defendant who was earlier released from action that was only mentioned "near the end of trial and without any prior notice" void under Rule 60(b)(4)); *Nature's First Inc. v. Nature's First Law, Inc.*, 436 F. Supp. 2d 368, 374-77 (D. Conn. 2006) (granting Rule 60(b)(4) motion and vacating default judgment and permanent injunction where defendant had not been served); *In re Aztec Supply Corp.*, 399 B.R. 480, 492-94 (Bankr. N.D. Ill. 2009) (granting Rule 60(b)(4) motion where party affected by bankruptcy proceedings was not given notice); *Local 78 v. Termon Constr., Inc.*, No. 01-CV-5589 (JGK), 2003 WL 22052872, at *5 (S.D.N.Y. Sept. 2, 2003) (granting motion to vacate default judgment pursuant to Rule 60(b)(4) where valid service of process was not effected). The Exchange Bondholders' absence from the proceedings below is significant, because the Injunction would impose an onerous condition on their constitutionally protected property right to receive payment on the Exchange Bonds. *See supra* at 23.

[20] The Injunction must also be vacated because the district court failed to comply with this Court's October 26, 2012 *Jacobson* instruction directing supplementation of the record regarding the Injunction's effects on third parties. SPE-295-296; *NML Capital*, 699 F.3d at 265.

Nor was the district court's failure to give the Exchange Bondholders notice or an opportunity to be heard in February 2012 cured by allowing them to file a brief in November 2012. First, the Injunction already existed, and the district court was considering only two limited issues on remand. SPE-295-296; *NML Capital*, 699 F.3d at 265. The district court allowed the EBG just ***three days*** to respond to NML's November 2012 submissions—a wholly insufficient interval. *See supra* at 7; *In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) (granting Rule 60(b)(4) motion where one day's notice of hearing to junior secured party in bankruptcy proceeding did not satisfy due process). The district court also refused to hold an evidentiary hearing.[21] *See Fengler v. Numismatic Am., Inc.*, 832 F.2d 745, 747-48 (2d Cir. 1987) (parties bound by injunctions entitled to evidentiary hearing). Moreover, the district court engaged in ***no*** substantive analysis of ***any*** arguments raised in the EBG's submissions, instead asserting in conclusory fashion that it had "considered" such arguments and rejected them. SPE-1361. This

[21] Among other things, such a hearing would have established (i) the tens of billions of dollars in third party interests that are put at risk by the Injunction; (ii) the numerous ways in which those interests are put at risk (*see, e.g.*, SPE-1128-1130 (Choi Dec. ¶¶ 8-22); Supplemental Declaration of Stephen Choi ¶¶ 22-30, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Nov. 26, 2012)); and (iii) whether NML or its affiliates has been purchasing credit default swaps, thereby effectively betting that its litigation tactics will trigger a default by the Republic. These are all significant facts that should have been considered in balancing the equities of an injunction in this case.

superficial "opportunity to be heard" was not sufficient legal process to safeguard the Exchange Bondholders' rights when tens of billions of dollars are at stake.

Likewise, even if the Exchange Bondholders had actual notice of the district court's February 23, 2012 hearing, the absence of formal service invalidates the Injunction. *See Orix Fin. Servs. v. Phipps*, No. 91-CV-2523, 2009 WL 2486012, at *3 (S.D.N.Y. Aug. 14, 2009) (granting Rule 60(b)(4) motion, in part, because "[t]he Second Circuit has rejected the argument that 'actual notice' is sufficient to cure improper service") (citing *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 256 (2d Cir. 1991); *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 385-86 (S.D.N.Y. 1986) (granting Rule 60(b)(4) motion and vacating default judgment where defendants were not properly served, notwithstanding any constructive or actual notice defendants had); *In re Metzger*, 346 B.R. 806, 818 (Bankr. N.D. Cal. 2006) (applying Rule 60(b)(4) to void fourteen-year-old sale order for defective notice even though creditor had actual notice of bankruptcy proceedings; creditor had no duty to investigate and inject himself into the proceedings).

The district court's failure to provide the Exchange Bondholders and other affected parties with full, reasonable notice and a meaningful opportunity to be heard is of great consequence. As the EBG has noted in its Motion for Certification of a question of state law to the New York Court of Appeals (filed December 27, 2012), NML's claims involve unsettled issues of New York law

with significant implications for third party rights, the capital markets as a whole, and New York's status as a world financial center. Motion of Non-Party Appellants Exchange Bondholder Group for Certification to New York Court of Appeals, at 8-14, *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv (L) (2d Cir. Dec. 27, 2012) ("Motion to Certify"). Although the inclusion of *pari passu* clauses in sovereign debt instruments governed by New York law has been commonplace for decades, no New York court has ***ever*** interpreted such language. Motion to Certify, at 9-10, No. 12-105-cv (L) (2d Cir. Dec. 27, 2012). Accordingly, there remains significant uncertainty in the capital markets regarding the long-term implications of the district court's rulings. The Exchange Bondholders should have been given an opportunity to be heard on these issues. Motion to Certify, at 13-14 & n.9, No. 12-105-cv (L) (2d Cir. Dec. 27, 2012).

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

A district court's determination of whether a party is necessary under Fed. R. Civ. P. 19 is reviewed for abuse of discretion. *Jonesfilm v. Lion Gate Int'l*, 299 F.3d 134, 139 (2d Cir. 2002).

The Exchange Bondholders are necessary parties to this action due to the confiscatory impact of the Injunction on their right to payment under the Exchange Bonds. Accordingly, the Exchange Bondholders' absence from the case at the

time the Injunction was entered and modified requires its vacatur. Under Fed. R. Civ. P. 19, a party is "necessary" if

> . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . .

Fed. R. Civ. P. 19(a)(1)(B). Even without expressly invoking Rule 19, courts have denied or vacated injunctions directed "against [non-parties] who are innocent of misconduct and are strangers to the district court." *Doctor's Assocs., Inc. v. Reinert & Dupree, P.C*, 191 F.3d 297, 306 (2d Cir. 1999) (partially vacating injunction barring nonparty franchisees from commencing separate state court actions against franchisor); *see also Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 933 (8th Cir. 2004) (reversing injunction as to federal agency that "was not a party to the underlying action and did not actively participate" in proposed budget cutbacks that plaintiffs were suing to enjoin); *Leblanc-Sternberg v. Fletcher*, 763 F. Supp. 1246, 1249 (S.D.N.Y. 1991) (denying plaintiffs' application to enjoin local election where officials managing election were not named defendants and stating that "[a] party to be enjoined must be before the court").

Under the foregoing standards, a party is necessary under Rule 19(a) when its contractual or property rights would otherwise be adjudicated in the party's

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

As shown in Point I *supra*, the Injunction substantially infringes the Exchange Bondholders' right to receive payments under the Exchange Bonds by imposing an onerous condition not included in the Exchange Bond Indenture. Further, the Injunction would effectively leave the Exchange Bondholders with no recourse. If the Republic chooses to pay only the Exchange Bondholders, then their payments will be frozen at BNYM indefinitely. If the Republic chooses not

to pay BNYM, the Exchange Bondholders will, from a practical standpoint, have no recourse other than to "stand in line" with NML. Simply put, this is a classic situation where two wrongs (the Republic's refusal to pay NML and an injunction that almost certainly will lead to failure to pay the Exchange Bondholders) do not make a right; rather, they make a bad situation worse.

Given the district court's recognition at the February 23, 2012 hearing that the Injunction could affect the rights of absent parties (see Point I, *supra*), the court was required to join them as necessary parties. *See Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543, 548 (S.D.N.Y. 2008) ("Although neither party has moved for joinder, courts frequently do—and indeed ***should***—consider the issue *sua sponte* because a primary purpose of Rule 19 is to protect the rights of an absentee party.") (emphasis added). "An injunction entered in the absence of an indispensable party should be vacated." *Edward G. Bashian & Sons v. Am. Nat'l. Bank & Trust Co. of Chi.*, No. 96-CV- 6021, 1997 WL 337434, at *6 (N.D. Ill. June 16, 1997) (partially vacating injunction for failure to join bank as necessary party at time injunction was entered, because bank held interest in subject matter of lawsuit); *see also Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 234-35 (9th Cir. 1975) (vacating preliminary injunction restraining voting of defendant corporation's stock entered before corporation was party to suit, because corporation "clearly was an indispensable party" under Rule 19), *overruled on other grounds by Stahl v.*

Gibralter Fin. Corp., 967 F.2d 335 (9th Cir. 1992). Accordingly, the Injunction and subsequent Orders should be vacated for failure to join the Exchange Bondholders as necessary parties.

CONCLUSION

For the foregoing reasons, this Court should vacate the Injunction and all related Orders, and reverse the district court's denial of the EBG's motion to vacate under Fed. R. Civ. P. 60(b)(4), as well as its denial of the EBG's motion to appear as interested non-parties.

Dated: December 28, 2012
New York, New York

By: _/s/ Sean F. O'Shea_____

Sean F. O'Shea
Michael E. Petrella
Daniel M. Hibshoosh
O'SHEA PARTNERS LLP
521 Fifth Avenue, 25th Floor
New York, New York 10175
Tel.: (212) 682-4426
soshea@osheapartners.com

BOIES, SCHILLER & FLEXNER LLP
David Boies
David A. Barrett
Nicholas A. Gravante, Jr.
Steven I. Froot
575 Lexington Avenue
New York, NY 10022
Tel.: (212) 446-2300

Attorneys for Interested Non-Party Appellants the Exchange Bondholder Group

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11,620 words.

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 proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: December 28, 2012

By: /s/ Sean F. O'Shea

Sean F. O'Shea
Michael E. Petrella
Daniel M. Hibshoosh
O'SHEA PARTNERS LLP
521 Fifth Avenue, 25th Floor
New York, New York 10175
Tel.: (212) 682-4426
soshea@osheapartners.com

BOIES, SCHILLER & FLEXNER LLP
David Boies
David A. Barrett
Nicholas A. Gravante, Jr.
Steven I. Froot
575 Lexington Avenue
New York, NY 10022
Tel.: (212) 446-2300

Attorneys for Interested Non-Party Appellants the Exchange Bondholder Group