12-105-cv(L),

12-109-cv (CON), 12-111-cv (CON), 12-157-cv (CON), 12-158-cv (CON), 12-163-cv (CON), 12-164-cv (CON), 12-170-cv (CON), 12-176-cv (CON), 12-185-cv (CON), 12-189-cv (CON), 12-214-cv (CON), 12-909-cv (CON), 12-914-cv (CON), 12-916-cv (CON), 12-919-cv (CON), 12-920-cv (CON), 12-923-cv (CON), 12-924-cv (CON), 12-926-cv (CON), 12-939-cv (CON),

United States Court Of Appeals
for the
Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., BLUE ANGEL CAPITAL, I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VERALA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL

(caption continued on inside cover)

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

BRIEF OF THE AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING NONPARTY THE BANK OF NEW YORK MELLON

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Plaintiffs-Appellees,

– v. –

REPUBLIC OF ARGENTINA,

Defendant-Appellant,

THE BANK OF NEW YORK MELLON, as Indenture Trustee,
EXCHANGE BONDHOLDER GROUP,
ICE CANYON LLC, FINTECH ADVISORY INC.,

Nonparty-Appellants,

EURO BONDHOLDERS,

Intervenors.

CORPORATE DISCLOSURE STATEMENT

Amicus curiae the American Bankers Association states that it is not a subsidiary of any corporation and that no publicly held corporation owns more than 10% of its stock.

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INTEREST OF *AMICUS CURIAE*

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its two million employees.[1] ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all forms of consumer financial services, often appears as *amicus curiae* in litigation that affects the banking industry. The decision of the Court in this case will have substantial implications for ABA members, some of whom regularly act as indenture trustees. ABA members provide more than 95 percent of corporate trust services in the U.S. and are significant participants in the global market for corporate trust services.

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. This brief is filed in conjunction with a motion for leave to file pursuant to Rule 29(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

I. As this Court has recognized, indenture trustees serve a critical role in the national banking system by providing a necessary mechanism for the financing of corporate and, as here, sovereign debt. The defining characteristic of an indenture trustee is that its obligations are defined solely by the terms of the indenture agreement. Having the duties of indenture trustees set by the four corners of the indenture agreement provides certainty that is essential to all participants in the financing process.

II. Federal Rule of Civil Procedure 65(d) authorizes a court to issue injunctions, but it carefully circumscribes that authority with respect to third parties. As relevant here, Rule 65(d) provides that an injunction may "bind[]" only "persons who are in active concert or participation" with parties and their officers, agents, or employees. And a stranger to the litigation acts in "active concert or participation" with a party only when it is either a successor to or an aider and abettor of a party. Here, because The Bank of New York Mellon ("BNYM"), serving as the Indenture Trustee, is neither a successor nor an aider and abettor, it is not properly subject to an injunction designed to coerce conduct by Argentina.

Permitting an injunction directed at the Indenture Trustee in these circumstances would not only exceed judicial authority, but it would estab-

lish dangerous precedent that could jeopardize the proper functioning of debt trustees. Parties to financing agreements rely upon the ability—and, indeed, the obligation—of debt trustees to make contractually required payments to bond holders. Permitting injunctions against these trustees that preclude them fulfilling their pre-existing obligations whenever expedient to enforce a judgment against the debtor will have significantly adverse consequences for the financial system.

III. If the Court nevertheless concludes that the Indenture Trustee in this case may be subject to an injunction intended to ensure compliance by Argentina, it is essential that the Court make clear that the Trustee may not become liable to third parties by complying with the injunction. Indenture trustees are innocent parties that serve an essential role in the financial system. Thus, it is imperative that any rule adopted by the Court provide assurance that compliance with the Injunction here triggers the exculpatory clauses of the indenture that relieve the Indenture Trustee of liability. Absent such a determination, indenture trustees in circumstances such as those in this case will be exposed to competing legal claims, an outcome that is fundamentally unfair to entities serving as trustees and that will impose uncertainty and expense on future transactions making use of indentures.

ARGUMENT

I. Trust Indentures Serve A Vital Role In The Financial System.

As this Court has previously explained, "[t]rust indentures are important mechanisms for servicing corporate debt." *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 815 (2d Cir. 1985). Through these indentures, "banks play an essential role in the process that brings corporate financings to the public market." *Id.* By "establishing a trust to hold a security interest for the benefit of bondholders or other creditors," the trust indenture "performs a very useful business function." Myron Kove et al., *Bogert's Trusts and Trustees* § 250. Because many bonds are "sold to numerous investors who are scattered over the country (if not throughout the world)," "[i]t would be wholly impractical to have the security run to the group of bondholders directly or to have a separate security instrument for each bondholder." *Id.* Absent a trust indenture, there would be "crippling complexity in the execution and enforcement of the security." *Id.*

The defining characteristic of an indenture trustee is that, "[u]nlike the ordinary trustee, who has historic common-law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement." *Meckel*, 758 F.2d at 816. It is "well-established

under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture." *Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988); *see also Hazzard v. Chase Nat'l Bank*, 287 N.Y.S. 541 (Sup. Ct. N.Y. Cnty. 1936), *aff'd*, 14 N.Y.S.2d (1st Dep't 1939), *aff'd per curiam*, 26 N.E. 801 (N.Y. 1940).

Creating uncertainty about the obligations of indenture trustees, however, will have the predictable effect of discouraging entities from serving in that capacity, making investors fear the prospect that trustees will be precluded from making contractually required payments, and accordingly increasing transaction costs for all involved. Debt indentures rely upon standard terms with uniform application; injecting uncertainty into that structure "would decrease the value of all debenture issues and greatly impair the efficient working of capital markets." *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982). Plainly, "uncertainties would vastly increase the risks and, therefore, the costs of borrowing with no offsetting benefits either in the capital market or in the administration of justice." *Id.* For this reason, the Court has "consistently rejected the imposition of additional duties on the trustee in light of the special relationship that the trustee already has with both the issu-

er and the debenture holders under the indenture." *Elliott Assocs.*, 838 F.2d at 71.

In sum, indenture trustees—like those at issue in this case—play a significant role in corporate and sovereign debt financing. Consistent with that role, the obligations of indenture trustees are solely those defined by the indenture itself. Imposing any additional rights, or creating uncertainty as to the duties of indenture trustees, would risk causing significant adverse consequences for the financial system.

II. The Indenture Trustee In This Case Should Not Be Subject To The Injunction.

It is against this background that the district court in this case issued the injunction that purports to run against BNYM. Although Rule 65 permits a court to enter injunctive relief against third parties, the scope of that authority is substantially limited. A court may enter injunctive relief only against third parties that are successors to, or aiders and abettors of, parties directly involved in the litigation. This rule is an essential limitation on the power of the courts—and the district court's order here both disregards central elements of Rule 65 and misunderstands the clear role of indenture trustees.

A. The district court's finding that the Indenture Trustee is subject to injunctive relief under Rule 65 departs from the Rule's plain terms.

Rule 65, by its terms, applies only to entities "who are in active concert or participation" with the parties themselves, or with their "officers, agents, servants, employees, and attorneys." In this context, "active concert or participation" means either (1) "successors in interest to parties named in the injunction with respect to the subject matter of the injunction" or (2) third parties that "aid or abet the named parties *in a concerted attempt* to subvert" the "proscriptions" of the injunction. *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 91 F.3d 914, 919 (7th Cir. 1996) (emphasis added); *see also Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 129-30 (2d Cir. 1979).

This limitation of Rule 65 is an essential check on the power of the judiciary: Although it is "well settled law" that "a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt," a court "cannot lawfully enjoin the world at large, no matter how broadly it words its decree." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d 1930) (L. Hand, J.). Thus, "the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because

it may have gone too far, but what it has power to forbid, an act of a party." *Id.* at 833. "This means that" the third party "must either abet the defendant, or must be legally identified with him." *Id.* As a consequence, in the Supreme Court's words, a court "may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945). *See also Heyman v. Kline*, 444 F.2d 65, 65-66 (2d Cir. 1971).

In holding that the Rule's standard is satisfied here and that the Indenture Trustee is subject to the injunction in this case, the district court stated simply and conclusorily that the Indenture Trustee "surely [is] 'in active concert or participation'" with Argentina. *NML Capital, Ltd. v. Republic of Argentina*, No. 08-cv-6978, Dkt. No. 424, at *11 (S.D.N.Y. Nov. 21, 2012) ("D. Ct. Op."). But the court provided no basis for this declaration. The lack of analysis is unsurprising, as there is no basis for the conclusion: the Indenture Trustee is neither a successor to nor an aider and abettor of Argentina.

Here, it has not been, and could not be, suggested that the Indenture Trustee, BNYM, is a successor in interest to Argentina. The trustee acts at arms length, and its duties run to the Exchange Bond holders.

Nor does the Indenture Trustee aid and abet Argentina. An aider and abettor must "associate" itself with the underlying party's wrongful behavior and must "participate[] in" that activity "as something that [it] wished to bring about." *SEC v. Apuzzo*, 689 F.3d 204, 214 (2d Cir. 2012). Such a showing is not possible here; there is absolutely no evidence or reason to believe that BNYM "wished" to bring about or assist the purportedly wrongful goals of Argentina. To the contrary, the Indenture Trustee seeks simply to execute contractual obligations entered into *before* Argentina engaged in the actions challenged in this suit. Given these pre-existing contractual obligations, the most that the Indenture Trustee can be accused of doing is *inaction*—that is, failing to alter its pre-injunction behavior. But "[i]naction on the part of the alleged aider and abettor ordinarily should not be treated as substantial assistance, except when it was designed intentionally to aid the primary fraud or it was in conscious and reckless violation of a duty to act." *Armstrong v. McAlpin*, 699 F.2d 79, 91 (2d Cir. 1983). Here, inaction is not *designed* or *intended* to assist Argentina in any way, nor is it a violation of any duty to act; the Indenture Trustee's conduct is simply the product of pre-existing contractual duties.

B. The district court's approach improperly expands the scope of Rule 65.

Rather than look to the terms of Rule 65 and their application in the circumstances of this case, the district court simply declared that the effectiveness of the injunction *against Argentina* would be facilitated by applying the injunction to third parties involved in the process of making payments on the Exchange Bonds. D. Ct. Op. 9. In several fundamental respects, that approach eliminates essential limitations on the scope of injunctive relief.

First, the approach taken below permits a court to *presume* that entities act "in active concert or cooperation" without any evidentiary basis for that belief. The district court concluded that the Indenture Trustee "surely" qualifies as "in active concert or participation" with Argentina simply by operation of the clearing system. D. Ct. Op. 10-11. This analysis substituted a presumption of cooperation for an evidentiary showing.

But that approach is flatly prohibited by Rule 65. The Seventh Circuit, for example, rejected such a presumption by a district court, finding that it "is essential" that a third party be "given an opportunity to present evidence" "before any enforcement action may be taken against a non-litigant." *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 767 (7th Cir. 2007); *see also Amari Co. v. Burgess*,

546 F. Supp. 2d 571, 582 (N.D. Ill. 2008) ("Even assuming that Defendants conceded that IPA is an alter ego of the individual Defendants (which they do not), IPA would still be entitled to notice and an opportunity to be heard before it could properly be enjoined from enforcing its confidentiality agreements."). If the relationship between a defendant and an unrelated third party could be merely presumed by a district court, Rule 65(d)'s carefully circumscribed limitations would disappear.

Second, by examining solely whether application of the injunction to the Indenture Trustee would help facilitate the injunction's effectiveness against Argentina, the court improperly employed a result-driven analysis. It reasoned that the Indenture Trustee *must* be within the power of the court because, otherwise, "the Injunctions will be entirely for naught." D. Ct. Op. 9. But considerations of the efficacy of a judgment against a party do not alone authorize a court to issue injunctive relief against a non-party.

In *Thompson v. Freeman*, 648 F.2d 1144, 1147-48 (8th Cir. 1981), for example, the Eighth Circuit held that an injunction against a third party could not be justified on just such utilitarian grounds. There, in agreeing with private plaintiffs that a state agency failed to timely process applications for certain benefits, the district court required the federal Depart-

ment of Health and Human Services ("HHS") to monitor the state agency. *Id.* at 1146-47. But the Eighth Circuit reversed, holding that "ineffectiveness" of the injunction absent inclusion of HHS "does not alone amount to 'active concert or participation'" between HHS and the state agency within the meaning of Rule 65—even though there were "ample grounds to believe that HHS has been lax in enforcing its regulations." *Id.* at 1148.

Rather than permitting expansive enforcement against third parties on the basis of expediency, Rule 65(d) ensures that the "scope of injunctions cannot be boundless." *Lynch v. Rank*, 639 F. Supp. 69, 74 (N.D. Cal. 1985). For this reason, "courts must be careful not to resort to fictional conspiracies" to bring conduct within the ambit of an injunction. *Id.* And here, nothing indicates that the Indenture Trustee entered into any sort of agreement with Argentina either to engage in wrongful conduct or to interfere with enforcement of the injunction against Argentina.

Third, the order below flouts the principle that "past contractual relationship[s]" cannot be sufficient to bring conduct within the scope of Rule 65(d). *Paramount Pictures Corp. v. Carol Pub'lg Group, Inc.*, 25 F. Supp. 2d 372, 375-76 (S.D.N.Y. 1998), *aff'd*, 181 F.3d 83 (2d Cir. 1999) (table). Here, as has been explained, the sole relationship between Argentina and the Indenture Trustee stems from contractual obligations that existed

prior to and wholly apart from Argentina's current recalcitrance. If that connection were enough to subject the Indenture Trustee to an injunction, the result would be both novel and sweeping.

For example, in *Paramount Pictures*, a movie studio sued a publisher for copyright infringement and obtained an injunction against the production and sale of a particular work. 25 F. Supp. 2d at 373. Because the publisher had already distributed the work to non-party distributors and retailers, the studio also sought an injunction against those parties. The court rejected that claim, reasoning that an injunction does not "reach backwards in time to action taken prior to the time it was issued." *Id.* at 375. As the rights of the retailers and distributors "became final before the entry of the injunction," they could not be "shown to be in 'active concert or participation'" with the publisher. *Id.* at 375-76. Thus, their conduct fell outside the scope of Rule 65(d).

That same limitation applies here. The rights and duties of the Indenture Trustee were settled by contractual agreements entered into long before the conduct of Argentina giving rise to the instant injunction. In simply adhering to existing rights and duties, the Indenture Trustee is not acting wrongfully—and therefore is not subject to an injunction designed to compel conduct by a different entity.

C. Placing the Indenture Trustee within the scope of Rule 65 would disrupt otherwise settled expectations and create considerable uncertainty in the financial system.

As we have explained, a critical feature of an indenture trustee is that its rights are set solely within the four corners of the indenture. *See*, *supra*, at 4-6. In this context, reading Rule 65 to subject trustees to the terms of an injunction as a mechanism for assisting enforcement of a judgment against a corporate or sovereign creditor would invite courts to impose extensive extra-contractual obligations on indenture trustees in a potentially wide range of circumstances—with baleful consequences for the financial system.

This is not a far-fetched prospect. For example, the ABA currently is aware of a U.S. issuer of corporate debt that has defaulted on certain bonds with an interest rate of 7.5%. That issuer, like Argentina here, offered exchange bonds paying a rate of 2%. Many bondholders accepted the exchange bonds at the lower rate of interest, while others did not. Under the approach taken below, holders of the defaulted bonds could seek a remedy against the trustee that administers the exchange bonds. But that would depart from the terms of the indenture, placing the obligations of the trustee in substantial jeopardy.

And it does not take much imagination to conceive of many other circumstances in which litigants will argue that indenture trustees should be required to assist in the enforcement of judgments against one party or another—a prospect that will, at the least, encourage wasteful and expensive litigation, and that at worst will require indenture trustees to depart from the terms of the controlling contracts, with all of the adverse consequences discussed above. The Court should avoid these dangers by adhering to the plain terms of Rule 65.

III. If The Indenture Trustee Is Subject To The Injunction, Compliance With The Injunction Should Not Subject The Trustee To Liability.

For the reasons just explained, the injunction in this case should not apply to the Indenture Trustee. But to the extent that the Court disagrees and holds that the Indenture Trustee is properly subject to the injunction, the Court should make clear that the Trustee's compliance with the injunction may not give rise to independent legal claims against it. Absent such a clear determination of the Indenture Trustee's status, the Trustee may be subject to competing legal claims: it may be compelled to adhere to the injunction on one hand, and to execute its pre-existing contractual obligations on the other. This Court has the authority to resolve such uncertainty by determining that compliance with the Injunction is *per se* lawful

behavior that is not subject to further challenge. Doing so will ensure that the rights of innocent third parties are properly protected and will prevent needless and costly subsequent litigation in this case.

A court's authority to issue an injunction under Rule 65 involves an exercise of the court's equitable powers. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). And fundamental to the exercise of those powers is the "principle that in determining the appropriate scope of an injunction the judge must give due weight to the injunction's possible effect on innocent third parties." *Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 744 (7th Cir. 2003); *see also Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.").

Accordingly, "the courts retain their normal powers to withhold the issuance of an injunction that would * * * impose unnecessary costs on innocent third parties." *United States v. Michaud*, 907 F.2d 750, 758 (7th Cir. 1990); *see also NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) ("The issuance of an injunction is the exercise of an equitable power, and is subject to the equitable constraints that have evolved over centuries in recognition of the heavy costs that injunctions can im-

pose (including costs to innocent third parties) and the potential severities of contempt."). By the same token, the RICO statute specifically requires a court issuing an injunction to make "due provision for the rights of innocent persons." 18 U.S.C. § 1964(a); *see also Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 236 (6th Cir. 2007) (in context of the Copyright Act, "when the relief sought will work an unjust hardship * * * upon innocent third parties, the courts, as a co-equal branch of the federal government, must ensure that judgments never envisioned by the legislative drafters are not allowed to stand" (emphasis omitted)).

Here, should an injunction issue against the Indenture Trustee, the Court should invoke this fundamental principle of equity to confirm that the Indenture Trustee will be held harmless for complying with the injunction's terms. Such an understanding would follow from the language of the indentures involved here, which provide that the Indenture Trustee shall not undertake any act that is "illegal or contrary to applicable law or regulation." SPE-662 (§ 5.2(xx)). An injunctive order that the Trustee may not engage in specified acts necessarily will rest on a determination that those acts would be "contrary to applicable law." By expressly making this point, the Court would properly, and equitably, ensure that compliance by the

Indenture Trustee with the injunction will not expose it to competing claims from Exchange Bond holders.

CONCLUSION

The Court should conclude that the Indenture Trustee is not within the scope of Rule 65 and thus may not be subject to the injunction issued by the district court in this case. In the alternative, the Court should make clear that the Indenture Trustee may not be liable to third parties for complying with the injunction.

Respectfully submitted,

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Dated: January 4, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 3,817 words, including footnotes; and

(ii) 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).

/s/ *Paul W. Hughes*
Paul W. Hughes

Dated: January 4, 2013

CERTIFICATE OF SERVICE

I certify that on January 4, 2013, I served the foregoing Brief of *Amicus Curiae* on all counsel via the Court's ECF system.

/s/ *Paul W. Hughes*
Paul W. Hughes