12-105-cv(L)

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

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

(*caption continued on inside cover*)

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

SUPPLEMENTAL BRIEF FOR *AMICI CURIAE* PROFESSOR RONALD MANN AND EM LTD. IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Attorneys for Amicus Curiae EM Ltd.

PROFESSOR RONALD MANN
435 West 116th Street
New York, New York 10027
(212) 854-1570

Amicus Curiae

—against—

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

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

Non-Party Appellants,

EURO BONDHOLDERS,

Intervenor.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel state that *amicus curiae* EM Ltd. is not publicly traded and has no corporate parent, and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE INJUNCTIONS DO NOT CONFLICT WITH ARTICLE 4A OF THE UCC BECAUSE THEY DO NOT PURPORT TO REACH INTERMEDIARY BANKS. 5

A. ARTICLE 4A PERMITS CREDITORS TO REACH ASSETS IN THE HANDS OF ORIGINATORS, BENEFICIARIES, AND THEIR BANKS, BUT FORBIDS COLLECTION ACTIVITY DIRECTED AT INTERMEDIARY BANKS 6

B. THE INJUNCTIONS DO NOT PURPORT TO REACH INTERMEDIARY BANKS. 12

II. THE DECISION BELOW IS CONSISTENT WITH *JALDHI*. 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Aqua Stoli Shipping Ltd. v. Gardner Smith PTY Ltd.,
460 F.3d 434 (2d Cir. 2006) 18

Consub Delaware LLC v. Schahin Engenharia Limitada,
543 F.3d 104 (2d Cir. 2008) 18

Grain Traders, Inc. v. Citibank, N.A.,
160 F.3d 97 (2d Cir. 1998) 7,18-20

Winter Storm Shipping, Ltd. v. TPI,
310 F.3d 263 (2d Cir. 2002) 4-5, 17-19

The Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.,
585 F.3d 58 (2d Cir. 2009) 4, 17

STATUTES

UCC Article 4A .... *passim*

UCC § 4A-102 comment. 6

UCC § 4A-103 .... 6, 7

UCC § 4A-104 .... 6, 7

UCC § 4A-104 comment 1 .... 6, 7

UCC § 4A-406 6

UCC § 4A-502 (February 1989 Draft) 11

UCC § 4A-502 .... 8, 9, 10-12, 15

UCC § 4A-502 comment 4 .... 9, 10, 13, 18, 19

UCC § 4A-502 comment 4 (April 1989 Draft) 12

UCC § 4A-503 .... 9-10, 14-15 20

UCC § 4A-503 comment 10

OTHER AUTHORITIES

12 C.F.R. § 210.25(b)(1) 5

Federal Rule of Civil Procedure 65 16

2 Cir. R. 29.1 1

James J. White & Robert S. Summers,
Uniform Commercial Code 951-56 (6th ed. 2010) 7

Benjamin Geva,
The Law of Electronic Funds Transfers 2.24-.28 (2012) 7

With the Court's leave, Professor Ronald Mann and EM Ltd. ("EM") submit this brief as *amici curiae* supporting affirmance of the November 21, 2012 opinion and related orders (collectively, the "Injunctions") of the U.S. District Court for the Southern District of New York entered by the Honorable Thomas P. Griesa (the "District Court") enjoining Argentina from violating the "Equal Treatment Provision" contained in Paragraph 1(c) of the Fiscal Agency Agreement ("FAA") that governs the debt instruments held by Plaintiffs-Appellees, and requiring Argentina to honor its payment obligations to Plaintiffs-Appellees to the same extent it honors its payment obligations to creditors that participated in Argentina's restructurings. The Injunctions were entered on remand following this Court's October 26, 2012 decision with respect to, among other rulings, the injunctions entered by the District Court on February 23, 2012.[1]

INTEREST OF *AMICI CURIAE*

Ronald Mann is the Albert E. Cinelli Enterprise Professor in Law and the Co-Director of the Charles E. Gerber Program in Transactional Studies at Columbia Law School. He has written and taught extensively about wire transfers for decades. In addition to his scholarship and teaching in the area, he is a member

[1] This Court previously granted leave for the undersigned *amici* to participate in the briefing of this matter. Pursuant to Local Rule 29.1, no party's counsel authored this brief in whole or in part; and no person, other than *amici* or their counsel, contributed money that was intended to fund preparing or submitting this brief.

of the American Law Institute and served as the Reporter for the most recently appointed Drafting Committee with responsibility for Article 4A of the Uniform Commercial Code ("UCC"). His interest in appropriate explication of the laws related to wire transfer systems is longstanding; he filed a similar brief in the earlier appeal of this matter to this Court (Docket No. 374, filed on May 24, 2012, Nos. 12-105(L), etc., decided October 26, 2012). The exaggerated assertions in the materials filed in the present appeal by the Republic of Argentina and Fintech Advisory Inc. ("Fintech"), as well as those in the District Court on remand by the Federal Reserve Bank of New York ("Federal Reserve"), give Professor Mann a particularly strong interest in providing this Court with a more balanced perspective on the UCC issues raised by this case.

EM has invested in the secondary sovereign debt market in New York and obtained in the District Court a judgment against the Republic of Argentina ("Argentina"). *See EM Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG). The debt instruments underlying EM's judgment were issued pursuant to the same FAA at issue in this appeal, which involves application in the pre-judgment context of the Equal Treatment Provision. Since the District Court has not yet been asked to address whether the Equal Treatment Provision can be used to enforce an existing judgment, EM is not a party to this appeal and currently has no direct financial interest in its outcome. EM has an interest in all of the issues presented

by this appeal, because EM believes that the Equal Treatment Provision applies with identical force in the post-judgment context, and because those issues are of exceptional importance to sovereign debt enforcement litigation.[2]

SUMMARY OF ARGUMENT

Considering New York's critical position as a global financial center, a threat of inappropriate transgression into the largely insulated interior of funds transfer systems would impose incalculable costs on the community. The Injunctions present no such threat.

More generally, the stability and enforceability of the rule of law is a foundational institution for New York's continuing success as a global financial center. It is no less important for this Court to facilitate the enforcement of commercial obligations than it is for the Court to limit the burdens of enforcement to parties with appropriate ties to the underlying obligations. The Injunctions steer far clear of the properly sheltered internal working of the wire transfer system. The contrary arguments of Argentina and Fintech before this Court, in addition to those asserted on remand in the District Court by the Federal Reserve, offer no basis for reversal or vacatur of the Injunctions. We write solely to respond to those

[2] Professor Mann expresses no opinion about any aspect of this appeal except as set forth in this brief. EM joins by reference the additional arguments made by Plaintiffs-Appellees supporting affirmance.

assertions, providing a more careful assessment of the relation between the Injunctions and the legal framework for wire transfers. We offer two brief points.[3]

First, we explain the consistency between the Injunctions and UCC Article 4A. Article 4A does not ban *all* creditor process that may implicate wire transfers. To the contrary, it adopts a comprehensive framework that explicitly describes both the collection strategies that are consistent with the statute and those that violate the statute. Generally, it permits processes, like the Injunctions now on appeal, directed to the "real-world" parties that are sending and receiving funds, as well as their banks. By contrast, it rejects processes (unlike the Injunctions) directed at wholly "intermediary" banks, whose activity in the "backbone" of the wire transfer system involves no direct contact with the real-world parties sending and receiving funds.

Second, to allay any concerns that the Injunctions might pose a *Winter Storm* problem, we analyze the logical flaws in the decision of the *Winter Storm* panel that led to its rejection seven years later in *Jaldhi*.[4] In general, the conceptual flaw

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[3] We note that no factual or legal developments have caused Section I.A (summary of the relevant provisions of UCC Article 4A) and Section II (discussion of this Court's decisions in *Winter Storm* and *Jaldhi*) to change materially from our prior brief. These sections are reproduced below for the Court's convenience and to provide appropriate context for Section I.B.

[4] We refer to *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *overruled by The Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 61-68 (2d Cir. 2009).

of *Winter Storm* was its holding that an intermediary bank held property belonging to the parties to the funds transfer. *Jaldhi's* rejection of that error underscores the impropriety of an injunction directed at intermediary banks, but it is irrelevant in a case like this one, which limits enforcement to the parties sending and receiving bond payments.

ARGUMENT

I. THE INJUNCTIONS DO NOT CONFLICT WITH ARTICLE 4A OF THE UCC BECAUSE THEY DO NOT PURPORT TO REACH INTERMEDIARY BANKS.

We start by situating the Injunctions against the applicable law of the relevant payment system (UCC Article 4A).[5] To that end, we first summarize the carefully crafted provisions of Article 4A that specify when and how creditors properly can proceed against parties to transfers governed by that statute. We then examine the terms of the Injunctions to illustrate their consistency with the principles of Article 4A.

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[5] New York has adopted Article 4A of the Uniform Commercial Code as Article 4-A of New York's Uniform Commercial Code. Similarly, the Board of Governors of the Federal Reserve System has incorporated Article 4A into the Federal Reserve's Regulation J to govern transfers through the Fedwire system. 12 C.F.R. § 210.25(b)(1). Because the relevant provisions in the different versions are the same, this brief refers for convenience to the official version of the Uniform Commercial Code promulgated by the American Law Institute and the Uniform Law Commission (formerly known as the National Conference of Commissioners on Uniform State Laws).

A. ARTICLE 4A PERMITS CREDITORS TO REACH ASSETS IN THE HANDS OF ORIGINATORS, BENEFICIARIES, AND THEIR BANKS, BUT FORBIDS COLLECTION ACTIVITY DIRECTED AT INTERMEDIARY BANKS.

Because the drafters of Article 4A had the luxury of "writ[ing] on a clean slate," they were able to craft a "unique" and novel framework for governing wire transfers. UCC § 4A-102 comment. The framework depends on two major concepts: the funds transfer and the payment order. A funds transfer is the "real-world" transaction that calls upon the wire transfer system. In the language of Article 4A, it is sent from an originator (the party making the payment) to a beneficiary (the party receiving payment).[6] Completion of the funds transfer discharges the obligation of the originator to the beneficiary.[7]

Each funds transfer consists of a number of "payment orders," each of which is sent from a "sender" to a "receiving bank."[8] When the originator is not a bank, the first payment order is sent from the originator to the originator's bank.[9] If the originator's bank is not also the beneficiary's bank, the transfer will involve one or more additional payment orders until a final payment order reaches the beneficiary's bank. Commonly, and especially in cross-border transfers, a funds

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6 *See* UCC §§ 4A-103(a)(2), 4A-104(a), 4A-104(c); 4A-104 comment 1.

7 *See* UCC § 4A-406.

8 *See* UCC §§ 4A-103(a)(1), (4), (5), 4A-104(a).

9 *See* UCC § 4A-104(c), (d).

transfer will include payment orders sent to one or more banks between the originator's bank and the beneficiary's bank, "intermediary banks" in the language of Article 4A.[10]

That framework creates a distinction between the parties that play a role in the overarching funds transfer (the originator, the beneficiary, and their respective banks) and those whose role is limited to processing of payment orders internal to the wire-transfer system (the intermediary banks). The payment-order regime functions by creating specific responsibilities at the payment-order level. Thus, an intermediary bank's liability is ordinarily limited to its responsibility as a receiving bank on a payment order from one bank and as a sender on a payment order to another bank. The originator, beneficiary, and their banks, by contrast, have rights and duties related to the obligation for which the funds transfer is sent.

This distinction undergirds the holding in this Court's justly celebrated decision in *Grain Traders*, that intermediary banks ordinarily have no responsibility to any party with whom they have not directly dealt. *Grain Traders,*

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[10] *See* UCC § 4A-104(b). *See generally* 4A-104 comment 1 ("[A] payment under Article 4A involves an overall transaction, the funds transfer, in which the originator * * * is making payment to the beneficiary * * *, but the funds transfer may encompass a series of payment orders that are issued in order to effect the payment initiated by the originator's payment order."); *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 100 (2d Cir. 1998); James J. White & Robert S. Summers, Uniform Commercial Code 951-56 (6th ed. 2010); Benjamin Geva, The Law of Electronic Funds Transfers 2.24-.28 (2012).

Inc. v. Citibank, N.A., 160 F.3d 97, 101-02 (2d Cir. 1998). As the Court explained there:

> [T]here are sound policy reasons for limiting [rights of recourse against a receiving bank] to the sender who directly paid the receiving bank. * * * To allow a party to, in effect, skip over the bank with which it dealt directly, and go to the next bank in the chain * * * would require intermediary banks to investigate the financial circumstances and various legal relations of the other parties to the transfer. These are matters as to which an intermediary bank ordinarily should not have to be concerned.

160 F.3d at 102.

Notwithstanding the protections for intermediary banks, nobody has ever supposed that the presence of a funds transfer or a payment order in a transaction insulated the participants from their general obligation to comply with judicial decrees. To the contrary, the drafters recognized the likelihood that creditors would want to reach funds flowing through the system. Thus, the statute explicitly describes, and confines, the proper bounds of those efforts.

For example, Section 4A-502(d) describes the appropriate process for the creditor of a beneficiary and suggests that the correct action is to look to the assets in the hands of the beneficiary's bank. The Official Comment to that provision offers a more expansive tripartite summary: (1) creditors of the originator should look to the originator's bank, which is the only bank with assets of the originator, (2) creditors of the beneficiary should look to the beneficiary's bank, the only bank

obligated to the beneficiary,[11] and (3) neither group of creditors should look to the intermediary banks, because those banks are obligated to neither the originator nor the beneficiary. UCC § 4A-502 comment 4.

Similarly, UCC § 4A-503 considers the possibility that creditors will not move affirmatively to acquire funds from parties involved in the payments process, but will seek instead to enjoin the process. Again, like Section 4A-502, the provision explicitly defines categories of permitted and prohibited collection activity:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

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[11] At first glance, it might seem odd that a creditor of a beneficiary cannot use a writ of garnishment to attach assets at the bank of an originator, when the originator is indebted to the beneficiary. But that creditor's writ of garnishment should reach only those indebted to the beneficiary (such as the originator). The point of Section 4A-502(d)'s restrictions on the strategies of a beneficiary's creditor is that the funds in the originator's account represent a debt that the originator's bank owes to the originator (not to the beneficiary). Even when the originator has sent a payment order to the originator's bank initiating a funds transfer to the beneficiary, the funds are not yet owed to the beneficiary, and thus are not yet subject to garnishment (or other process) of the beneficiary's creditor.

UCC § 4A-503. As with Section 4A-502, the only categorical prohibitions relate to intermediary banks. *See* UCC § 4A-503 comment ("In particular, intermediary banks are protected.").

The boundaries that those provisions draw are not arbitrary happenstance. Rather, they flow naturally from the conceptual framework described above. Because the person initiating a funds transfer might have obligations to third parties with regard to the funds being used for the payment, it makes sense that a creditor of the originator could reach those funds (UCC § 4A-502 comment 4 sentence 4) or that a court could restrain the dissipation of those funds (UCC § 4A-503(i), (ii)). Similarly, because a third party might have a claim to the funds sent to the beneficiary, a court just as naturally could allow a creditor to reach those funds when they appear at the beneficiary's bank (UCC § 4A-502(d)[12]) or restrain the release of those funds from that bank (UCC § 4A-503(iii)). Because intermediary banks have no obligations directly to the parties to the funds transfer, creditors of those parties can impose no obligations on intermediary banks. Hence, it makes no sense for courts to interfere with them at all (UCC §§ 4A-502(d) (last sentence), 4A-503 (last sentence)).

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[12] *See also* UCC § 4A-502(c) (procedure for beneficiary's banks responding to garnishment of beneficiary).

The drafting history of Article 4A underscores that point.[13] The earliest draft to consider the interface between creditors and the funds transfer system included a broad provision protecting all banks except the beneficiary's bank, with no suggestion (even in the comment) of other possibilities. UCC § 4A-502(4) (February 1989 Draft) ("The proper party to receive creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer is the beneficiary's bank. Any other party to a funds transfer served with such creditor process is not obliged to act with respect to the process."). But the drafters quickly recognized the overbreadth of that provision, which had failed to consider the possibility that creditors of an originator might seek relief against parties involved in funds transfers. Thus, the very next draft added two sentences to the proposed comment, quite similar to the language in existing law, emphasizing the proper scope of relief for creditors of the originator. This newly added language explained: "A creditor of the originator can levy on the account of the originator in the originator's bank, but that levy is subject to the limitations stated in [the predecessor to UCC § 4A-502(b)]. Except for the account that is debited, no

[13] The materials discussed in this paragraph are available in the NCCUSL Archives in the Special Collections Department at the Biddle Law Library at the University of Pennsylvania Law School. For the convenience of the Court, we reproduce the relevant materials in an Appendix to this brief.

property of the originator is involved in the funds transfer." UCC § 4A-502 comment 4 (April 1989 Draft).

The history, like the text, contemplates a coherent two-step framework for managing creditor process: (1) relief is readily available against the assets of originators and beneficiaries, at the banks with which they deal; (2) relief is not available against wholly intermediary banks, because they hold assets of neither the originators nor the beneficiaries.

B. THE INJUNCTIONS DO NOT PURPORT TO REACH INTERMEDIARY BANKS.

Read against that backdrop, the Injunctions are not in the least bit controversial. As clarified in response to this Court's earlier decision, the Injunctions explicitly except intermediary banks from their application: "Nothing in this ORDER shall be construed to extend to the conduct or actions of a third party acting solely in its capacity as an 'intermediary bank,' under Article 4A * * * , implementing a funds transfer in connection with the Exchange Bonds." Amended February 23, 2012 Order, dated November 21, 2012 ¶ 2(g) (Supplemental Appendix ("SPE") 1383).

In light of that clarification, there is no substantial basis for concern under Article 4A. Although there was some uncertainty at the time of the earlier appeal, the structure of the payments is now clear, involving two separate sets of funds transfers: one from Argentina (as originator) to Bank of New York ("BNY") as

beneficiary, and then a second transfer from BNY (as originator) to the Depository Trust Company ("DTC") (as beneficiary). *See* Brief of the Defendant-Appellant the Republic of Argentina, dated December 28, 2012 ("Argentina Br.") 35 (conceding that "BNYM initiates its *separate* funds transfer to distribute payment to the exchange bondholders"); *see also* Trust Indenture ¶ 3.5(a) (SPE 650); Declaration of Kevin Binnie, dated November 16, 2012, ¶ 12 (SPE 625). Argentina's concession and the record make it clear that Fintech's argument (Brief for Non-Party Appellant Fintech Advisory Inc., dated December 28, 2012 ("Fintech Br.") 30-33) rests on an erroneous factual premise—that it is the beneficiary of a funds transfer originated by Argentina.

Thus, the Injunctions will operate in the first instance upon the funds transfer that runs from Argentina to BNY. To be clear, the reason that this payment is itself a funds transfer (rather than a payment order that is a part of a larger transfer) is because Argentina sends the funds to satisfy a financial obligation to BNY: the bond indenture obligates Argentina to provide funds on a periodic basis to BNY so that BNY can distribute them to the registered holders of the bonds, who in turn distribute them to the beneficial owners of interests in the bonds.[14]

[14] The same analysis would apply if Argentina instead sent funds directly to some other party to the bond transaction (such as the registered holders of the bonds or the beneficial owners). In either case, the party to whom the funds were being sent would be the beneficiary; nothing in Article 4A would constrain process that reached the beneficiary or the financial institution at which its

Because BNY is a "Participant" under the Injunctions, and is not operating as an intermediary bank with respect to the funds transfer from Argentina, nothing in Article 4A suggests any problem with injunctions that prevent BNY from sending the funds on to the recipients. Specifically, clause (iii) of UCC § 4A-503 explicitly permits application of the Injunctions to prevent BNY as beneficiary of the first transfer from taking any steps to withdraw or transfer funds from the first transfer. Similarly, clauses (i) and (ii) of UCC § 4A-503 would permit application of the Injunctions to bar BNY from initiating a funds transfer to send those funds onward.

Argentina argues (Argentina Br. 33-40) that the Injunctions violate Article 4A, but its broad assertions are so general that they fail to specify any concern cognizable under that statute. Although it acknowledges that BNY is the beneficiary of a funds transfer that it originates (Argentina Br. 35), it fails to wrestle with the devastating consequences of that concession for its position.

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funds were held. Although Fintech argues (erroneously) that Argentina is sending funds transfers directly to the beneficial owners (Fintech Br. 30-33), it likely would be difficult (if not impossible) for Argentina to make a funds transfer directly to the beneficial owners; because of trading of the beneficial interests, Argentina would be unlikely to have timely information about the identities and bank account information for those entities and individuals. That of course is why bond issues typically adopt the structure presented here, in which a bond trustee or registered owner receives funds from the issuer and distributes them to the entities that hold beneficial interests at the time of each payment.

Rather, its argument rests almost entirely on the premise that process based on an obligation of the originator can be directed only to the originator and its bank. *See* Argentina Br. 34-35 (arguing that "*all* 'creditor process' must be directed only *to the bank of the party that owes the creditor the debt*"), and 37-38 (suggesting it is "absurd" to restrain banks holding property not belonging to Argentina).

But as summarized above this is plainly incorrect. Article 4A-503, as quoted by Argentina at page 34 of its brief, explicitly authorizes injunctive relief that (like the Injunctions on appeal) bars a beneficiary's bank (like BNY) from releasing funds it has received by wire transfer. If, as here, the purpose of such injunctive relief is to prevent the completion of a transfer that was initiated in violation of a court's order to the originator, the relief seems routine and sensible.

The fundamental problem with Argentina's argument is that it ignores the critical distinction in Article 4A between orders that restrain a transfer (governed by UCC § 4A-503) and those that attach funds (governed by UCC § 4A-502). The order in this question does not attach the funds; it merely enjoins the completion of the payment. *See* Injunctions ¶¶ 2(d), (e) (SPE 1382). Because it merely enjoins completion of the payment, it is explicitly authorized by Article 4A even if it does apply to beneficiary's banks. *See* UCC § 4A-503(iii) (authorizing an order that

"restrain[s] * * * the beneficiary's bank from releasing funds to the beneficiary.").[15]

Argentina also argues (Argentina Br. 36) that the Injunctions reach "numerous other entities in the chain of payment to the exchange bondholders." But it ignores the reality that those institutions would be protected if they were operating as intermediary banks (as some of them surely would be). And it also ignores the factual reality that the funds would never leave BNY's hands because the Injunctions will keep the funds in the hands of the BNY (which Argentina agrees is a beneficiary, not an intermediary bank).[16]

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[15] The Federal Reserve in the District Court noted the possibility under UCC § 4A-406 that the funds transfer might discharge Argentina's obligation to the payment recipients even if the recipients never receive payment. Declaration of Kevin S. Reed, dated November 19, 2012, Exhibit H (SPE 1303). We fail to understand why this presents a problem. If Argentina attempts to transfer funds to recipients within the jurisdiction of the District Court, in flagrant violation of the District Court's Injunctions, it does not seem anomalous that the District Court could prevent completion of the transfer even if it harms the recipients. In any event, any such concern would arise under Fed. R. Civ. P. 65 or other law, not Article 4A.

[16] To be sure, if – notwithstanding the Injunctions – BNY were to transfer the funds onward (perhaps to DTC or the registered bondholders), Article 4A would permit the Injunctions to prohibit withdrawal or application of the funds by the recipients of those transfers. Because the recipients of those second-stage transfers would be the "beneficiaries" of those transfers for purposes of Article 4A, application of the Injunctions to them and their banks (where the funds were received) would be permitted for the same reasons as discussed above for the first-stage transfer to BNY.

More broadly, Argentina suggests that the scope of the affected payments will have broad effects on the payment system that are inconsistent with public policy and the spirit of Article 4A. (Argentina Br. 38-40) As a factual argument, that is quite exaggerated. As discussed above, the Injunctions should apply directly to the funds transfer from Argentina to BNY. Under the form of bonds, Argentina is obligated to make that transfer on a specified day. *See* SPE 1190, ¶ 2(a). Given the amount of money at stake and the attention the litigation has received, it hardly imposes an unreasonable burden on the payment system for BNY to observe that periodic transfer and retain the funds in question. Moreover, even if a large number of funds transfers were involved, it seems to us to say less about the Injunctions' interference with the funds transfer system than it does about the difficulties that face a financial institution handling the affairs of an entity the size of Argentina that is committed to routine contravention of the judgment of a federal court.

II. THE DECISION BELOW IS CONSISTENT WITH *JALDHI*.

Argentina also suggests repeatedly that the Injunctions run afoul of the problems that ensued upon the decision in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002). (Argentina Br. 35-36) But in fact the Injunctions are much more consistent with the understandings of the *Jaldhi* Court (*Shipping Corp.*

of India v. Jaldhi Overseas PTE Ltd., 585 F.3d 58, 61-68 (2d Cir. 2009) (overruling *Winter Storm*)) than it is with the ill-fated *Winter Storm* decision.

The central flaw of *Winter Storm* was its failure to recognize the hermetic separation of the rights of parties in the outside "real" world – the originators and beneficiaries of funds transfers – from the obligations of intermediary banks within the black box of the funds transfer system. By treating funds at intermediary banks as subject to attachment based on the conduct of originators and beneficiaries – with whom the intermediary banks had never dealt – the *Winter Storm* panel undermined the basic framework of Article 4A. Specifically, and with all due respect, the *Winter Storm* panel erred in treating funds in the hands of the intermediary bank as property of the defendant, *Winter Storm*, 310 F.3d at 276-78; *see Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104, 108-13 (2d Cir. 2008) (repeating that error).

Neither *Winter Storm* nor *Consub Delaware* can sensibly be reconciled with the recognition in *Grain Traders* (summarized above) that the intermediary bank is responsible only to its sender and receiving bank. *See Grain Traders*, 160 F.3d at 101-02; *see also Aqua Stoli Shipping Ltd. v. Gardner Smith PTY Ltd.*, 460 F.3d 434, 445 n.6 (2d Cir. 2006) (criticizing *Winter Storm* on that basis).

The *Jaldhi* Court's retreat from *Winter Storm* reflected a renewed understanding and embrace of the Article 4A framework. Specifically, the *Jaldhi*

Court returned to the emphasis, first articulated clearly in *Grain Traders*, on the step-by-step structure of Article 4A obligations: the internal parties to a transfer give and receive obligations only to and from their counterparties on their respective payment orders. Explaining that the specific error of the *Winter Storm* panel was its assumption that intermediary banks hold property of the originator or beneficiary, the *Jaldhi* Court overruled *Winter Storm* based on the structure of UCC Article 4A, which makes it clear intermediary banks hold no such thing. *Jaldhi*, 585 F.3d at 68-71 ("'[U]ntil the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer * * * .'") (quoting UCC § 4A-502 comment 4); *see* Permanent Editorial Board for the Uniform Commercial Code, PEB Commentary No. 16, at 2 (July 1, 2009) ("[C]redits in an intermediary bank * * * are not property of either the originator or the beneficiary.").

To put it colloquially, *Winter Storm* erred in treating the wire transfer system as a pipe, in which funds flow directly from the originator to the beneficiary, capable of interception at any point. *Jaldhi* rests on an understanding of the wire transfer system as more like a transporter (of *Star Trek* vintage), in which the originator's funds leave the beginning point (the originator's bank) and appear at the destination (the beneficiary's bank), without traversing the space between. *See* UCC § 4A-502 comment 4 ("A creditor of the originator * * * cannot reach [funds

that are no longer at the originator's bank] because no property of the originator is being transferred.").

Thus, *Jaldhi* did not overrule *Winter Storm* because of a free-floating need to insulate wire transfers from lawful process. It reversed the specific conclusion of *Winter Storm* that creditor process can extend all the way to the backbone institutions transmitting the payments behind the scenes. *Jaldhi* documents the importance of understanding the precise obligations of the parties to funds transfers and payment orders, and ensuring that creditor process is limited to assets and obligations of the relevant parties.

Viewed through the *Jaldhi/Grain Traders* lens, the Injunctions are not in the least objectionable. In relevant part, they address only the parties that are processing payments on Argentina's bonds. If Argentina or BNY wishes to distribute those funds by wire transfer, the Injunctions' prohibition of that activity is a pedestrian application of UCC § 4A-503. If the Injunctions were extended to intermediary banks, which ordinarily would have no reason to realize they are processing or facilitating payments sent by BNY, it would contravene Article 4A. But of course the Injunctions by their express terms do not reach intermediary banks.

CONCLUSION

We submit, respectfully, that with regard to the issues addressed in this brief, the Injunctions should be affirmed.

Dated: New York, New York
January 4, 2013

Respectfully submitted,

/s/ Ronald Mann
Professor Ronald Mann
435 West 116th Street
New York NY 10027
(212) 854-1570
Amicus Curiae

/s/ David W. Rivkin
David W. Rivkin
Suzanne M. Grosso
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
Attorneys for Amicus Curiae *EM Ltd.*

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1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i) because this brief contains 7,885 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/ David W. Rivkin
David W. Rivkin
Suzanne M. Grosso
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
Attorneys for Amicus Curiae *EM Ltd.*

APPENDIX

§ 4A-502. CREDITOR PROCESS SERVED ON RECEIVING BANK; SETOFF BY BENEFICIARY'S BANK

(1) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(2) If a receiving bank accepts a payment order and debits the account of the sender, the resulting reduction in the account balance is effective notwithstanding service of creditor process with respect to the account, unless the creditor process is served at a time and in a manner affording the receiver a reasonable opportunity to act on it before the bank accepts the payment order.

(3) This subsection applies if a beneficiary's bank has received a payment order and has credited the beneficiary's account with respect to the order.

(a) Until the payment order is accepted, the amount credited to the beneficiary's account (i) may not be set off against an obligation owed by the beneficiary to the bank, and (ii) may not be applied to satisfy creditor process served on the bank with respect to the account.

(b) The bank may allow withdrawal of the amount credited to the account unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(c) If creditor process with respect to the account is served on the bank before the payment order is accepted, the bank may not reject the order except for a reason unrelated to the service of process.

(4) The proper party to receive creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer is the beneficiary's bank. Any other party to a funds transfer served with such creditor process is not obliged to act with respect to the process.

COMMENT

1. Under subsection (2) if a receiving bank accepts a payment order and debits the sender's account, the debit takes precedence over a garnishment of the sender's account if the garnishment was not served in a time and manner to allow

the bank to act on it before accepting the order. The ration-ale is obvious. In accepting the payment order the bank may have relied on a credit balance in the sender's account. Under subsection (2) time must be allowed for notice of the service of creditor process to be received by personnel of the bank responsible for the acceptance.

2. Subsection (3) deals with payment orders issued to the beneficiary's bank. The bank may credit the beneficiary's account when the order is received, but under Section 4A-405(1) the bank incurs no obligation to pay the beneficiary until the order is accepted pursuant to Section 4A-207(2). Thus, before acceptance, the credit to the beneficiary's account is provisional. Subsection (3)(a) states that until acceptance occurs, the credit can't be set off against an obligation owed to the bank. This follows because until acceptance the credit does not represent an obligation owed by the bank. If the payment order was accepted when received, as in the case of a Fedwire, the bank could set off immediately. But if the beneficiary's bank receives a payment order from an intermediary bank which had not yet paid the order when it was received, the bank can wait until acceptance occurs by receipt of payment (Section 4A-207(2)(b)) and then set off. As an alternative the bank could set off after accepting the order by notifying the beneficiary under Section 4A-207(2)(a).

The same principle applies to creditor process. Subsection (3)(a) also states that the credit to the beneficiary's account cannot be applied to the creditor process until acceptance. In some states a garnishment applies only to the amounts owed by the bank to the debtor at the time of garnishment. Under that kind of statute, garnishment before the payment order was accepted would not apply to the amount represented by the order even though a provisional credit to the beneficiary's account had been made, because until acceptance nothing is owed to the beneficiary. And, the garnishment would not apply to the credit if the payment order is accepted later. In other states, the law provides that the garnishment applies to debts of the bank to the debtor arising after service is made. In those states, the levy or garnishment will reach the amount represented by the payment order if it is accepted after service is made. Both subsection (3)(a) and (b) apply to this type of statute. Although the creditor process does not apply to the amount credited to the beneficiary's account until the order is accepted, acceptance normally will occur in ordinary course, unless the bank rejects the order. Normally there is no reason for a beneficiary's bank to reject a payment order, but if the beneficiary's account is garnished, the bank may be faced with a difficult choice. If it rejects the order, the garnishing creditor's potential recovery of funds of the beneficiary is frustrated. It may be faced with a claim by the creditor that the

rejection was a wrong to the creditor. If the bank accepts the order, the effect is to allow the creditor to seize funds of its customer, the beneficiary. Subsection (3)(c) gives the bank no choice in this case. It provides that it may not favor its customer over the creditor by rejecting the order. The beneficiary's bank may rightfully reject only if there is an independent basis for rejection.

3. Subsection (3)(b) is similar to subsection (2). Normally the beneficiary's bank will release funds to the beneficiary shortly after acceptance or it will accept by releasing funds. Since the bank is bound by a garnishment order served before funds are released to the beneficiary, the bank might suffer a loss if funds were released without knowledge that a particular garnishment order had been served. Subsection (3)(b) protects the bank if it did not have adequate notice of the garnishment when the funds were released.

4. A creditor may want to intercept a funds transfer. The creditor may try to do so by serving process on the originator's bank, an intermediary bank or the beneficiary's bank. The purpose of subsection (4) is to guide the creditor and the court as to the proper method of reaching the funds. Since a funds transfer is simply a process for causing the beneficiary's bank to incur an obligation to the beneficiary, the funds can be reached by the creditor only by serving creditor process on the beneficiary's bank.

5. "Creditor process" is defined in subsection (1) to cover a variety of devices by which a creditor of the holder of a bank account or a claimant to a bank account can seize the account. Procedure and nomenclature varies widely from state to state. The term used in Section 4A-502 is a generic term.

§ 4A-502. CREDITOR PROCESS SERVED ON RECEIVING BANK; SETOFF BY BENEFICIARY'S BANK

(1) As used in this section, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account.

(2) If a receiving bank accepts a payment order and debits the account of the sender, the resulting reduction in the account balance is effective notwithstanding service of creditor process with respect to the account, unless the creditor process is served at a time and in a manner affording the receiver a reasonable opportunity to act on it before the bank accepts the payment order.

(3) This subsection applies if a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank.

(a) The bank may credit the beneficiary's account and the amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account.

(b) The bank may credit the beneficiary's account and may al-low withdrawal of the amount credited to the account unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal.

(c) If creditor process with respect to the account is served, the bank may not reject the payment order except for a reason unrelated to the service of process.

(4) The proper party to receive creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer is the beneficiary's bank. Any other bank served with such creditor process is not obliged to act with respect to the process.

COMMENT

1. Under subsection (2) if a receiving bank accepts a payment order and debits the sender's account, the debit takes precedence over a garnishment of the sender's account if the garnishment was not served in a time and manner to allow the bank to act on it before accepting the order. The ration-ale is obvious. In

accepting the payment order the bank may have relied on a credit balance in the sender's account. Under subsection (2) time must be allowed for notice of the service of creditor process to be received by personnel of the bank responsible for the acceptance.

2. Subsection (3) deals with payment orders issued to the beneficiary's bank. The bank may credit the beneficiary's account when the order is received, but under Section 4A-404(1) the bank incurs no obligation to pay the beneficiary until the order is accepted pursuant to Section 4A-207(2). Thus, before acceptance, the credit to the beneficiary's account is provisional. But under Section 4A-207(2) acceptance occurs if the beneficiary's bank pays the beneficiary pursuant to Section 4A-405(1). Under that provision, payment occurs if the credit to the beneficiary's account is applied to a debt of the beneficiary. Subsection (3)(a) allows the bank to credit the beneficiary's account with respect to a payment order and to accept the order by setting off the credit against an obligation owed to the bank or applying the credit to creditor process with respect to the account.

In some states a garnishment applies only to the amounts owed by the bank to the debtor at the time of garnishment. Under that kind of statute, garnishment before the payment order was accepted would not apply to the amount represented by the order even though a provisional credit to the beneficiary's account had been made, because until acceptance nothing is owed to the beneficiary. And, the garnishment would not apply to the credit if the payment order is accepted later. In other states, the law provides that the garnishment applies to debts of the bank to the debtor arising after ser-vice is made. In those states, the levy or garnishment will reach the amount represented by the payment order if it is accepted after service is made. Al-though the creditor process does not apply to the amount credited to the beneficiary's account until the order is accepted, acceptance normally will occur in ordinary course, unless the bank rejects the order. Normally there is no reason for a beneficiary's bank to reject a payment order, but if the beneficiary's account is garnished, the bank may be faced with a difficult choice. If it rejects the order, the garnishing creditor's potential recovery of funds of the beneficiary is frustrated. It may be faced with a claim by the creditor that the rejection was a wrong to the creditor. If the bank accepts the order, the effect is to allow the creditor to seize funds of its customer, the beneficiary. Subsection (3)(c) gives the bank no choice in this case. It provides that it may not favor its customer over the creditor by rejecting the order. The beneficiary's bank may rightfully reject only if there is an independent basis for rejection.

3. Subsection (3)(b) is similar to subsection (2). Normally the beneficiary's bank will release funds to the beneficiary shortly after acceptance or it will accept by releasing funds. Since the bank is bound by a garnishment order served before funds are released to the beneficiary, the bank might suffer a loss if funds were released without knowledge that a particular garnishment order had been served. Subsection (3)(b) protects the bank if it did not have adequate notice of the garnishment when the funds were released.

4. A creditor may want to intercept a funds transfer. The creditor may try to do so by serving process on the originator's bank, an intermediary bank or the beneficiary's bank. The purpose of subsection (4) is to guide the creditor and the court as to the proper method of reaching the funds. Since a funds transfer is simply a process for causing the beneficiary's bank to incur an obligation to the beneficiary, the funds transfer cannot be intercepted by creditor process. A creditor of the originator can levy on the account of the originator in the originator's bank, but that levy is subject to the limitations stated in subsection (2). Except for the account that is debited, no property of the originator is involved in the funds transfer. The beneficiary has no property interest in the funds transfer until the funds transfer is completed, i.e. when the beneficiary's bank incurs an obligation to the beneficiary by accepting a payment order for the benefit of the beneficiary. A creditor of the beneficiary that wants to reach the funds to be received by the beneficiary must serve creditor process on the beneficiary's bank to reach the obligation of the beneficiary's bank to pay the beneficiary which arises upon acceptance by the beneficiary's bank under Section 4A-404(1).

5. "Creditor process" is defined in subsection (1) to cover a variety of devices by which a creditor of the holder of a bank account or a claimant to a bank account can seize the account. Procedure and nomenclature varies widely from state to state. The term used in Section 4A-502 is a generic term.

Case: 12-105 Document: 703 Page: 36 01/04/2013 808562 38

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12-105-cv(L)

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Carmine D. Boccuzzi, Jr.
Christopher P. Moore
Cleary Gottlieb Steen & Hamilton LLP
1 Liberty Plaza
New York, NY 10006
212-225-2000

Jonathan I. Blackman
Cleary Gottlieb Steen & Hamilton LLP
City Place House
55 Basinghall Street
London, EC2V 5EH
England
+442076142200

Attorneys for Defendant-Appellant
The Republic of Argentina

Theodore B. Olson
Matthew McGill
Jason J. Mendro
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
202-887-3680

Robert A. Cohen
Dechert LLP
1095 Avenue of the Americas
New York, New York 10036
212-698-3501

Attorneys for Plaintiff-Appellee
NML Capital, Ltd.

Barry Robert Ostrager
Kimberly A. Hamm
Tyler B. Robinson
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017
212-455-2000

Melissa Kelly Driscoll
Menz Bonner & Komar LLP
444 Madison Avenue, 39th Floor
New York, NY 10022
212-223-2100

Edward A. Friedman
Andrew W. Goldwater
Jessica Murzyn
Daniel B. Rapport
Emily A. Stubbs
Friedman Kaplan Seiler & Adelman LLP
7 Times Square
New York, NY 10036
212-833-1100

Jeffrey A. Lamken
MoloLamken LLP
600 New Hampshire Avenue
Washington, DC 20037
202-556-2010

Walter Rieman
Paul, Weiss, Rifkind, Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
212-373-3260

Attorneys for Plaintiffs-Appellees
Aurelius Capital Master , Ltd., ACP Master , Ltd., Blue Angel Capital I LLC, Aurelius Opportunities Fund II, LLC

Jeannette Anne Vargas
Assistant U.S. Attorney
United States Attorney's Office
for the Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
212-637-2678

Attorneys for Amicus Curiae
United States of America

Sergio J. Galvis
Joseph E. Neuhaus
Michael J. Ushkow
Sullivan & Cromwell LLP
125 Broad Street
New York, New York 10004
212- 558-4000

Attorneys for Amicus Curiae
The Clearing House Association L.L.C

Andrew W. Amend
Walter Rieman
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue of the Americas
New York, NY 10019
212-373-3000

Attorneys for Movants
Montreaux Partners L.P. and Wilton Capital

Richard Abbott Samp
Washington Legal Foundation
2009 Massachusetts Avenue
202-588-0302

Movant

Gary Steven Snitow
Michael Champlin Spencer
Milberg LLP
1 Pennsylvania Plaza, 48th Floor
New York, NY 10119
212-594-5300

Attorneys for Plaintiffs-Appellees
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

Stephen D. Poss
Robert D. Carroll
Goodwin Procter LLP
53 State Street
Boston, MA 02109
617-570-1000

Attorneys for Plaintiff-Appellee
Olifant Fund, Ltd.

Kevin S. Reed
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
212-849-7000

Attorneys for Movant
Kenneth W. Dam

Joel M. Miller
Miller & Wrubel P.C.
570 Lexington Avenue, 25th Floor
New York, NY 10022
212-336-3501

Attorneys for Movants
Luis A. Erize, Martin E. Paolantoni and Estela B. Sacristan,

I certify that an electronic copy was uploaded to the Court's electronic filing system. Six hard copies of the foregoing Supplemental Brief for *Amici Curiae* Professor Ronald Mann and EM Ltd. in Support of Plaintiffs-Appellees and Affirmance were sent to the Clerk's Office By Hand Delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 4th day of January 2013.

/s/ Ramiro Honeywell
Ramiro Honeywell