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)

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,

-v.-

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF *AMICI CURIAE* MONTREUX PARTNERS, L.P. AND WILTON CAPITAL IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

Jack L. Goldsmith III
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 894-9003
jgoldsmith@law.harvard.edu

Judd B. Grossman
590 Madison Avenue, 18th Floor
New York, New York 10022
(646) 770-7445
jgrossman@grossmanllp.com

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 ("Rule 26.1"), *amici curiae* provide the following disclosures.

Amicus curiae Montreux Partners, L.P., states that it is a limited partnership organized and existing under the laws of the State of Delaware; that it is not a corporation; that it therefore is not a nongovernmental corporate party for purposes of Rule 26.1; and that Rule 26.1 does not require any disclosures with respect to it.

Amicus curiae Wilton Capital states that it is an exempted company with limited liability incorporated in the Cayman Islands; that Montreux Partners II, L.P. is the parent of, and directly owns 100% of the stock of, Wilton Capital; and that no publicly held corporation owns 10% or more, directly or indirectly, of the stock of Wilton Capital.

Table of Contents

Page

Corporate Disclosure Statement i

Table of Authorities iv

Statement of Interest of Amici Curiae 1

Statement of the Case 3

Introduction and Summary of Argument 6

Argument 11

I. The District Court Correctly Applied Federal Rule of Civil Procedure 65(d)(2)(C) to Determine That BNY Would Be in "Active Concert or Participation" with Argentina if It Processes Argentina's Illegal Payments to the Exchange Bondholders 11

A. Rule 65(d)(2)(C) Requires a Non-Party with Notice of an Injunction to Avoid "Active Concert or Participation" with an Enjoined Party 11

B. BNY Would Be in "Active Concert or Participation" with Argentina Under Rule 65(d)(2)(C) if It Processes Argentina's Illegal Payments to the Exchange Bondholders 15

i. The Legal Standard for "Active Concert or Participation" Is Not "Substantial Assistance" 16

ii. BNY's Involvement in the Payment Chain Between Argentina and the Exchange Bondholders Is More Than "Mere Receipt" and Clearly Constitutes "Active Concert or Participation" 19

iii. BNY's Independent Interests Are Irrelevant to Whether It Is in "Active Concert or Participation" with Argentina 23

II. The District Court's Amended Order Did Not Enjoin BNY and Does Not Violate the Due Process Clause 27

A. The District Court's Amended Order Did Not Enjoin BNY 28

B. The District Court's Amended Order Does Not Violate Due Process 29

Conclusion 35

Certificate of Compliance with Rule 32(A)(7)(B) 36

Table of Authorities

Page(s)

Cases

Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.,
96 F.3d 1390 (Fed. Cir. 1996) 24

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

Eli Lilly & Co. v. Gottstein,
617 F.3d 186 (2d Cir. 2010) 24, 32

Goya Foods, Inc. v. Wallack Mgmt. Co.,
290 F.3d 63 (1st Cir. 2002) 19

Heyman v. Kline,
444 F.2d 65 (2d Cir. 1971) 24

Microsystems Software, Inc. v. Scandinavia Online AB,
226 F.3d 35 (1st Cir. 2000) 30, 32

N.Y. State Nat'l Org. for Women v. Terry,
961 F.2d 390 (2d Cir. 1992), *vacated on other grounds*,
41 F.3d 794 (2d Cir. 1994) 18, 25

NLRB v. Blackstone Mfg. Co.,
123 F.2d 633 (2d Cir. 1941) 18, 31

NML Capital, Ltd. v. Republic of Arg.,
No. 08-cv-06978-TPG (S.D.N.Y. entered Nov. 21, 2012) ..... passim

NML Capital, Ltd. v. Republic of Arg.,
699 F.3d 246 (2d Cir. 2012) 3, 4, 11, 29

Patsy's Italian Rest., Inc. v. Banas,
658 F.3d 254 (2d Cir. 2011) 11, 18

Regal Knitwear Co. v. NLRB.,
324 U.S. 9 (1945) ..... passim

Reliance Ins. Co. v. Mast Constr. Co.,
84 F.3d. 372 (10th Cir. 1996) 19, 22, 25

SEC v. Homa,
514 F.3d 661 (7th Cir. 2008) 19

United States v. Porhownik,
182 F.2d 829 (2d Cir. 1950) 19

Vuitton et Fils S.A. v. Carousel Handbags,
592 F.2d 126 (2d Cir. 1979) 14, 19

Statutes

Clayton Act § 19, ch. 323, 38 Stat. 730, 738 (1914) (repealed 1948) 13

Foreign Sovereign Immunities Act of 1976 sec. 4, § 1609,
28 U.S.C. § 1609 (2006) 4

Rules

Fed. R. App. P. 29(c)(5) 1

Fed. R. Civ. P. 65 ..... passim

Fed. R. Civ. P. 65(d) 17, 18, 31

Fed. R. Civ. P. 65(d)(2) ..... passim

Fed. R. Civ. P. 65(d)(2)(A) 13

Fed. R. Civ. P. 65(d)(2)(B) 11, 13, 14, 26

Fed. R. Civ. P. 65(d)(2)(C) ..... passim

Local Rule 29.1(b) 1

Other Authorities

11A Charles Alan Wright, et al., *Federal Practice and Procedure*
§ 2956 (2d ed. 1995) 15, 30

Webster's Third New International Dictionary 470 (1993) 17

Montreux Partners, L.P. and Wilton Capital respectfully submit this brief as *amici curiae* in support of affirmance.[1]

Statement of Interest of Amici Curiae

Amici curiae Montreux Partners, L.P. and Wilton Capital (collectively, "Montreux") are investors in sovereign debt. Montreux therefore has a keen interest in the resolution of the questions presented by these consolidated appeals in a manner consistent with relevant law and procedure governing sovereign debt, and with principles of fairness to creditors.

Montreux also has a more specific interest stemming from its investment in bonds issued by the Republic of Argentina ("Argentina") pursuant to the same Fiscal Agency Agreement ("FAA") whose provisions are at the center of these appeals. To date, Montreux

[1] Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), *amici curiae* state that this brief was not authored in whole or in part by counsel for any party; that no party or its counsel contributed money that was intended to fund preparing or submitting this brief; and that no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief.

has obtained judgments under these FAA Bonds against Argentina in a combined total in excess of $150 million.[2]

During the first round of appeals, this Court granted Montreux leave to file a brief as *amici curiae* regarding the proper interpretation of the FAA's *Pari Passu* Clause. *See NML Capital, Ltd. v. Republic of Arg.*, No. 12-105-cv (L) (2d Cir. entered May 21, 2012) (order granting motion for leave to file *amicus* brief); Brief of *Amici Curiae* Montreux Partners, L.P., *NML*, No. 12-105-cv (L) (2d Cir. filed Apr. 17, 2012).

Montreux also has an interest in this second round of appeals, which concerns questions about the meaning and scope of the District Court's amended injunctions against Argentina. In particular, Montreux has a substantial interest in the injunctions' application to any non-parties "who are in active concert or participation" with Argentina in handling Argentina's payments to the Exchange

[2] *See Montreux Partners, L.P. v. Republic of Arg.*, No. 1:05-cv-04239-TPG (S.D.N.Y. entered May 29, 2009) (judgment); *Wilton Capital, Ltd. v. Republic of Arg.*, No. 1:07-cv-01797-TPG (S.D.N.Y. entered May 29, 2009) (judgment); *Wilton Capital v. Republic of Arg.*, No. 1:09-cv-00401-TPG (S.D.N.Y. entered June 26, 2009) (amended judgment).

Bondholders, *see* Fed. R. Civ. P. 65(d)(2)(C), for this issue affects creditors' rights generally and may also become relevant in subsequent District Court proceedings concerning the rights of post-judgment creditors.

Statement of the Case

On October 26, 2012, this Court affirmed the District Court's summary judgment ruling that Argentina breached the *Pari Passu* Clause in the FAA Bonds by ranking its payment obligations under those Bonds below its payment obligations under the 2005 and 2010 Exchange Bonds. *See NML Capital, Ltd. v. Republic of Arg.,* 699 F.3d 246, 257-61 (2d Cir. 2012) ("Opinion"). The Court also affirmed the District Court's injunctions, which ordered Argentina to make a "Ratable Payment" to Plaintiffs under the FAA "concurrently or in advance" of any payments it makes under the Exchange Bonds. *Id.* at 261-64. Of note, the Court found "no abuse of discretion in the injunctive relief fashioned by the district court." *Id.* at 250. It explained that the District Court was well within the law to order specific performance in light of "Argentina's continual disregard for the rights of its FAA creditors and the judgments of our courts to whose

jurisdiction it has submitted." *Id.* at 262. The Court also ruled that the injunctions were consistent with the Foreign Sovereign Immunities Act of 1976, *see* 28 U.S.C. § 1609, and determined that the District Court likewise did not abuse its discretion in balancing equities and the public interest in Plaintiffs' favor. 699 F.3d at 262-64.

The Court remanded the case to the District Court on two issues. First, it asked the District Court to elucidate how it intended the Ratable Payment formula to operate. *Id.* at 255. Second, it sought clarity on the scope of the injunctions under Rule 65(d)(2)(C). *Id.* at 264-65. On the latter issue, the Court noted that in anticipation of Argentina's violation of the injunctions, the District Court had ordered that copies of the injunctions be provided to "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds." *Id.* at 255. The Court stated that such parties "could include Argentina's agent-banks located in New York" that process payments from Argentina to the Exchange Bondholders. *Id.* It also acknowledged that under Rule 65(d)(2), the District Court's injunctions bind "'officers, agents, servants, employees, and attorneys,' as well as 'other persons who are in

active concert or participation with' them" or a party. *Id*. However, the Court sought clarification whether the injunctions applied to pure intermediary banks. *Id.* at 264. It also expressed "confusion" about how the injunctions "apply to third parties generally," and stated that "the district court should more precisely determine the third parties to which the Injunctions will apply." *Id.*

On November 21, 2012, the District Court followed the Court's instructions in an Opinion and an Amended Order. *See NML*, No. 08-cv-06978-TPG (S.D.N.Y. entered Nov. 21, 2012) (Doc. 251) ("Remand Opinion"); *NML*, No. 08-cv-06978-TPG (Doc. 252) (S.D.N.Y. entered Nov. 21, 2012) ("Amended Order"). The Amended Order clarified the Ratable Payment formula, listed the non-party "participants" covered by operation of Rule 65(d)(2)(C), and excluded "intermediary banks" pursuant to Article 4A of the U.C.C. Amended Order ¶¶ 2(b)-(c), (f), (g). In its Remand Opinion, the District Court stated that although the "participants" were probably not all agents of Argentina, "they surely are [under Federal Rule of Civil Procedure 65(d)(2)(C)] 'in active concert or participation' with Argentina in processing the payments from Argentina to the exchange bondholders."

Remand Opinion 11. It also rejected the argument by Bank of New York Mellon ("BNY"), a non-party "participant," that its status as Indenture trustee excluded it from the injunction. *Id*. The District Court reasoned that if Argentina defied the injunctions and illegally sought to make payments to the Exchange Bondholders, "this would not involve the normal and proper situation dealt with by BNY under the Indenture, and dealt with by others in the chain." *Id.* at 11-12. In these circumstances, it added, "these third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation, and they should avoid taking such steps." *Id*. at 12.

Introduction and Summary of Argument

These consolidated appeals present residual questions about the District Court's injunctions against Argentina and their application under Rule 65(d)(2)(C) of the Federal Rules of Civil Procedure to certain non-parties. *Amici curiae* file this brief to assist the Court in its interpretation of Rule 65(d)(2)(C). The brief will set forth the governing legal framework of Rule 65(d)(2)(C) and explain why the District Court properly adhered to it. It will also respond to the contentions about

Rule 65(d)(2)(C) made by Argentina and the Non-Party Appellants.[3] The brief gives particular attention to the arguments made by Non-Party Appellant BNY, which is the first entity in the payment chain between Argentina and the Exchange Bondholders, and which devotes most of its brief to the Rule 65(d)(2)(C) issue.[4]

Rule 65(d)(2)(C) protects the integrity of injunctions by preventing enjoined parties from circumventing them with the aid of non-parties. The Rule accomplishes its aim by imposing a self-executing duty on any non-party with actual notice of the injunction to avoid "active concert or participation" with the enjoined party. This duty arises regardless of whether the non-party is served or identified

---

[3] Brief of Defendant-Appellant Republic of Argentina, *NML*, No. 12-105-cv (L) (2d Cir. filed Dec. 28, 2012) ("Argentina Brief"); Brief for Non-Party Appellant Bank of New York Mellon, as Indenture Trustee, *NML*, No. 12-105-cv (L) (2d Cir. filed Dec. 28, 2012) ("BNY Brief"); Brief for Non-Party Appellants Exchange Bondholder Group, *NML*, No. 12-105-cv (L) (2d Cir. filed Dec. 28, 2012) ("EBG Brief"); Brief for Non-Party Appellant Fintech Advisory Inc., *NML*, No. 12-105-cv (L) (2d Cir. filed Dec. 28, 2012) ("Fintech Brief").

[4] The District Court stated that BNY is the first entity in the payment chain between Argentina and the Exchange Bondholders. *See* Remand Opinion 10. *Amici* will assume this is so in responding to BNY's arguments. But the analysis below relies on principles that should govern all entities in the payment chain other than the "intermediary banks" excluded under ¶ 2(g) of the Amended Order.

by the court, and the non-party can be held in contempt if it is shown in a contempt proceeding to have been "in active concert or participation" with the enjoined party. As a result, BNY has a duty under Rule 65(d)(2)(C) to avoid "active concert or participation" with Argentina's expected violation of the injunctions.

The relevant violation of the injunctions for purposes of this case is not, as BNY claims, Argentina's failure to pay the FAA Bondholders. It is, rather, Argentina's payments to the Exchange Bondholders without also making proper payments to the FAA Bondholders. Since BNY would clearly "participate" in this latter transaction, the District Court correctly concluded that BNY would violate its duties under Rule 65(d)(2)(C) if it processed the payments in the absence of certification that Argentina had so paid the FAA Bondholders.

BNY seeks to escape this conclusion by proposing a novel "substantial assistance" test for determining which non-party acts constitute "active concert or participation" with an enjoined party. BNY would meet even this test because Argentina cannot successfully violate the injunctions without BNY's substantial assistance. But more

importantly, the proposed "substantial assistance" test has no basis in the language of Rule 65 or this Court's precedents. Instead, the well-settled test under Rule 65(d)(2)(C) is that a non-party engages "in active concert or participation" when it *takes part in* the enjoined party's violations—something BNY would clearly do if it processes Argentina's illegal payments to the Exchange Bondholders. BNY also argues for an exception to Rule 65(d)(2)(C) based on its independent duties and interests. This Court's precedents reject such an exception, however, and insist that it is the fact of "active concert or participation," and not the motivation for action, that matters.

BNY further argues that the District Court's "injunction against non-party BNY" violates the Due Process Clause of the United States Constitution. The fundamental problem with this argument is that the District Court did not in fact enjoin BNY. The District Court's Original Order[5] enjoined only Argentina, and it required Argentina to notify unspecified non-parties who process Exchange Bond payments that they are bound by the injunctions by independent operation of Rule

[5] *NML*, No. 08-cv-06978-TPG (S.D.N.Y. entered Feb. 23, 2012) ("Original Order").

65(d)(2). After this Court requested that the District Court "more precisely determine the third parties to which the Injunctions will apply," the District Court listed in its Amended Order the non-parties it believed were bound by operation of Rule 65(d)(2)(C). But the District Court never purported to enjoin any non-party.

Moreover, regardless of whether the Amended Order is characterized as a specification of the non-parties bound under Rule 65(d)(2)(C) or a new injunction under that Rule, it does not violate the Due Process Clause. Non-parties' Due Process rights under the Rule are fully protected in contempt proceedings. Contrary to BNY's representations, the District Court's decision under Rule 65(d)(2)(C) followed standard procedures, exercised no contempt power, punished no one, and did not deprive BNY of its day in court. BNY retains the prerogative to process Argentina's payments under the Exchange Bonds and test the legality of its actions in a contempt proceeding where its Due Process rights would be fully protected.

Argument

I. The District Court Correctly Applied Federal Rule of Civil Procedure 65(d)(2)(C) to Determine That BNY Would Be in "Active Concert or Participation" with Argentina if It Processes Argentina's Illegal Payments to the Exchange Bondholders

The District Court's determination that BNY would be "in active concert or participation" with Argentina if it processes payments from Argentina to the Exchange Bondholders is a proper application of Rule 65(d)(2)(C) that easily satisfies the abuse of discretion standard governing appellate review of injunctions. *See Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 272-273 (2d Cir. 2011).[6]

A. Rule 65(d)(2)(C) Requires a Non-Party with Notice of an Injunction to Avoid "Active Concert or Participation" with an Enjoined Party

Rule 65(d)(2) codifies the common law on the scope of injunctions. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). The most influential common-law decision on the scope of injunctions, and an important touchstone today for understanding Rule 65(d)(2) and

[6] Some of the non-parties covered by the District Court's injunctions may be agents of Argentina who are bound by the injunctions under Rule 65(d)(2)(B). *See* Opinion, 699 F.3d at 255; Remand Opinion 11. However, because the District Court relied on Rule 65(d)(2)(C), and because that provision suffices to uphold the Order, *Amici* will not address BNY's or other non-parties' possible status as agent(s).

its constitutionality, is this Court's seminal decision in *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.).

In *Alemite*, the trial court had enjoined defendant John Staff and his "agents, employees, associates, and confederates" from infringing a patent. *Id*. at 832. Plaintiff then brought a contempt proceeding against John's brother, Joseph, who once worked for John but who had started his own business and in that context had infringed the same patent. *Id*. The district court found John guilty of contempt even though it concluded that he "had no connection or part whatever in the acts of contempt hereby adjudged against Joseph Staff." *Id.* at 832.

This Court reversed. It is "well settled law," the Court explained, that "a person who knowingly assists a defendant in violating an injunction subjects himself to civil as well as criminal proceedings for contempt." *Id.* The Court further acknowledged that at common law, "a person not a party may be punished [with contempt] when he has helped to bring about . . . an act of a party." *Id*. at 833. The problem was that the district court had found Joseph in contempt *not* for acts that assisted John's violation of the patent, but instead for his own actions that in no way aided the enjoined party. This went too

far, the Court explained, because it effectively "enjoin[ed] the world at large" beyond the court's proper powers of equity. *Id*. at 832. For a non-party to be held in contempt for violating an injunction, the Court said, he must "either abet the defendant, or must be legally identified with him." *Id*. at 833. Joseph satisfied neither branch of this test, and thus could not be held in contempt. *See id*.

Rule 65(d)(2) reflects the common-law principles and distinctions drawn in *Alemite* but uses somewhat different terms drawn from the now-repealed Section 19 of the Clayton Act. *See* Fed. R. Civ. P. 65(d)(2) advisory committee's note (2007). Thus Rule 65(d)(2)(A) binds a "party." Rule 65(d)(2)(B) further binds those whom *Alemite* describes as "legally identified" with a party—its "officers, agents, servants, employees, and attorneys." And Rule 65(d)(2)(C) binds those who in *Alemite*'s words "abet" the enjoined party, or "knowingly assist" it, or "help to bring about" its forbidden act. The phrase that Rule 65(d)(2)(C) uses to capture these concepts of assistance is "persons who are in active concert or participation" with a party or its privy.

Two features of Rule 65(d)(2)(C) warrant special attention. First, the textual and categorical distinctions between Rule 65(d)(2)(B)

and (C) indicate that, as *Alemite* implied, one who assists an enjoined party within the meaning of Rule 65(d)(2)(C) need not be an agent of or have a similar legal relationship with the enjoined party, for such legal relationships are separately captured by Rule 65(d)(2)(B). *See Regal Knitwear*, 324 U.S. at 14 (holding that regardless of whether an injunction that applied to defendant's "successors and assigns" fell within Rule 65(d)(2)(B), any successors or assigns would be bound by the injunction under 65(d)(2)(C) if they "come within the description of persons in active concert or participation with [defendants] in the violation of an injunction"); *Alemite*, 42 F.2d at 832-33.

Second, persons covered by Rule 65(d)(2)(C) who have actual notice of an injunction have a duty to comply with it, subject to contempt, regardless of whether they were served or officially identified by the court or the party that moved for the injunction. *See* Fed. R. Civ. P. 65(d)(2) (injunction binds covered entities "who receive actual notice of it by personal service *or otherwise*" (emphasis added)); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 129 (2d Cir. 1979). It is thus hornbook law that "[n]onparties with notice of the order who [knowingly aid, abet, assist, or act in concert with the person enjoined] can be held

in contempt even though they were not named or served with original process in the injunction suit or even served with a copy of the decree." 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2956 (2d ed. 1995). As a result, both the common law and Rule 65 "place[ ] a duty upon someone with knowledge of an injunction not to act in concert with those who have been enjoined." *Id*.

B. BNY Would Be in "Active Concert or Participation" with Argentina Under Rule 65(d)(2)(C) if It Processes Argentina's Illegal Payments to the Exchange Bondholders

The District Court's ruling under Rule 65(d)(2)(C) rests on the following logic. The injunctions require Argentina to make a "Ratable Payment" to Plaintiffs under the FAA Bonds concurrently or before making payment on the Exchange Bonds. Argentina will violate the injunctions if (as the District Court found Argentina has credibly threatened to do) it makes payments on the Exchange Bonds but not the FAA Bonds. The first violation would occur when Argentina pays the first entity in the Exchange Bondholder payment chain—BNY, presumptively—if it does not also pay the FAA Bondholders. BNY will know whether Argentina's Exchange Bond payments are illegal because the injunctions require Argentina to certify that it has complied with its

obligations under the FAA Bonds, and to give notice of this certification to all non-intermediary entities in the Exchange Bond payment chain. Thus, "if Argentina attempts to make payments to the exchange bondholders, contrary to the ruling of the Court of Appeals and thus contrary to law," the entities that process those payments would be in "active concert or participation" with Argentina's violation under Rule 65(d)(2)(C). Remand Opinion 11-12.

BNY sets forth three arguments that attempt to explain why it would not be in "active concert or participation" with Argentina's violations of the injunctions even were it to receive and pay forward funds as part of an illegal effort by Argentina to pay the Exchange Bondholders without making a ratable payment to Plaintiffs. All three are based on misreadings of applicable law and lack merit.

i. The Legal Standard for "Active Concert or Participation" Is Not "Substantial Assistance"

Relying on "aiding and abetting" decisions that have nothing to do with Rule 65(d)(2)(C), BNY maintains that the standard for meeting the Rule's "active concert or participation" requirement is "clear and convincing evidence" of "substantial assistance." BNY Brief 28-29; *see also* Argentina Brief 42-43; Fintech Brief 24-25. This entirely

novel proposal has no basis in Rule 65(d)(2)(C) or this Court's decisions. Courts do sometimes use the phrase "aiders and abettors" to describe the non-parties who are subject to Rule 65(d)(2)(C). Indeed, the District Court used this terminology. Amended Order ¶ 2(e). But this Court's decisions have never used a "substantial assistance" test in the Rule 65 context; and it would be a mistake—a mistake that would significantly weaken the efficacy of injunctions generally—to import the technical standards for aiding and abetting liability into Rule 65(d)(2)(C).

Rule 65(d)(2)(C) adopts the disjunctive phrase "active concert *or* participation," and that phrase—which BNY and the other Appellants fail to parse—is what governs the scope of injunctions in federal court. "Concert" means "to act in harmony or conjunction." *Webster's Third New International Dictionary* 470 (1993). "Participation" is "the act of participating," and to "participate" means "to have a part of or share in something" or "to take part." *Id.* at 1646. This Court used this standard definition of "participate" in explaining the language of Rule 65 soon after its promulgation. *See, e.g.*, *United States v. Porhownik*, 182 F.2d 829, 833 (2d Cir. 1950) (L. Hand, J.) (suggesting that Rule 65(d) applies to one who "*takes part in* the

violation of an injunction of which he has notice" (emphasis added)); *NLRB v. Blackstone Mfg. Co.*, 123 F.2d 633, 635 (2d Cir. 1941) (L. Hand, J.) ("[E]quity has always treated as contumacious those who *take an actual part* in the defendant's own violation of its injunction, provided they have notice of the decree; [the provision of the Clayton Act adopted by Rule 65] states no more than the common-law." (emphasis added)); *cf. Alemite*, 42 F.2d 832 at 832-33 (injunction at common law extends to those who "abet" the enjoined party, "knowingly assist[ ]" it, or "help[ ] to bring about" its forbidden act).[7]

This Court's contemporary decisions, including ones that state the test under Rule 65(d)(2)(C) as "aiding and abetting," use a threshold for "active concert or participation" that is lower than the "substantial assistance" standard proposed by BNY and that is consonant with "to take part." *See, e.g.*, *N.Y. State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 393-95, 397 (2d Cir. 1992), *vacated on other grounds*, 41 F.3d 794 (2d Cir. 1994); *Patsy's Italian Rest.,* 658 F.3d at

[7] BNY cites *Alemite* for the proposition that Rule 65(d)(2)(C) requires a showing of "substantial assistance." BNY Brief 27; *see also* Fintech Brief 24. That phrase appears nowhere in *Alemite*, and the standard articulated there is quite different.

275; *Vuitton et Fils*, 592 F.2d 126 at 129-130. Decisions in other Circuits are similar. *See, e.g.*, *SEC v. Homa*, 514 F.3d 661, 674 (7th Cir. 2008) (Rule 65(d)(2)(C) applies to non-parties who "act with" and "cooperate with" named party); *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 75 (1st Cir. 2002) (non-party must act "for the benefit of, or to assist, a party"); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d. 372, 377 (10th Cir. 1996) (non-party that provides "aid and assistance" to enjoined party is covered). There can be no doubt that were BNY to process Argentina's illegal payments to the Exchange Bondholders, it would "take part in" that transaction, and thus act in "participation" with Argentina's violation of the injunctions.

ii. BNY's Involvement in the Payment Chain Between Argentina and the Exchange Bondholders Is More Than "Mere Receipt" and Clearly Constitutes "Active Concert or Participation"

BNY maintains that it is not bound by the injunctions against Argentina because its "mere receipt of funds under the Indenture, on behalf of the *Exchange Holders*, is not clear and convincing evidence that it is in 'active concert' with Argentina's failure to pay *Plaintiffs*." BNY Brief 29 (emphasis in original); *see also*

Argentina Brief 42-43. Setting aside the argument's erroneous deployment of the "clear and convincing" standard and its exclusion of "participation" from the relevant test, the argument makes two claims: (1) the relevant violation of the injunctions for purposes of Rule 65(d)(2)(C) is Argentina's failure to pay the FAA Bondholders; and (2) BNY's "mere receipt" of funds in the Exchange Bondholder payment stream does not implicate Rule 65(d)(2)(C). These claims do not withstand scrutiny.

BNY wishes to characterize the relevant violation of the injunctions as Argentina's failure to pay on the FAA Bonds, a transaction with which it says it has no relationship. But this characterization is inaccurate. As this Court made clear in its Opinion, the violation of the injunctions is not Argentina's failure to pay under the FAA Bonds *per se*. Rather, it is Argentina's payment on the Exchange Bonds while continuing not to pay under the FAA Bonds. The relevant transaction for purposes of the anticipated violation of the injunctions is thus *Argentina's payment of money to BNY in the Exchange Bond payment chain in the absence of certification that it has paid under the FAA bonds*. BNY clearly "participat[es]" in *this*

transaction, and is thus bound by the injunctions under the ordinary operation of Rule 65(d)(2)(C).

BNY resists this conclusion on the ground that its "mere receipt" of funds is unrelated to Argentina's violation of the injunctions. BNY Brief 29-30. As noted above, Argentina's payment of funds to BNY under the Exchange Bonds without certification would be Argentina's initial violation of the injunction. To the extent that BNY has a standing relationship with Argentina to receive the funds, advance notice that the funds are coming without certification, and an ability to decline receipt, its receipt of the funds would constitute "active concert or participation" in Argentina's violation.[8]

More importantly, BNY's receipt of the funds without certification cannot be considered in isolation. As BNY acknowledges in its brief, receipt of the funds is but the first step in a process that

---

[8] We do not suggest Rule 65(d)(2)(C) would bind a truly unwitting non-party based on "mere receipt" of illegal funds that came into its hands despite having prior notice of an injunction and despite having taken prudent steps to avoid receipt. Yet even there, the non-party would have safe harbor options, including interpleading the funds or seeking judicial guidance before taking further action with the funds. *See Regal Knitwear*, 324 U.S. at 15 (encouraging district courts to clarify doubts about scope of injunctions to non-parties under Rule 65(d)).

culminates in its paying of those funds down the payment chain toward the Exchange Bondholders. *See* BNY Brief 30; *see also* Remand Opinion 10. Such actions by BNY would empower Argentina to violate the injunctions.

BNY's receipt and payment forward of Argentina's Exchange Bond payments is thus far more than the requisite "taking part" in Argentina's violations of the injunctions—it is essential to complete the violations. Absent BNY's "participation" in the payment process, Argentina simply could not successfully violate the injunctions by paying the Exchange Bonds while at the same time not paying Plaintiffs' FAA Bonds. Under the applicable standard, such receipt and payment forward would thus be "active concert or participation." *See*, *e.g.*, *Reliance Ins. Co.*, 84 F.3d. at 377 (non-party bank that allowed an enjoined depositor to withdraw funds was in "active concert or participation" under Rule 65(d)(2)(C) because the depositor "could not have completed the transactions, thereby violating the [court's] order, without the aid and assistance of" the bank).[9]

[9] Thus even if (contrary to the analysis in Point I.B.i above) "substantial assistance" were the test, BNY's processing of illegal

iii. BNY's Independent Interests Are Irrelevant to Whether It Is in "Active Concert or Participation" with Argentina

BNY argues that because it has an independent contractual duty to the Exchange Holders and an independent interest in the funds Argentina pays to the Exchange Bondholders, it "cannot be punished for acting in furtherance of that interest." BNY Brief 30-31; *see also* Fintech Brief 22-23. The decision that BNY cites for this proposition is *Regal Knitwear*, 324 U.S. at 13. In the course of interpreting Rule 65(d), *Regal Knitwear* stated that courts "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." *Id.* The Supreme Court was not there suggesting that a non-party's independent funds or independent contractual duties limit the normal extension of injunctions to those in "active concert or participation" with the enjoined party under Rule 65(d)(2)(C). Rather, as its citation to *Alemite* makes plain, the Supreme Court was embracing *Alemite*'s holding that a court cannot enjoin a non-party for acts that do not aid or assist the enjoined party. *See*

---

payments by Argentina would meet it because Argentina could not successfully violate the injunctions without BNY's assistance.

Regal Knitwear, 324 U.S. at 13 (citing *Alemite*, 42 F.2d 832); *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 195 (2d Cir. 2010); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394-96 (Fed. Cir. 1996); *Heyman v. Kline*, 444 F.2d 65, 65-66 (2d Cir. 1971).

Neither *Regal Knitwear* nor Rule 65(d)(2)(C) permits a non-party in "active concert or participation" with an enjoined party to invoke independent interests as a basis for not complying with an injunction. This Court recently made this point in *Eli Lilly*, a case involving a non-party attorney representing a client who had assisted an enjoined party in an unrelated case in promulgating documents subject to a protective order. Mistakenly relying on the same passage in *Regal Knitwear* as BNY, the attorney claimed that a non-party who "'act[s] independently' of a party found in violation of a court order cannot be an aider and abettor if the nonparty's actions were based on a 'genuinely independent interest.'" *Id.* at 193 (alteration in original). The non-party added that he could not be in "active concert or participation" with the enjoined party because "he acted independently as a lawyer in the interests of his client" and had an independent "interest in the documents." *Id*.

The Court disagreed, reasoning that "[a]iding and abetting a party is not acting independently." *Id.* It added that Rule 65(d)(2)(C) is "directed to the actuality of concert or participation, without regard to the motives that prompt the concert or participation." *Id.* (quoting *N.Y. State Nat'l Org. for Women*, 961 F.2d at 397) (internal quotation marks omitted).[10] *See also Reliance Ins.*, 84 F.3d at 377 (enforcing injunction against non-party bank under Rule 65(d)(2)(C) that claimed to be "merely . . . carrying out its own independent contractual obligation to allow a depositor's withdrawal upon request" (ellipsis in original)). For similar reasons, BNY cannot invoke its independent interests to "carry out [the] law violation," Remand Opinion 12, that would occur if it receives and pays forward Argentina's payments on the Exchange Bonds in the absence of certification. What matters is the actuality of

[10] The Court also rejected an argument akin to BNY's claim that it is not bound by the injunctions under Rule 65(d)(2)(C) because its purpose in processing Argentina's payments would be to honor otherwise lawful contracts. *See* 617 F.3d at 193 (rejecting argument that aiding violation of protective order is justified if done in pursuit of "otherwise legitimate" goals).

BNY's participation in the Exchange Bond payment chain, not its motives or its independent interests in so participating.[11]

Because BNY is bound by the injunctions against Argentina by operation of Rule 65(d)(2)(C), it must, absent proper certification, either decline Exchange Bond payments from Argentina or, if it finds itself in receipt of them, interplead the funds, freeze the relevant accounts, or take some other practical step to ensure that it does not pay forward the funds in violation of the injunctions. There can be little doubt that a sophisticated bank like BNY has the knowledge, means, and interest to take advance steps to meet its legal obligations while at the same time standing ready to perform under the Indenture if Argentina complies with the injunctions. Indeed, BNY has acknowledged that the relevant Indenture releases it from doing "anything which may . . . be illegal or contrary to applicable law or

[11] BNY's claimed legal independence from Argentina is conceivably relevant only to the operation of Rule 65(d)(2)(B), which focuses on legal connection. Rule 65(d)(2)(C) is entirely separate and focuses on the fact of the non-party's "active concert or participation" with the enjoined party, regardless of its legal relationship to the enjoined party. *See Regal Knitwear*, 324 U.S. at 14; s*ee also* discussion *supra* p. 14.

regulation." Brief of Non-Party Bank of New York Mellon, as Indenture Trustee, on Remand from the Court of Appeals at 17, *NML*, No. 08-cv-06978-TPG (Doc. 396) (S.D.N.Y. filed Nov. 16, 2012). There can thus be no question here of conflicting obligations. Finally, if BNY encounters any difficulties or uncertainties in ensuring that it does not assist Argentina in its violation of the injunctions, the District Court's Amended Order prudently provides that any covered non-party "that requires clarification as to its duties, if any, under this ORD[E]R may make an application to this Court," and "[s]uch clarification will be promptly provided." Amended Order ¶ 2(h).[12]

II. The District Court's Amended Order Did Not Enjoin BNY and Does Not Violate the Due Process Clause

BNY devotes a large portion of its brief to the claim that the District Court's "injunction against non-party BNY" violates the Due Process Clause. *See* BNY Brief 16; *see also id.* at 1-2, 12, 15-26; EBG Brief 29-34. This claim lacks merit for two reasons.

[12] The District Court's offer to provide such clarification is precisely what the Supreme Court has encouraged in this context. *See Regal Knitwear*, 324 U.S. at 15.

A. The District Court's Amended Order Did Not Enjoin BNY

The first problem with BNY's constitutional argument is that the District Court did not in fact enjoin BNY. In both its Original Order and its Amended Order, it enjoined only Argentina. *See* Original Order ¶ 2(d); Amended Order ¶ 2(d). The Orders require Argentina to provide "copies of this ORDER to all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds," and state that these entities "shall be bound by the terms of this ORDER as provided by Rule 65(d)(2) and prohibited from aiding and abetting any violation of this ORDER." Original Order ¶ 2(e); Amended Order ¶ 2(e). Paragraph 2(e) does not purport to be an injunction against BNY or any other non-party. Rather, it simply states what Rule 65(d)(2)(C) has long required, namely, that non-parties who come under its description are *by operation of the Rule* bound by the injunction against a party. Paragraph 2(e) ensures that non-parties covered by Rule 65(d)(2)(C) have notice and can prepare in an orderly way to comply with their legal duties under Rule 65.

In its Opinion last Fall, this Court expressed uncertainty about the scope of Paragraph 2(e), and ordered the District Court to "more precisely determine the third parties to which the Injunctions will apply." 699 F.3d at 264. The District Court complied by listing parties that satisfy Rule 65(d)(2)(C), including BNY, in a new Paragraph 2(f). *See* Amended Order ¶ 2(f). BNY's constitutional claim is that the District Court's compliance with this Court's instructions violates the Due Process Clause. This irony aside, the important point is that the District Court did not purport to enjoin BNY and the other non-parties on remand. It simply clarified, at this Court's request, which actors it believed were bound by the injunctions against Argentina by operation of Rule 65(d)(2)(C).

B. The District Court's Amended Order Does Not Violate Due Process

Regardless of whether one characterizes Paragraph 2(f) of the Amended Order as a specification of the parties bound by operation of Rule 65(d)(2)(C) or as a new injunction against those non-parties, the Order does not violate the Due Process Clause. BNY is correct to say that normally "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not

been made a party by service of process." BNY Brief 16 (citations omitted). What it fails to mention is that there is a longstanding exception to this principle—an exception recognized at common law and today embodied in Rule 65(d)(2)(C)—for non-parties that participate in a party's violation of an injunction. *See* 11A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2956 (2d ed. 1995). The exception is consistent with the Due Process Clause because "the adjudicative framework surrounding contempt proceedings fully protects nonparties' constitutional rights." *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 42-43 (1st Cir. 2000).

The controlling law on the interrelationship between Rule 65(d)(2)(C) and contempt proceedings is set out in the Supreme Court's decision in *Regal Knitwear*, which affirmed a decision of this Court. 324 U.S. at 9 (affirming *NLRB v. Regal Knitwear Co.* (*Regal Knitwear I*), 140 F.2d 746 (2d Cir. 1944) (L. Hand, J.)). The question in *Regal Knitwear* was whether an NLRB Order that extended to "successors and assigns" could be enforced without deleting this phrase from the Order simply because it thus applied to non-parties. 324 U.S. at 10. This Court declined to cut the phrase on the basis of its earlier ruling in a

similar case, *NLRB v. Blackstone Manufacturing Co*. *See Regal Knitwear I*, 140 F.2d at 747 (affirming based on *Blackstone Mfg.*, 123 F.2d 633). *Blackstone Manufacturing* ruled that "successors and assigns" could remain in an NLRB Order because the Order could impose no liability "which would not exist without" the phrase by operation of the common law and Rule 65. 123 F.2d at 635. It also made clear the non-party "successor or assign" would not be in contempt of the Order even if it did "exactly those things which the order forbids" because the non-party's contempt, if any, must be determined in a separate contempt proceeding that assesses whether it took part in the enjoined party's violations. *Id.*

The Supreme Court quoted this Court's language from *Blackstone Manufacturing* when it affirmed this Court's decision in *Regal Knitwear*. 324 U.S. at 11. It agreed that the phrase "successors and assigns" should not be deleted because the NLRB's Order could require no more than the independent operation of Rule 65(d). *Id.* at 14. It also encouraged District Courts, when asked, to clarify the applicability of their injunctions to non-parties under Rule 65 if doubts arose. *Id.* at 15. It made clear, however, that a non-party cannot be

liable or in contempt of the injunction until tested "on a concrete set of facts" in a contempt proceeding. *Id.* at 16. The Court declined to say "[w]hether it is wise that an order attempt to define its own effect on others than parties to the action when the law has already done so." *Id.* But it concluded that a district court could do this in an Order as long as there were "some circumstances" in which the non-party entities described in the Order "may" fall within the scope of Rule 65. *Id.*

Regal Knitwear thus makes clear that while a District Court can determine the applicability of its Orders to non-parties under Rule 65(d)(2)(C), a non-party's rights are not thereby finally adjudicated and the non-party is not in contempt if it declines to abide by the injunction. Rather, the non-party—if it believes it is not in "active concert or participation" with the enjoined party—retains the right to test the applicability of the injunction to it under Rule 65(d)(2)(C) in a contempt proceeding with plenary process. *See also Microsystems Software,* 226 F.3d at 43 ("[c]ontempt proceedings operate to ensure that nonparties have had their day in court"); *Eli Lilly & Co.*, 617 F.3d at 194 (court that enjoined non-party under Rule 65(d)(2)(C) did not impose "liability," which could only happen in contempt proceeding).

The District Court carefully followed these principles. Its Original Order contained a non-specific description of the parties covered by Rule 65(d)(2) that was akin to the non-specific description in the Order upheld in *Regal Knitwear*. At this Court's request, and as *Regal Knitwear* said was appropriate, the District Court gave more concrete guidance in its Amended Order by naming specified non-parties covered under Rule 65(d)(2)(C). BNY therefore misrepresents the District Court's Amended Order when it says the District Court "ran roughshod over the principles of proof, process and jurisdiction," BNY Brief 19; deprived BNY of its "day in court," *id.* at 13; and exercised "contempt powers to punish the lawful conduct of a non-party," *id.* To the contrary, the District Court followed standard procedures, exercised no contempt power, punished no one, and did not deprive BNY of its day in court.[13] If BNY thinks the District Court is

[13] The District Court stated in its Remand Opinion that the non-parties "should properly be held responsible for making sure that their actions are not steps to carry out a law violation," Remand Opinion 12, but this was not a "finding," let alone a final adjudication or a contempt ruling. It was, rather, an explanation of paragraph 2(f) of the Amended Order, which provided the guidance this Court sought and that the Supreme Court has encouraged in order to "avoid unwitting contempts," *Regal Knitwear*, 324 U.S. at 15.

wrong in its belief that BNY is covered by Rule 65(d)(2)(C), it can process Argentina's payments under the Exchange Bonds and have its day in court to test the legality of its actions in a contempt proceeding, where Plaintiffs would have the burden on the issue. Only after receiving plenary process in a contempt proceeding would BNY's rights be adjudicated; only then, if it loses, could it be punished.

In asking this Court to "vacate the Injunctions against non-party BNY Mellon," BNY Brief 43, BNY is effectively seeking invalidation of Paragraph 2(f) of the Amended Order, which named BNY as a non-party covered by Rule 65(d)(2)(C). But granting this request would not in any way alter whatever obligations BNY has under the Rule. BNY would still face the same choice whether to comply with the injunctions as a bound party under Rule 65(d)(2)(C) or to test its obligations under the Rule in a contempt proceeding. The only effect of granting BNY's requested relief would be to enhance uncertainty about the operation and effect of the District Court's injunctions against Argentina, which this Court has already upheld as substantively correct. In light of this Court's request for clarity about the injunctions' scope, that cannot be the right approach.

Conclusion

The District Court's Amended Order should be affirmed.

Dated: January 4, 2013

Respectfully submitted,

s/ Jack L. Goldsmith III

Jack L. Goldsmith III
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 894-9003
jgoldsmith@law.harvard.edu

Judd B. Grossman
Grossman LLP
590 Madison Avenue, 18th Floor
New York, New York 10022
(646) 770-7445
jgrossman@grossmanllp.com

Attorneys for Amici Curiae *Montreux Partners, L.P. and Wilton Capital*

Certificate of Compliance with Rule 32(A)(7)(B)

The undersigned counsel for *amici curiae* Montreux Partners, L.P. and Wilton Capital certifies that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B). This brief contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count function in Microsoft Word.

Dated: January 4, 2013

s/ Judd B. Grossman

Judd B. Grossman
Grossman LLP
590 Madison Avenue, 18th Floor
New York, New York 10022
(646) 770-7445
jgrossman@grossmanllp.com