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In the United States Court of Appeals for the Second Circuit

NML CAPITAL, LTD., *ET AL.*,

Plaintiffs-Appellees,

-v.-

REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

JOINT RESPONSE OF PLAINTIFFS-APPELLEES TO THE MOTION OF NON-PARTY APPELLANTS EXCHANGE BONDHOLDER GROUP FOR CERTIFICATION TO THE NEW YORK COURT OF APPEALS

[appearances on inside cover]

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PRELIMINARY STATEMENT

Movants are sophisticated institutional investors in certain bond instruments ("the Exchange Bonds") issued by the Republic of Argentina ("the Republic") in the course of its 2005 and 2010 debt restructurings. They observed this litigation from the sidelines until three weeks ***after*** this Court affirmed the district court's decision finding a violation of Appellees' bond agreements ("the FAA Bonds") and upheld the substance of the district court's Injunction. Movants then asked the district court to vacate the ruling this Court had just affirmed. Finding no success there, they now seek to circumvent the abuse-of-discretion standard applicable to this Court's review by requesting certification to the New York Court of Appeals. This Court should decline that request.

Movants ask this Court to certify the question of how the Equal Treatment Provision "should be interpreted" and claim certification is necessary to "determine whether Plaintiffs are entitled to specific performance." Mot. 2, 16. These are the ***very questions*** decided by this Court in its October 26, 2012, opinion. This Court had "little difficulty" finding a violation of the bond agreements, and explained at length why specific performance was appropriate. 699 F.3d 246, 260, 261-64 (2d Cir. 2012). Movants' attempt to use the certification device to second-guess this Court's well-reasoned decision is patently inappropriate.

Yet, even if Movants' proposed question could be construed to pertain only to issues remanded by this Court for clarification, certification still would be improper because equitable relief issued by a federal court is an issue of federal law reviewed for abuse of discretion—not a question of New York law reviewed *de novo*. As this Court has explained: "State law does not govern the scope of the equity powers of the federal court; and this is so even when state law supplies the rule of decision." *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir. 1981). There simply is no basis for certification of the Movants' proposed question, particularly at this late date.

BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

The Republic, in 2005 and 2010, offered bondholders a take-it-or-leave-it deal: Bondholders could retain the FAA Bonds (which Argentina would not honor) or they could exchange those instruments for new instruments—the "Exchange Bonds"—worth less than 30 cents on the dollar.

Appellees are bondholders who chose to stand on their contractual rights. The FAA Bond agreements contained numerous provisions to protect creditors, including a broad waiver of sovereign immunity and an acceleration clause providing that the entire amount of unpaid principal and accrued interest would become due upon default. Another provision—the Equal Treatment Provision—stated that the

"payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." JA-157.[1]

Movants (or their predecessors in interest) took the deal. Movants were aware that other creditors would continue to seek to enforce their rights under the FAA Bonds. Indeed, the prospectus for the 2005 offer explicitly warned there could be "no assurance" that litigation under the FAA Bonds would not "interfere with payments" under the Exchange Bonds. JA-466. And, in fact, some Movants even pursued such litigation ***themselves*** before accepting the exchange.[2]

B. Proceedings Through This Court's October 26, 2012 Decision

In December 2011, the district court issued its decision holding that the Republic violated the Equal Treatment Provision by repudiating the FAA Bonds, while at the same time continuing to regularly pay creditors (including Movants) under the Exchange Bonds. On February 23, 2012, after receiving additional brief-

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[1] Citations to "JA" refer to the Joint Appendix filed on March 21, 2012; citations to "SPA" refer to the Special Appendix also filed on March 21, 2012; and citations to "SPE" refer to the Supplemental Appendix filed on December 28, 2012.

[2] *See*, *e.g.*, *Gramercy Argentina Opportunity Fund v. Republic of Argentina*, No. 1:07-cv-11492-TPG (S.D.N.Y. 2007). Indeed, Movant Gramercy—before accepting the 2010 offer—issued a press release predicting "success" in its "litigation and collection efforts" against Argentina in light of "well-established precedents" such as "Elliott vs. Republic of Peru," a case that awarded relief similar to the Ratable Payment Injunction in order to remedy a violation of an equal treatment provision. SPE-1352.

ing, the district court entered its Injunction requiring the Republic to make a "Ratable Payment" to Appellees whenever the Republic "pays any amount due under terms of the [exchange] bonds." SPA-38. The Republic appealed to this Court.

After extensive briefing and argument, this Court affirmed "the judgments of the district court (1) granting summary judgment to plaintiffs on their claims for breach of the Equal Treatment Provision and (2) ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to the holders of the 2005 and 2010 restructured debt." 699 F.3d at 265. The Court had "little difficulty" concluding that the Republic breached the Equal Treatment Provision. *Id.* at 260.

With respect to the Injunction (including the Ratable Payment mechanism) the Court agreed that the balance of the equities favored relief. Finding no basis to upset the district court's finding that "the Republic had sufficient funds" to pay Appellees, the Court rejected the Republic's dire predictions regarding the Injunction's effects. 699 F.3d at 263. The Court stressed that "[i]t is up to the sovereign . . . whether it will repudiate [a] creditor's debt in a manner that violates a *pari passu* clause." *Id.* at 264. The Court also found it "highly unlikely that in the future sovereigns will find themselves in Argentina's predicament," given (among other things) the widespread use of collective action clauses in more recent bond offerings. *Id.*

The Court, having affirmed the substance of the Injunctions, remanded to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), with instructions to clarify "the operation of the payment formula and the Injunctions' application to third parties and intermediary banks." 699 F.3d at 265.

C. Proceedings On Remand

On remand, Movants appeared for the first time in this litigation, seeking leave to intervene as interested non-parties. SPE-14. Movants did not limit their participation to the limited issues identified by this Court for clarification on remand; instead, Movants filed a Motion to Vacate—in its entirety—the judgment that this Court had just affirmed. SPE-15.

The district court entered an order on November 21, 2012, providing the clarification this Court requested. The district court laid out the application of the Injunction to third parties. SPE-1370. And, the district court explained that the Ratable Payment remedy requires that, if the Republic pays 100% of what it ***currently*** owes under the Exchange Bonds, the Republic must likewise pay Appellees 100% of what it ***currently*** owes under the FAA Bond agreements. The district court explained that the Equal Treatment Provision requires "that the obligations under the various debts are complied with to the same extent," and that as a result "payment to plaintiffs must surely relate to a debt *actually due* to them." SPE-1365-66 (emphasis added).

The district court further explained that, under the FAA Bond agreements' acceleration provisions, the debt ***actually due*** to Appellees is the entire amount of unpaid principal, plus accrued interest; the district court noted that "[t]here is simply no debt owed to plaintiffs on terms providing for payments of 1% of some sum of money, spaced out over 100 installments of 1% each." SPE-1366. By contrast, because the Republic has not defaulted on the Exchange Bonds and has, in fact, made all payments in full and on time, the Republic is currently obligated to make periodic payments of interest and a portion of the principal on those bonds. In practical effect, therefore, the Ratable Payment formula requires that the Republic pay Appellees the ***full*** unpaid accelerated principal plus accrued interest (including capitalized and prejudgment interest) the next time it pays the ***full*** scheduled amount due under the Exchange Bonds. The district court found that to instead require the Republic to make fictionalized incremental payments to Appellees would constitute a "radical departure" from the bond agreements and the Equal Treatment Provision. *Id.*

The district court addressed Movants' concern that this remedy would be unfair to them. The district court observed that Movants, in voluntarily giving up their rights under the FAA Bonds, "bargained for certainty and the avoidance of the burden and risk of litigating their rights." SPE-1367. As a result, they "were able to watch year after year while plaintiffs in the litigation pursued methods of

recovery against Argentina which were largely unsuccessful." *Id.* It was "hardly an injustice" that, after many years of litigation, Appellees finally were in a position to be paid what they were owed under their agreements. *Id.*

Finally, the district court on November 26, 2012, entered orders denying Movants' motions to intervene and to vacate the Injunction. SPE-18.[3] Movants timely appealed from the district court's orders clarifying the Injunction, denying leave to intervene, and denying the motion to vacate.

ARGUMENT

I. Certification Is Improper Because Movants Seek To Re-Litigate Issues That Have Already Been Decided By This Court

The question Movants have proposed for certification would invite the New York Court of Appeals to consider issues—pertaining to the proper interpretation of the Equal Treatment Provision—already definitively addressed by this Court

[3] The district court also entered an order on November 21 lifting the stay of the Injunction, citing as justification the "extraordinary circumstance" of statements by Argentine officials indicating they did not intend to comply with the Injunction. SPE-1375. In order to protect the Republic's interests while this Court's review was still ongoing, the district court provided that the Republic could, if it chose to continue to make payments under the Exchange Bonds, make any necessary Ratable Payments to Appellees into an escrow account. SPE-1376. This Court subsequently re-imposed the stay pending appeal, thus eliminating any occasion for the escrow procedure contemplated by the district court to be put into effect.

just months ago in a published opinion in this very case.[4] There is no basis to invite the New York courts to exercise that kind of review of this Court's decisions.

Movants do not conceal the fact that their motion to certify is intended to permit the New York Court of Appeals to decide the very same issues already decided in this Court's October 26 decision. Movants identify as the issue for certification "how to interpret under New York contract law a *pari passu* clause in an unsecured debt instrument"—the ***very question*** decided by this Court. Mot. 8. And, Movants cast covert (and not-so-covert) aspersions towards the Court's decision: They quote at length a submission by the United States seeking permission to argue in favor of panel rehearing and rehearing en banc, and Movants note, with dismay, the reduced market price for Argentina's Exchange Bonds after Argentina's leaders announced that they would not comply with this Court's decision. *Id.* at 13. In substance, Movants seek nothing less than to permit the New York Court of Appeals to exercise appellate review over this Court's decision.

The certification device was not incorporated into federal appellate practice to undermine fundamental principles of finality and repose. "[W]here litigants have once battled for the court's decision, they should neither be required nor . . . permitted to battle for it again." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*,

[4] The Republic has also sought certification in its Opening Brief, and Appellees will separately address that request for certification in their Response Brief.

956 F.2d 1245, 1255 (2d Cir. 1992) (citation and punctuation omitted). Thus, issues already litigated become the "law of the case," even where new or different parties enter the litigation between the first and second appeal. *See*, *e.g.*, *Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, J.). A court will not revisit already-decided issues absent "'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 790 (1981)). Movants do not even attempt to satisfy this rigorous standard. Instead, they posit (in a footnote) three reasons why certification of this Court's October 26 Decision is nevertheless appropriate. *See* Mot. 16 n.10.

First, Movants point out that "Argentina's petition for panel and en banc rehearing is pending." *Id.* But the mere ***pendency*** of such a motion provides no basis for the Court to subject its earlier decision to review by the New York Court of Appeals. Were it otherwise, any party dissatisfied with the resolution of a state-law question by a federal court of appeals need only file a rehearing petition and claim that fact as a basis for certification.

Second, Movants note that they filed a motion to vacate the judgment in the district court pursuant to Federal Rule of Civil Procedure 60(b), and that their appeal from the denial of that motion is pending. But Rule 60(b) permits relief from

a judgment only under certain narrow circumstances—such as fraud or newly discovered evidence—and affords no basis for the New York Court of Appeals to review the merits of this Court's October 26 decision.

Finally, Movants cite *Policano v. Herbert*, 453 F.3d 75, 76 (2d Cir. 2006) (per curiam), for the proposition that an issue may be certified "after an initial appellate decision, but before the mandate [has] issued." Mot. 17 n.10. *Policano* cannot bear such weight. For starters, it was a highly unusual case: The panel affirmed a grant of *habeas corpus* on the ground that the defendant was convicted of depraved indifference murder, whereas the evidence indicated the murder was intentional, but the panel withheld the mandate to permit further consideration. Here, by contrast, the Court decided the question that Movants seek to certify and then specifically directed that the mandate ***issue*** and return to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994), for clarification of two distinct issues. *See* 669 F.3d at 265 (directing that "the mandate should automatically return to this Court" after the remand was concluded); *Jacobson*, 15 F.3d at 22 (setting out procedure according to which the court may "direct that a mandate issue forthwith and that the mandate state the conditions that will restore jurisdiction to this court"). The highly unusual procedure followed in *Policano* is not appropriate where, as here, the panel has already decided the question proposed for certification and the mandate has already been ordered to issue.

Moreover, the nature of the state-law issue in *Policano* was strikingly different and peculiarly called for the expertise of the state court. In that case, the certified question concerned the content of state law at the time of the petitioner's conviction; the certified question thus called for the state court to answer what amounted to a question of historical fact regarding the content of state law at a previous point in time, which then formed a predicate for the panel's federal-law analysis. *See* 453 F.3d at 75-76. By contrast, the state-law issue here—the interpretation of the Equal Treatment Provision—is a "simple question of contract interpretation" that this Court ultimately had "little difficulty" resolving. 699 F.3d at 258, 260 (internal quotation marks omitted). Analysis of that question does not call for application of any rule of procedure or substantive law unique to New York law. It may be (and has been) resolved by application of New York principles of contract interpretation routinely applied by this Court, which are substantively identical to those applied under federal common law. Indeed, Movants identify no interpretative principle of New York law that this Court failed to apply, or even applied incorrectly. Nor could they given that this Court found that, on the undisputed facts, Argentina's conduct amounted to a breach "even under Argentina's interpretation of the Equal Treatment Provision." *Id.* at 260. They simply refuse to accept this Court's ruling. Their motion thus is not so much an effort to consult the New York Court of Appeals' specialized expertise, as it is an attempt to

subject this Court's decision to a form of appellate review beyond that allowed by the rehearing or certiorari processes.

Movants also intimate that certification of this already-decided question is appropriate because the Court should never have endeavored to decide this state-law issue in the first place. Movants declare accusingly that the issue is one of first impression, and that the panel's October 26 decision did not cite controlling state authority on the interpretation of the Equal Treatment Provision. Mot. 9. That, of course, is incorrect; this Court cited the controlling New York principles of contract interpretation, including the fundamental precept (with which Movants take no issue) that "'[a] contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect.'" 699 F.3d at 258 (quoting *Singh v. Atakhanian*, 818 N.Y.S.2d 524, 526 (App. Div. 2006)).

That this Court did not cite further state authority as to how those principles should apply to the Equal Treatment Provision in this case is unsurprising: The provision's meaning presented a routine question of contract interpretation, which this Court had jurisdiction to decide in light of the statutory grant of federal jurisdiction over all cases against sovereigns. *See* 28 U.S.C. § 1330. It is also irrelevant because it is, in fact, entirely proper for a federal court to address issues of state law; indeed, the Framers of the Constitution intended that the federal courts would do precisely that. *See* U.S. Const. art. III, § 2. This is true even if, as Mo-

vants contend here, a case presents an issue of first impression. *See*, *e.g.*, *Cooper v. Am. Airlines, Inc.*, 149 F.2d 355, 358 (2d. Cir. 1945) (deciding issue of state law although "the highest court of New York has now twice carefully said that the question before us is open and undecided"). In part for this reason, this Court generally does not certify questions of contract interpretation to state courts when the applicable interpretive principles are not in dispute. And that, in turn, helps to explain why the Republic itself did not seek certification of these issues while its appeal was first pending before this Court.[5]

Finally, there is absolutely no merit to Movants' implication that the effect of this Court's October 26 decision on "[t]he price for some Argentine bonds" somehow justifies certification of this already-decided question to the New York Court of Appeals. Mot. 13. Movants thus dwell at length on dire conjecture over potential policy effects of this Court's decision—predictions based, in large part, on the market's reaction to the Republic's ***own statements*** that it would not comply with this Court's decision. *See also id.* at 11-14. But these predictions are legally

[5] Another reason is that the particular question of contract interpretation here is unlikely to have implications for future litigants. As this Court explained, the widespread adoption of collective action clauses, as well as the fact that much sovereign debt is issued under local law, make it "highly unlikely that in the future sovereigns will find themselves in Argentina's predicament." 699 F.3d at 264.

irrelevant; this Court does not second-guess decisions based on their effect on the prices of financial instruments, and Movants are wrong to suggest otherwise.

Movants' predictions are, in any event, unfounded. As this Court has recognized—in the context of litigation involving a ***prior*** default by Argentina—the interest "in maintaining New York's status as one of the foremost commercial centers in the world" is ultimately advanced by "encouraging foreign debtors to pay their debts that are due in New York." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991) (internal quotation marks omitted), *aff'd*, 504 U.S. 607 (1992). After all, "[i]f individuals or corporate entities become wary of their ability to protect their rights in business transactions conducted in New York they will look elsewhere." *Id.*; *see also* James K. Glassman, Op-Ed., *As Argentina Balks Over Debts, Bond Markets Hold Their Breath*, Wall St. J., Dec. 28, 2012, at A15 ("Argentina has been getting off the hook for years, but markets have always assumed that the country would eventually be held to account. If U.S. courts and European governments back off, then the market effects could be dire.").

II. The Proper Scope Of The Injunction Is A Question Of Federal Equity Practice That Cannot Be Certified

In addition to the proper interpretation of the Equal Treatment Provision, Movants also urge that the New York Court of Appeals "determine as a matter of state law the parameters of specific performance under the contract." Mot. 18. This remedial issue was, at least in part, already addressed by this Court's October

26 decision, which devoted extensive attention to the question of whether specific performance was warranted, and which explicitly affirmed the decision of the district court "ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt." 699 F.3d at 265. But, certification of this issue is ***also*** inappropriate for a second reason—the proper scope of the injunction is an issue of federal, not state, law.

This Court has held that "[s]tate law does not govern the scope of the equity powers of the federal court; and this is so even when state law supplies the rule of decision." *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir. 1981). In other words, the propriety of the district court's remedy for the violation of the Equal Treatment Provision is a matter of federal equity procedure, ***not*** an issue of state law that could permissibly be certified. Thus, in *Perfect Fit*, this Court remedied a state-law claim of unfair competition by ordering a product recall, notwithstanding the defendant's contention that New York law did not authorize such a remedy. The Court found that it "***would not matter*** if New York did bar its courts from granting that remedy." *Id.* (emphasis added). Likewise, the Supreme Court in *Guaranty Trust Co. v. York*, 326 U.S. 99, 106 (1945), explained that "[s]tate law cannot define the remedies which a federal court must give" and that

"a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it."

Movants attempt to blur this distinction between contract interpretation and equitable discretion, suggesting that the New York Court of Appeals could determine "what kind and measure of 'ratable payments' are required by the *pari passu* clause." Mot. 18. But the Ratable Payment mechanism was devised to craft a remedy that would be fair under the circumstances. The district court stated that "what is being done here is not literally to carry out the *Pari Passu* Clause," SPE-1365, and this Court likewise observed in its October 26 decision that a district court has "considerable latitude in fashioning [injunctive] relief" and need not craft a remedy "identical with that promised in the contract," 699 F.3d at 261. To be sure, the district court looked to the FAA Bond agreements to help determine what remedy would be appropriate. Indeed, the district court's Injunction was an appropriate exercise of its equitable discretion in part because it was the remedy ***most*** consistent with the language of the agreement—including, among other things, the agreement's payment provisions and acceleration clause. Movants, however, cannot possibly dispute that the district court properly interpreted those relatively straightforward aspects of the agreement; it is uncontroversial that the amount ***currently*** due to Appellees is the entire unpaid principal, plus accrued interest. The district court's explication of those provisions therefore provides no basis to submit

the entire remedy crafted by the district court pursuant to its equitable powers under federal law to the review of the New York Court of Appeals.

This Court will review the district court's Injunction for abuse of discretion, and will affirm "so long as it achieves a 'fair result' under the 'totality of the circumstances.'" 699 F.3d at 261 (quoting *Leasco Corp. v. Taussig*, 473 F.2d 777, 786 (2d Cir. 1972)); *see also Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 40 (2d Cir. 2010). Movants' effort to certify this question of federal law is a transparent effort to evade that deferential standard of review. This Court should reject that effort.

CONCLUSION

For the foregoing reason, EBG's motion to certify should be denied.

Dated: January 9, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January 2013, a true and correct copy of the foregoing pleading was served on the counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

/s/ Matthew D. McGill
Matthew D. McGill