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United States Court of Appeals

for the

Second Circuit

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD.,

Plaintiffs-Appellees,

— v. —

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

(Caption Continued on Inside Cover)

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

REPLY BRIEF OF DEFENDANT-APPELLANT THE REPUBLIC OF ARGENTINA

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Plaintiffs-Appellees,

THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE, EXCHANGE BONDHOLDER GROUP, FINTECH ADVISORY INC.,

Non-Party Appellants,

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

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ARGUMENT

Plaintiffs seek to treat the Court's remand to the district court, and this appeal from the orders entered on remand, as an inconsequential tying up of loose ends, claiming that the Court's October 26 Decision effectively affirmed in advance whatever the district court chose to do. Not so. The Court retains the power and the duty, after a *Jacobson* remand, to make the final decision on the district court orders before it, not to rubber stamp whatever the district court decided.

Here, the Court was expressly concerned about, and asked the district court to consider, the effect of the Injunctions on third parties, and the meaning that should be ascribed to "ratable payment" – two significant questions, unanswered by the terms of the pari passu clause, that required careful analysis and the weighing of evidence. No remand would have been necessary were it self-evident, as plaintiffs claim, that the Injunctions should apply to a universe of identified and unidentified non-parties, and preclude the distribution of payments on performing debt unless holdout plaintiffs are paid in full.

The November 21 Orders bear out this Court's concerns. The sweeping Orders exceed the limits on the district court's extraterritorial reach and authority, including under the FSIA, as well as fundamental boundaries of prejudgment equitable powers under *Grupo Mexicano de Desarrollo, S.A. v.*

Alliance Bond Fund, Inc., 527 U.S. 308, 322 (1999) ("*Grupo Mexicano*"). The Orders ignore substantive principles of contract and property law, and represent manifest abuses of discretion in punishing third parties for another entity's purported breach of contract.

Plaintiffs cannot justify the district court's actions by invoking the court's equitable powers and asserting that they permit it to enter orders that "must be affirmed" as long as they purportedly accomplish "a fair result under the totality of the circumstances." NML Br. at 18 (citation omitted). Neither *Leasco Corp. v. Taussig*, 473 F.2d 777, 786 (2d Cir. 1972), nor any other case plaintiffs cite gives a blank check to the district court; equitable authority is flexible, but that "flexibility is confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano*, 527 U.S. at 322.

Here, for all plaintiffs' talk about "equal treatment," what they really want is to use the pari passu clause to *enforce* their contractual right to be paid a defaulted debt: a prejudgment collection device to avoid the difficulties under the FSIA of attaching property or enforcing a judgment against a sovereign debtor. Any actual claim to "equal treatment" would be satisfied by treating all holdout creditors on the same terms as the participants in the Republic's 2010 Exchange Offer. Anything else is not equal treatment, but a preference that would violate Argentine law and public policy as well as fundamental principles of intercreditor

equity. Equitable treatment is a cornerstone of all sovereign debt restructuring and applies to all countries, not just Argentina. While plaintiffs retain the right to seek to do *better* than the exchange bondholders by obtaining judgments and enforcing them within the limits of the law, that is a matter of legal rights, not equitable remedies. There is nothing equitable, in the name of "equal treatment," in depriving the exchange bondholders of the benefit of their own bargain, and thereby imperiling the restructuring of 92 percent of the Republic's external debt that was accomplished *only* because of the exchange bondholders' willingness to accept that bargain.

Plaintiffs seek to minimize all these problems by repeatedly asserting that the Republic's Central Bank has sufficient reserves to pay them in full. The reality is different: the Amended Injunctions open the door to potential claims by holders of more than $43 billion in principal and interest of both defaulted and restructured Argentine debt, an amount greater than the reserves. No country on earth could, as plaintiffs suggest, expose itself to handing over its reserves, and no country should ever be commandeered by a U.S. district court to do so. It is impossible for the Republic to do so. This inequitable and unfair "remedy" demanded by plaintiffs is wrong on the law and the facts, and should be rejected.

POINT I

THE NOVEMBER 21 ORDERS VIOLATE THE FSIA AND THE TRADITIONAL LIMITS ON THE COURT'S EQUITY JURISDICTION

The district court's order that the Republic pay the full amount of plaintiffs' claims into escrow with funds located outside the United States cannot be justified under the FSIA. Republic Br. at 21-24. Recognizing this, plaintiffs assert that the escrow was ordered "to protect Argentina pending final resolution of the litigation," NML Br. at 45, and was mooted by this Court's Stay. *Id.* This is disingenuous: the escrow requirement was not an "option" but an order, and there was nothing protective about it. More important, it highlights the fundamental reality that an order to pay to plaintiffs Republic assets located outside the United States, whether via an escrow or directly, violates the FSIA's limitation on creditor remedies to sovereign property located in the United States and used here for a commercial activity. 28 U.S.C. §§ 1609-1611; *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1131-32 (9th Cir. 2010) (motion to assign Iran's rights to creditor payment denied because debt obligation was sitused in France and therefore "immune from execution"); *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007) (rejecting extraterritorial enforcement: "We would need some hint from Congress before we felt justified in

adopting such a breathtaking assertion of extraterritorial jurisdiction.").[1] That the Amended Injunctions do not literally attach or execute on Republic property, NML Br. at 45, does not change the fact that they require a turnover of property not in the United States, and therefore outside the scope of the court's enforcement powers under the FSIA.

The FSIA bars not only attachment of immune property prior to judgment, but also "*any other means* to effect the same result." *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (emphasis added); *see also Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.*, 875 F.2d 1174, 1177 (5th Cir. 1989) (FSIA property immunity applies where "purpose of [an] injunction is to secure the payment of a judgment"). An injunction directing the Republic to pay plaintiffs their full contract claims for money damages whenever it makes a single periodic interest payment on its restructured debt "effects the same result" as an execution device – it is the functional equivalent of a C.P.L.R. § 5225(b)

[1] NML is wrong to claim that the Republic's FSIA arguments are foreclosed by the law of the case doctrine, NML Br. at 44, which is "at best, a discretionary doctrine which does not constitute a limitation on the court's power . . . ." *Brody v. Vill. of Port Chester*, 345 F.3d 103, 110 (2d Cir. 2003). The November 21 Orders' escrow requirement was not before the Court when it issued its October 26 Decision, and the Court may in any event "depart from its prior legal pronouncements when circumstances of the case warrant." *United States v. Fernandez*, 506 F.2d 1200, 1203 (2d Cir. 1974). The escrow demonstrates that the Amended Injunctions seek directly to order the application of immune property outside the United States to the payment of plaintiffs' claims.

"turnover" order, which is barred as to property outside the scope of § 1610 of the FSIA. *See* Republic Br. at 21-22; *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 283 (2d Cir. 2011) (affirming denial of turnover order as violative of § 1610).

That this improper "enhanced judgment enforcement mechanism," to use NML's own words, NML Letter at 3 (A-210), is not "activated" unless the Republic makes a payment on its exchange bonds is irrelevant: an order to pay a monetary claim is an order to pay a monetary claim, regardless of when that order goes into effect.[2] Plaintiffs repeatedly acknowledge, as they must, that the Amended Injunctions are designed to further their collection efforts. *See, e.g.*, NML Br. at 14 (noting that the "remedy" requires the Republic "to pay Appellees what they are owed" on their defaulted debt); *id.* at 23. They could hardly do otherwise: the Court found that the purported harm the Injunctions address is the

[2] Plaintiffs mischaracterize the Republic's position as asserting that creditors "may never obtain orders of specific performance enforcing their contractual rights against sovereigns." NML Br. at 47. What the Republic does say is that enforcement orders to secure or pay monetary claims, however denominated, must be consistent with the FSIA provisions governing attachment and execution immunity. Republic Br. at 21-22; Rehearing Petition at 4-10; U.S. En Banc at 6-8. NML's assertion that the Court held that the FSIA "imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign," NML Br. at 9, 47, omits the Court's critical qualification: "at least where the district court's use of its equitable powers does not conflict with the separate execution immunities created by § 1609." Oct. 26 Decision at 25.

non-payment of plaintiffs' future money *judgments*. Oct. 26 Decision at 24. And the FSIA did not create an exception from immunity for judgments outstanding for any particular length of time or based on the source or size of the judgment or underlying breach. *See De Letelier v. Republic of Chile*, 748 F.2d 790, 798 (2d Cir. 1984) (Congress "create[d] a right without a remedy" in enacting the FSIA); *Peterson*, 627 F.3d at 1128 (same); *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) (outside of FSIA's immunity exceptions "a plaintiff must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment"). Plaintiffs ask this Court not "to put form over substance," Aurelius Br. at 29, but in arguing that the district court's payment order is anything but an execution device they do just that.

Plaintiffs' demand for payment of full principal and interest is all the more improper because "traditional equitable relief" did *not* include "injunction[s] to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation," except where, "unlike the present case, [the court] sought to prevent future losses that either were incalculable or would be greater than the sum awarded." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-11 (2002); *Grupo Mexicano*, 527 U.S. at 319-20 (recognizing "the substantive rule that a general creditor (one without a judgment) had no cognizable interest, either at law or in equity, in the property of his debtor,

and therefore could not interfere with the debtor's use of that property"). The Supreme Court in *Grupo Mexicano* determined that a creditor could not restrict a debtor's payment of other debt because, *inter alia*, "an equitable power to restrict a debtor's use of his unencumbered property before judgment" did not exist. *Id.* at 322.

Finally, plaintiffs' rebuttal that the Amended Injunctions do not violate the Tenth Amendment misses the point. NML Br. at 46. No one says they do, but it is unimaginable that Congress, in enacting the FSIA, intended to permit the invasion of the Treasury of a *foreign* state and the commandeering of its Legislative and Executive branches when in our Constitutional system the United States must respect its *own* states and is forbidden from commandeering their legislatures. *See* Republic Br. at 22-24. The Republic consented to the jurisdiction of U.S. courts, NML Br. at 47, but, under the FSIA, that waiver extended to suit and enforcement *in* the United States, not to orders of a U.S. court dictating Argentina's use of its property in its own territory, and the exercise of its sovereign decision-making powers.

POINT II

THE DISTRICT COURT'S INEQUITABLE INTERPRETATION OF "RATABLE PAYMENT" MUST BE REJECTED

Faced with the undeniable fact that requiring payment of full principal and interest to plaintiffs upon a single installment payment on performing debt

defies the label "equal treatment," plaintiffs proffer various arguments to justify their demand for court-imposed better treatment. These arguments fail.

First, plaintiffs assert that "no one is challenging" the district court's "Ratable Payment" determination. NML Br. at 21. That is obviously inaccurate: the Republic and the EBG have explained that any "Ratable Payment" formula that ignores the haircut taken by the exchange bondholders does not (and could not as a matter of logic or math) constitute "equal treatment." Republic Br. at 29, EBG Br. at 28-29. As explained by the Republic in its opening brief, the Argentine Executive is prepared to once again present to Congress a proposal to definitively treat all holdout creditors on the same terms as participants in the Republic's 2010 Exchange Offer. *See* Republic Br. at 4, 30.[3] This is neither "haggl[ing]" with this Court, *see* NML Br. at 28, nor as plaintiffs dismissively state, a "cramdown," *id.* – rather, it is a concrete proposal that gives substance to the concept of "equal," as opposed to special, treatment to plaintiffs. *See Lamberti v. Angiolillo*, 905 N.Y.S.2d 560, 561 (1st Dep't 2010) (equitable relief of specific performance may not grant "superior rights").

[3] Plaintiffs' *amici* argue that payment in full is warranted by the purported "past harm" caused by the Republic's 2005 and 2010 Exchange Offers. Duane Morris Br. at 8. However, the assertion that such injury began with the 2005 Exchange Offer is unsupported by the record and contradicted by this Court's conclusion that "to hold that the 2005 and 2010 exchange offers themselves violated the Equal Treatment Provision, *[is] a position not even plaintiffs have taken*." *See* Oct. 26 Decision at 19 n.10 (emphasis added). In fact, plaintiffs did not assert pari passu rights in connection with either Offer.

While plaintiffs argue that the district court's formula is supported by the reference in the pari passu clause to "payment obligations," NML Br. at 22-23, this Court held (based at least in part on plaintiffs' own concession) that the language of the clause does not itself require "Ratable Payment," much less explain how such payment would be made. Oct. 26 Decision at 19 n.10.[4] Plaintiffs thus pick and choose from the provision's words, ignoring entirely the word "equally," and offering no explanation as to how the treatment of creditors can be viewed as "equal" where one group is required to be paid out in full while the remainder continue to be paid in installments for decades. *Cf. Grupo Mexicano*, 527 U.S. at 332 (rejecting remedies divorced from rules and precedents "as if [one] should make the standard for the measure the Chancellor's foot" (citing 1 Commentaries on Equity Jurisprudence § 19, at 21)).

Second, plaintiffs assert that the district court's interpretation of the payment formula does not work any unjust hardship on the Republic, saying that the Republic can "easily" afford to pay them, NML Br. at 25-26, 31, and suggesting that it is simply a matter of paying plaintiffs $1.44 billion out of the

[4] Plaintiffs also try to justify their requested "Ratable Payment" by arguing that the exchange bondholders traded the right to such payment "for a *different* set of rights." NML Br. at 26 (emphasis in original). But NML does not explain how that "different set" of installment payments on restructured debt is "equal" to full principal and interest on defaulted debt. This is all the more true for the GDP-linked securities, on which the Republic does not make interest payments, but periodic payments that provide a higher return if Argentina's economy grows. *See* ICE Canyon Br. at 19-30.

Central Bank's *immune* reserves of approximately $40 billion. *Id.* at 4. Plaintiffs have not explained this conclusion, which has nothing to do with reality.

The Amended Injunctions would prompt claims equal to more than $43 billion in principal and interest of defaulted and restructured debt – an amount greater than the entirety of the Central Bank's reserves. This would create both a legal and economic impossibility and serve no purpose other than to create crisis. Another pari passu case on additional, unrestructured debt has recently been filed in Germany, *see Stefan Laxhuber v. Republic of Argentina* (Frankfurt Regional Court Jan. 23, 2013), and one plaintiff recently filed amended complaints in the district court to add pari passu claims, *see, e.g., VR Global Partners, L.P. v. Republic of Argentina*, No. 11 Civ. 8817 (TPG) (Am. Compl. dated Sept. 4, 2012). Plaintiffs' *amici* are also asserting the same purported pari passu rights as well. *See* EM/Mann Br. at 2-3 ("EM believes that the Equal Treatment Provision applies with identical force in the post-judgment context"); *see also* Italian Bondholders Br. at 12 (noting Italian Bondholders' intention to pursue contractual claims against the Republic if their ICSID claims fail).

Plaintiffs couple the gross understatement of the amount of potential claims with their argument that the reserves are freely available to pay claims on Republic debt. NML Br. at 24. That assertion ignores the complex function of reserves in an economy that depends on reserves to support the currency and the

foreign exchange market, to enable the Central Bank to act as a lender of last resort to Argentine banks, and to serve as a cushion against external shocks, among other functions provided for under Argentine law. *See NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 194-95 (2d Cir. 2011) (vacating attachments and restraints of Argentine Central Bank reserves and discussing various central bank functions). Those reserves are not an open till to pay plaintiffs and other claimants at the order of U.S. courts. *See* Puente Br. at 27 (expressing "grave trepidation" about the Amended Injunctions' impact on the Republic's economy and populace). In its rush to judgment, the district court did not consider the amount or the serious effects of a payment that would be equivalent to the depletion of a country's reserves, and its failure to do so resulted in a remedy that is neither "fair" nor "workable." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 375 (1977).

Finally, plaintiffs argue that "every court that has considered the meaning of an equal treatment provision in a sovereign debt instrument has ordered an equal treatment remedy," NML Br. at 29, but the cases they cite consist of the *ex parte* order of a Belgian Court, *see Elliott Assocs. L.P. v. Banco de la Nacion*, Gen. Doc. No. 2000/QR/92 (Appeals Ct. of Brussels Sept. 26, 2000) (A-1357), another Belgian decision that was reversed, *see LNC Invs. LLC v. Republic of Nicaragua*, Folio 2000 No. 1061, R.K. 240/03 (Commercial Ct. of Brussels

Sept. 11, 2003) (A-1334), *rev'd in part on other grounds*, Gen. Doc. No. 2003/KR/334 (Court of Appeals of Brussels, 9th Chamber, Mar. 19, 2004), and a cryptic district court case, *Red Mountain Fin., Inc. v. Democratic Republic of Congo*, No. CV 00-0164 R (BQRx) (C.D. Cal. May 29, 2001) (A-1369), where the district court judge crossed out the proposed order referencing the pari passu clause.[5] More relevant is *Kensington Int'l Ltd. v. Republic of Congo*, [2003] EWHC 2331 (Tomlinson, J.), in which the court both questioned the "equal payment" interpretation and refused to grant injunctive relief, *inter alia*, because it did not regard it appropriate "to make an order compliance with which can only realistically be achieved by coercion of third parties." *Id.* ¶ 96; *see also id.* ("I view with disquiet . . . a situation in which third parties are potentially exposed to penal consequences which could never be visited upon the defendant to whom the order is actually directed."). No reasoned opinion in any court, and certainly no decision by a New York court, has ever granted the relief plaintiffs seek, or suggested it would be proper to do so.

[5] The formula proposed by plaintiffs in *Red Mountain* did not provide for a one-time payment of 100 cents on the dollar, but partial payment based on the percentage represented by the amount owed by Congo against the total amount of Congo's obligations (A-2883).

POINT III

THE AMENDED INJUNCTIONS IMPROPERLY ENJOIN THIRD PARTIES FROM TRANSFERRING THE EXCHANGE BONDHOLDERS' PROPERTY

A. The Amended Injunctions Exceed the Bounds of Rule 65(d)

Expressing concern over how "the challenged order will apply to *third parties generally*," Oct. 26 Dec. at 28 (emphasis added), this Court charged the district court on remand with determining the third parties to which the Injunctions would apply so that the Court could determine whether such application was "reasonable." *Id.* The district court nevertheless accepted plaintiffs' invitation to enjoin the world at large, sweeping up in the Amended Injunctions as purported aiders and abettors all parties with any role in the exchange bondholders' receipt of payment on their bonds, although those parties play no role in the Republic's decisions and are merely doing their jobs. NML Amended Injunction ¶ 2(f)-(g) (SPE-1382-83). These sweeping Amended Injunctions should be reversed.

Rule 65(d)(2)(C) codifies the common law standard that one who "aids and abets" a violation of a court order may be held in contempt. *See Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 303 (2d Cir. 1999); *Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010). Because the purpose of the rule is to prevent *the enjoined party* from

"nullify[ing] a decree by carrying out prohibited acts through aiders and abettors," *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945), liability reaches only those that are "associate[s] or confederate[s]" of the defendant. *See Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 436 (1934). A court may not "enjoin the world at large" and may not punish a non-party for helping to bring about "merely what the decree has forbidden . . . but what it has power to forbid, an act *of a party*." *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (emphasis added).

None of the non-parties identified by plaintiffs and the district court meets this standard. The alleged breach of the pari passu clause identified by the Court was the purported "subordination" of plaintiffs' debt accomplished by the Republic's passage of the Lock Law, its moratorium on payment to plaintiffs, and its statements that it was not in the legal position to pay plaintiffs, in contrast to the Republic's servicing of its restructured debt. *See* Oct. 26 Decision at 20.[6]

The third party financial institutions are in no sense "*confederates*" of the Republic in its non-payment to plaintiffs. No third party aids and abets, takes part in, or indeed plays any role in this non-payment, just as no third party played any role in the Republic's purported breach of the pari passu clause. The receipt by the exchange bondholders of funds belonging to them is not an unlawful act.

[6] NML itself describes the Court's holding on no fewer than ten occasions as requiring payment to plaintiffs. *See* NML Br. at 1, 2, 6, 9, 13, 17, 18, 21, 28.

See Oct. 26 Decision at 19 n.10 (noting that not even plaintiffs have taken position that 2005 or 2010 Exchange Offers violated the "Equal Treatment Provision"); *Capital Ventures Int'l v. Republic of Argentina*, 282 F. App'x 41, 42 (2d Cir. 2008) (summary order).[7]

The Republic, not third parties, is the sole decision-maker regarding debt payments. The Republic makes payments on restructured debt in Argentina. The moment the Republic's funds transfer to BNYM is complete, BNYM holds the property "in trust" for the exchange bondholders. Indenture §§ 3.1, 3.5(a), 5.5, 11.2 (SPE-648, 650, 665, 683). The funds are no longer property of the Republic, but property of the exchange bondholders, and the Republic has "no interest whatsoever in such amounts." Indenture § 3.5(a) (SPE-650). Any purported violation by the Republic of the Amended Injunctions would therefore be consummated before any non-party – including BNYM – takes any further action, and none of the enjoined third parties "aids or abets" the Republic's payment to BNYM.[8]

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[7] Plaintiffs try to distinguish *Capital Ventures* – where the Court instructed the district court to "take care" to "avoid interrupting Argentina's regular payments to bondholders" – because the Court there dealt with attachment proceedings, but whether the exchange bondholders are deprived of their property rights by attachment, restraint, or by operation of an "injunction," their payments are still interrupted and the bondholders are still deprived of their property.

[8] Plaintiffs accuse BNYM of "facilitating the transfer about *one month* before Argentina sends its money," Aurelius Br. at 19 (emphasis in original), but the

Plaintiffs seek to overcome this deficiency by mischaracterizing three out-of-circuit cases as finding Rule 65(d) liability despite a defendant only undertaking the "first step in the payment process." Aurelius Br. at 19. None of these cases involves payment processes, and each involves a non-party's substantial assistance *to* the enjoined party in *its* carrying out of the enjoined act. *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372 (10th Cir. 1996), and *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 209 F.3d 63 (1st Cir. 2002), are otherwise distinguishable, *see* Republic Br. at 43, and *Waffenschmidt v. MacKay* concerned the plainly inapplicable scenario of non-parties acting as "agents" for the defendant and "knowingly participat[ing] in his scheme to dissipate funds." 763 F.2d 711, 717, 718 (5th Cir. 1985).

The third parties identified in the Amended Injunctions undertake the distinct, independent acts of transferring through the international payment system property that *already* belongs to the exchange bondholders. *See Heyman v. Kline*, 444 F.2d 65, 65-66 (2d Cir. 1971) ("Rule 65(d) does not grant a court power" to punish non-party with "genuinely independent interest in the property"); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1395 (Fed. Cir. 1996) (65(d) not applicable to non-parties' "independent conduct regarding the

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documents plaintiffs cite merely show BNYM informing the Republic of the payment date. *See* SPE-526-37. This is a standard back-office provision, not evidence of aiding and abetting.

subject matter of the . . . case"); *Lynch v. Rank*, 639 F. Supp. 69, 73-74 (N.D. Cal. 1985) ("courts must be careful not to resort to fictional conspiracies," as "genuinely independent interests" preclude 65(d) liability). That these non-parties "simply . . . perform[] [their] contracted-for services" to other non-parties – *not* the Republic – is insufficient to establish aider and abettor liability. *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 392-93 (S.D.N.Y. 2009); *see also GMA Accessories, Inc. v. Eminent, Inc.*, 2008 WL 2355826, at *14 (S.D.N.Y. May 29, 2008) (Rule 65(d) designed to reach "manipulative conduct"); *Meridian Horizon Fund, LP v. KPMG (Cayman)*, 2012 WL 2754933, at *5 (2d Cir. July 10, 2012) (summary order); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 427 (S.D.N.Y. 2007).[9]

In their effort to enjoin anyone in the world that has any connection to the international payment system, plaintiffs prove the real aim of the Amended Injunctions: to coerce payment in full to them, or else to seize the funds of the

[9] Contrary to plaintiffs' assertion, this conclusion is consistent with *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010) (citing in dicta *N.Y. State Nat'l Org. for Women v. Terry*, 961 F.2d 390 (2d Cir. 1992)), *see* Aurelius Br. at 22, as it is the independent and lawful nature of transferring property *of* the exchange bondholders *to* the exchange bondholders that removes the non-parties here from the purview of aiding and abetting liability. Nor are plaintiffs helped by a provision in the Form of Security for exchange bonds stating that the Republic's obligations are not satisfied until exchange bondholders receive payments, *see id.* at 19 (citing SPE-544) – this does not change the fact that the sole act performed by the Republic is its payment to BNYM, at which point the funds belong to the exchange bondholders.

exchange bondholders, and otherwise hold third parties' property for ransom. This aim cannot be squared with this Court's conclusion that the Injunctions would not "'execute upon' any funds, much less those held in trust for the exchange bondholders." Oct. 26 Decision at 25 n.14; *see also* Montreux Br. at 26 (asserting that if BNYM finds itself in receipt of payments from Argentina, it should "interplead the funds, freeze the relevant accounts, or take some other practical step to ensure that it does not pay forward the funds").

Plaintiffs seek to justify this attempt to take the property of third parties as punishment for the Republic's breach, on the grounds that this is the only way to compel obedience by the Republic. Aurelius Br. at 37. But injunctive relief that only works if it coerces or injures third parties is profoundly inequitable. *See Kensington Int'l Ltd. v. Republic of Congo*, [2003] EWHC 2331 ¶ 96 (refusing to "make an order compliance with which can only realistically be achieved by coercion of third parties"). Equity provides no basis for such grave injury to third parties and to the economic stability of an entire nation. Argentina cannot comply with the Amended Injunctions because under its law and public policy it cannot treat some bondholders better than all others, and the impossibility of enforcing an injunction against a sovereign because of sovereign immunity provides no basis to enjoin third parties from being paid debts that are unquestionably owed to them. *Franke v. Wiltschek*, 209 F.2d 493, 498 (2d Cir. 1953) (equity will not "attempt an

injunction when it would be vain"); *Storm LLC v. Telenor Mobile Commc'ns AS*, 2006 WL 3735657, at *12 (S.D.N.Y. Dec. 15, 2006) (Lynch, J.) ("equity will not undertake futile acts").

B. The Amended Injunctions Violate UCC Article 4A

Application of the Amended Injunctions to the international payment system is also improper under Article 4A of the UCC. *See* Republic Br. at 33-40; Clearing House Br. at 18-25; FRBNY Letter at 2-6 (SPE-1302-06). Plaintiffs' claim to the contrary misreads Section 503 as allowing a creditor to restrain parties to a funds transfer who neither owe an obligation to the creditor, nor hold any property in which the debtor has an interest. Aurelius Br. at 45; EM/Mann Br. at 14.

Section 503 states that the parties to a funds transfer may only be enjoined "*for proper cause*" – something plaintiffs only claim to have against the Republic, and not the myriad third-party institutions comprising the international payment system or the exchange bondholders to whom those entities transfer the bondholders' undisputed property. *See* U.C.C. § 4A-503 (emphasis added); *Black's Law Dictionary* 250 (9th ed. 2009) (defining "cause" as "a ground for legal action; a lawsuit; a case"). In the creditor/debtor context, "proper cause" means that the restrained party must hold funds of the creditor's debtor. *See Brown v. J.P. Morgan & Co.*, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach

money in hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), *aff'd*, 295 N.Y. 867 (1946); *EM Ltd. v. Republic of Argentina*, 2012 WL 1028109, at *7-8 (S.D.N.Y. Mar. 28, 2012).

As the comment to Section 503 instructs, that section must be read in conjunction with Section 502's express command that creditors may serve process *only* on a party that holds the *debtor's* property. U.C.C. § 4A-503 cmt. (noting that Section 503 is "related to Section 4A-502(d) and to Comment 4 to Section 4A-502"); U.C.C. § 4A-502(d) (creditor of funds transfer beneficiary may only serve creditor process on beneficiary's bank); *id.* cmt. 4 (creditor of originator may only serve process on originator's bank because at all other times "no property of the originator is being transferred"). For this reason courts have regularly cited Sections 502 and 503 interchangeably and referred to both as barring creditor restraints generally. *See, e.g.*, *Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 70 (2d Cir. 2009); *Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, 1993 WL 267282, at *3 (S.D.N.Y. July 14, 2003) (applying Section 503 in action involving attachment attempt because the "term 'creditor process' is a generic term and covers a variety of devices by which a creditor can seize an account"). Section 503 is a creditor remedy provision that bars enjoining transfers of property that does not belong to the debtor.

To accept plaintiffs' interpretation of Section 503, one would have to accept the proposition that Article 4A's drafters – while crafting a statutory protection for funds transfers – purposely gave courts the option to interfere with funds transfers received and made by non-debtor third parties, notwithstanding the historical absence of such a "remedy" at law or equity. Tellingly, plaintiffs do not cite a *single case* where a court has frozen in a funds transfer the property of third parties due to their debtor's conduct.

Nor do plaintiffs have an answer to the damaging effects that the Amended Injunctions will have on the international payment system. Republic Br. at 38-40; Clearing House Br. at 20-25; FRBNY Letter at 4 (Amended Injunctions might lead to "confusion and disruption to the smooth and efficient functioning of the payments system") (SPE-1304). Beyond intermediary banks,[10] the Amended Injunctions will harm and disrupt the numerous beneficiary banks in the payment system. Clearing House Br. at 20-25. Article 4A of the UCC protects from creditor disruption *all* payments and entities – originators, beneficiaries, and intermediary banks – in the funds transfer process with which a creditor has no "proper cause" to interfere. U.C.C. § 4A-503(iii) (a "court *may not otherwise restrain*" a person in the payment chain) (emphasis added). The November 21

[10] Although the Amended Injunctions "carve out" entities acting solely as intermediary banks, confusion clearly remains, as Euroclear, which is an intermediary bank, is nevertheless named in the Orders. Euroclear Br. at 4; NML Amended Injunction ¶ 2(f) (SPE-1382).

Orders would be "peculiarly burdensome" for those entities, including beneficiary banks, because they would need to monitor the transfers they receive and potentially inquire up the funds-transfer chain to determine whether the payments were covered by the Amended Injunctions. The result would be to impose onerous costs on the banks, and to hold up unrelated transfers. *See* Clearing House Br. at 20; FRBNY Letter at 5 (burden imposed on beneficiary banks, "including . . . the New York Fed," could "caus[e] significant delay for legitimate payments") (SPE-1305); *see also* Agustino Fontevecchia, *Fed's $2.6T Payments System Risks Paralysis As Judge Orders Argentina To Pay Defaulted Bonds*, Forbes, Nov. 26, 2012. The Court should not permit this.

POINT IV

THE AMENDED INJUNCTIONS VIOLATE THE PUBLIC INTEREST

The inequitable effect of the Amended Injunctions on third parties is not limited to those most directly damaged by them, but extends far more broadly to damage the financial markets generally, the future of other sovereign debt restructurings, and New York's role in the international financial and legal community. *See* Republic Br. at 46-54. Moreover, sovereign debt crises typically provoke contagion, and unresolvable ones will foreseeably derail global economic security. All of these interests require reversal of the Amended Injunctions. *See*

Republic Br. at 31 (citing cases vacating injunctions where district court failed to properly weigh public interest).

In response, plaintiffs primarily invoke the public interest "of enforcing contracts and upholding the rule of law," NML Br. at 36, but that interest is not a talisman: if breach of contract were enough to support sweeping injunctive relief regardless of the scope of the injunction, or the impact on third parties or broader public interests, sweeping injunctions to enforce financial contracts would be the norm, and not the exception. In fact, it is mandatory that courts of equity, when granting injunctive relief, "sensitively assess *all* the equities of the situation, including the public interest." *Beal v. Stern*, 184 F.3d 117, 123 n.2 (2d Cir. 1999) (emphasis added) (quotation omitted). There are many instances where, regardless of the contractual right of private plaintiffs, the *public* interest does not support the injunctive relief claimed, and this is one of them.

Plaintiffs are on no firmer ground when they move from generalities to specifics. They dismiss as "baseless hyperbole" that the Amended Injunctions will create further litigation by other holders of defaulted Republic debt, as well as by exchange bondholders themselves. NML Br. at 25 n.3. But they have no answer to the fact that the Amended Injunctions would prompt claims by holders of more than $43 billion of defaulted and restructured Republic external debt. *See supra*, Point II. Nor do they otherwise address the consequences if the Amended

Injunctions, which would require the Republic to violate its own law and public policy, cause a default on the already restructured debt. The 92 percent of defaulted debt that has been restructured would then become the subject of a new wave of litigation by exchange bondholders, *cf.* Republic Br. at 46-47 (Amended Injunctions contrary to the Court's policy of encouraging settlement), and plaintiffs would be no closer than they are now from their goal of collecting on their claims.

The destructive effect of the Amended Injunctions extends to the sovereign debt markets generally and the process of sovereign debt restructuring. *See* U.S. En Banc at 3 (Amended Injunctions threaten "core U.S. policy regarding international debt restructuring. The effect could extend well beyond Argentina"); Krueger Br. at 9 ("When a country's debt is truly unsustainable, short of really positive unforeseen changes . . . debt *must be restructured*") (emphasis added); *id.* at 17-18 (consequences of "ratable payment" remedy "would reduce prospects for growth in developing countries, increase the costs to creditors and debtors of debt resolution, harm the international sovereign debt market, and reduce the ability of the private international capital market to enhance the growth of developing countries").

Plaintiffs seek to dismiss that impact by invoking collective action clauses ("CACs") in other sovereign bonds, asserting that they "effectively end[] the ability of a holdout minority to litigate based on a pari passu clause." Dam Br.

at 10; *see* NML Br. at 38. But that conclusion is based on speculation, not facts. The inclusion of CACs in New York law-governed sovereign bonds is relatively recent; they are only included in sovereign bonds issued in the past decade. Krueger Br. at 13. As explained by Professor Krueger, the former First Deputy Director of the IMF, the lack of long-term market experience with CACs and the fact that no country has been close to restructuring on bonds with CACs make it virtually impossible "to reach a firm conclusion that CACs would prevent holdouts." *Id*.

More fundamentally, the assertion that "once a sovereign can obtain the required percentage of votes required by a CAC, holdouts are foreclosed from using the pari passu clause," Dam Br. at 15, ignores that the Amended Injunctions incentivize creditors *not* to restructure, thereby making it difficult, if not impossible, to assemble the majority needed to invoke CACs, whether that majority is 75 percent or 66 2/3 percent. Krueger Br. at 12 n.10 ("Should holdout creditors be expected to be paid on a ratable basis with new borrowing by the sovereign, the reluctance to lend would increase greatly (*and the incentive to hold out would increase*)" (emphasis added)); Republic Br. at 48-51.

The example of Greece demonstrates these phenomena. Greece – which retroactively inserted CACs into its bonds – restructured some 95 percent of its debt. *See* Dam Br. at 12. But most of Greece's bonds were governed by Greek

law that did not permit holdout creditors to invoke a pari passu clause to interfere with payments to restructured debt holders, so the disincentive to restructure created by the Amended Injunctions was not present.[11] And "even those bonds that include both CACs and aggregation clauses allow holders to block the restructuring of a particular bond issue by buying a somewhat larger stake in that issue." W. Mark C. Weidemaier, *Sovereign Debt After NML v. Argentina*, Capital Mkts. L.J. ("Weidemaier") (forthcoming 2013) (manuscript at 10). Holdouts in the Greek restructuring acquired such blocking positions, thus thwarting "amendment of bond issues despite collective action clauses" and exposing the limitations of CACs. U.S. En Banc at 4.

Plaintiffs' efforts to minimize the impact of the Amended Injunctions by somehow limiting them to the allegedly unique case of Argentina and dismissing their future impact as a precedent are belied by what has happened in the few months since this Court's October 26 Decision. There has been consternation in the sovereign debt market, which sees that the Amended

[11] "[CACs] are not designed to eliminate holdouts by any means necessary, nor to protect creditors participating in an exchange from a lone holdout armed with a nuclear remedy – especially when the holdout sues under a contract wholly apart from theirs." Anna Gelpern, *Contract Hope and Sovereign Redemption*, Capital Mkts. L.J. (forthcoming 2013) (manuscript at 16). Indeed, CACs can actually make it "easier for would-be holdouts [to] identify bond issues where they can secure blocking positions." *Id.* at 15.

Injunctions are not just limited to the "particular words in the FAA" and the "particular facts of this case," NML Br. at 37-38, because "functionally similar or identical" pari passu clauses are "widespread" in outstanding sovereign bonds, and the broad pari passu clause interpretation upon which the Amended Injunctions rely is not limited to any set of facts. Weidemaier at 11-12. The United States agrees, and has told this Court in no uncertain terms that its October 26 Decision is wrong and should be revisited. *See* U.S. En Banc at 1. The essence of a judicially crafted equitable remedy is that it be fair to *all* concerned, not just to the plaintiff who seeks it, and that it do no more harm than the harm it is designed to remedy. The Amended Injunctions fail that test by any measure.

CONCLUSION

For the foregoing reasons, the Court should reverse and vacate the November 21 Orders and all associated Orders.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i), because it contains 6,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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