12-0105-cv(L), 12-0109-cv(con), 12-0111-cv(con), 12-0157-cv(con), 12-0158-cv(con), 12-0163-cv(con), 12-0164-cv(con), 12-0170-cv(con), 12-0176-cv(con), 12-0185-cv(con), 12-0189-cv(con), 12-0214-cv(con), 12-0909-cv(con), 12-0914-cv(con), 12-0916-cv(con), 12-0919-cv(con), 12-0920-cv(con), 12-0923-cv(con), 12-0924-cv(con), 12-0926-cv(con), 12-0939-cv(con), 12-0943-cv(con), 12-0951-cv(con), 12-0968-cv(con), 12-0971-cv(con), 12-4694-cv(con), 12-4829-cv(con), 12-4865-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,

(For Continuation of Caption See Inside Cover)

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

REPLY BRIEF FOR NON-PARTY APPELLANT THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE

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Plaintiffs-Appellees,

– v. –

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

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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PRELIMINARY STATEMENT

In its opening brief, BNY Mellon explained why, in light of the record and settled law, the District Court's Injunctions against it violate the Due Process Clause, contravene Rule 65(d)(2)(C), and exceed historic limits on equitable power. In addition, BNY Mellon demonstrated that those Injunctions disserve the public interests in protecting the constitutional rights of non-parties, preserving the essential role of indenture trustees, and maintaining proper relationships in debtor-creditor law.

In response, Plaintiff Aurelius and its *amici* dismiss all of this as inconsequential.[1] While they voice little disagreement with the legal principles BNY Mellon relies on, they insist that BNY Mellon is a garden variety "aider and abettor" which should be enjoined to make the District Court's ruling on the *pari passu* clause effective—the legal end, in other words, justifies the equitable means, no matter how unconstitutional or ill-conceived. Further, they assert that any concerns BNY Mellon has about due process must wait for a later hearing when it faces a contempt citation. No piece of this response withstands reasoned analysis.

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[1] Plaintiffs-Appellees Aurelius Capital Master, Limited, *et al.* ("Aurelius") filed a brief addressing issues relevant to BNY Mellon. Dkt. 820. *Amici curiae* Montreux Partners, L.P. and Wilton Capital ("Montreux") also filed a brief that responds principally to BNY Mellon's opening brief. Dkt. 781. Plaintiffs-Appellees NML Capital, Limited and Olifant Fund, Limited ("NML") filed a separate brief that does not address any issues relating to BNY Mellon. Dkt. 821.

For starters, the Injunctions violate the Due Process Clause because they specifically enjoin BNY Mellon and define the acts that will bring it into contempt—even though BNY Mellon has not been named as a party, served with process, or given an opportunity to contest the reasons that it is enjoined. An injunction cannot be entered against anyone, and most particularly a non-party, without process, proof supporting the elements of injunctive relief, and an opportunity to respond. The Injunctions against BNY Mellon must be vacated on this ground alone.

Next, the attempt to label BNY Mellon as an "aider and abettor" acting in "active concert" with Argentina materially distorts existing law. The District Court has enjoined the ministerial conduct of the Indenture Trustee—BNY Mellon—which will have done nothing except comply with its lawful and independent obligations under a trust indenture. BNY Mellon's receipt and distribution of funds—without a shred of evidence that it has joined with Argentina in any scheme to circumvent the Injunctions—is not "active concert or participation with" Argentina's presumed violation of the Injunctions. The Injunctions must be vacated for this reason also.

Beyond this, Plaintiffs and Montreux avoid any discussion of the established limits on a federal court's equitable powers and make no attempt to refute BNY Mellon's showing that, as applied to a non-party indenture trustee, the Injunctions

disserve the public interest. These grounds, too, require that the Injunctions against BNY Mellon be vacated.

Alternatively, if the Injunctions are not vacated, all parties agree that further clarification is needed to protect BNY Mellon's interests in avoiding a contempt citation and ensuring no liability to its bondholders.

ARGUMENT

I. The Injunctions Against BNY Mellon Must Be Vacated Because They Violate Due Process.

Aurelius and Montreux do not dispute that courts cannot enjoin non-parties who are not named in the action, served with process, or subject to a claim or judgment. They argue instead that the Injunctions do not really enjoin BNY Mellon, so there is no due process concern. This assertion belies reality and does not, in any event, avoid the due process problems that infect the Injunctions against BNY Mellon.

A. The Injunctions Improperly Enjoin BNY Mellon Without Process, Appearance, Or An Evidentiary Hearing.

Due process prohibits enjoining a non-party who has not been named as a party in a complaint, properly served with process, or given an opportunity to defend itself. There is no dispute that none of these requirements is satisfied with respect to BNY Mellon. BNY Br. at 15-20. Aurelius and Montreux nevertheless claim that there is no due process problem because the District Court did not purport to enjoin BNY Mellon. Aurelius Br. at 28-29; Montreux Br. at 28-29.

How can that be so? The Injunctions specifically name *BNY Mellon* and forbid *BNY Mellon* from receiving or distributing funds to the Exchange Holders in the absence of Ratable Payments by Argentina to the Plaintiffs. *See* SPE-1381 [¶ 2(e), (f)]; SPE-1368 (finding that "it is necessary that the process for making payments on the Exchange Bonds be covered by the Injunctions, and that the parties participating in that process be covered") (emphasis in original). The Injunctions are no different functionally from those vacated by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and cases that apply its holding. *See* BNY Br. at 17-20. So it should be in this case as well.

Aurelius and Montreux make a related argument—that BNY Mellon is not enjoined directly but merely identified as one "of the non-parties bound under Rule 65(d)(2)(C)" (Montreux Br. at 29; Aurelius Br. at 27-29)—but that does not remedy the due process problem either. The violation remains because Rule 65(d)(2)(C) cannot be used to circumvent constitutional due process requirements. BNY Br. at 23-26 (discussing cases); *see also Zenith Radio Corp.*, 395 U.S. at 112; *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 767 (7th Cir. 2007).

Lake Shore Asset Management illustrates this principle. There, the district court issued an injunction against the lone defendant, Lake Shore Asset Management. But it also stated that the injunction extended to the "Lake Shore

common enterprise," a reference to Lake Shore Asset Management's non-party affiliates which "the district court evidently was confident" were "'in active concert or participation with' Lake Shore Asset Management" under Rule 65(d)(2)(C). *Lake Shore Asset Mgmt.*, 511 F.3d at 767. The Seventh Circuit vacated the injunction to the extent it named these non-party affiliates because Lake Shore Asset Management—the "only defendant"—"must be the sole addressee of the injunction." *Id.* at 766-67 (citing *Zenith Radio*, 395 U.S. at 110-11). *See also R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 958 (4th Cir. 1999) (same, even where non-party was the subject of, and served with, injunction motion).

Just like the district court in *Lake Shore Asset Management*, the District Court here "evidently was confident" that non-party BNY Mellon acts in active concert with Argentina. Judicial "confiden[ce]" is not, however, a substitute for the unflinching requirements that one must be named as a party to an action, served with process, and given a full opportunity to litigate before being subjected to the "drastic and extraordinary" remedy of injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2761 (2010).

Aurelius and Montreux all but ignore *Zenith Radio*, *Lake Shore Asset Management* and the other cases that establish these due process requirements. They offer, instead, a strained interpretation of case law that does not survive

scrutiny. Montreux relies (at 30-32) on *Regal Knitwear Co. v. NLRB*, 324 U.S. 9 (1945), where the Supreme Court affirmed an injunction that—tracking the language of Rule 65(d)— enjoined the defendant's "successors and assigns" and did not specify the conduct that would bring those unidentified "successors and assigns" into contempt. *See Regal Knitwear*, 324 U.S. at 10-11. Here, in contrast, the Injunctions specifically name the non-parties who are enjoined, as well as the conduct they are enjoined from undertaking, despite the fact that those non-parties were not afforded the required due process protections. These are the very types of injunctions, under the very types of circumstances, repeatedly invalidated under the Due Process Clause.[2]

Montreux falls back on the proposition that a non-party covered by Rule 65(d)(2)(C) must obey an injunction even if it has not been served with process. Montreux Br. at 14. But that observation only begs the question. An injunction cannot properly reach a non-party under Rule 65(d)(2)(C) unless that party is first served with process and then given a full opportunity to be heard. *See Lake Shore Asset Mgmt.*, 511 F.3d at 766 (holding that "it does not follow" from the fact that

[2] *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35 (1st Cir. 2000) (cited at Aurelius Br. at 26, 30; Montreux Br. at 30, 32), also is inapposite because the court there likewise did not specifically name the non-parties who were bound by the injunction. *Id.* at 37. And, the First Circuit did not make any ruling on Rule 65(d)(2)(C) or the propriety of enjoining non-parties. Rather, it dismissed the non-parties' appeal for lack of standing, in acknowledged conflict with this Court's precedent. *Id.* at 42 ("declin[ing] to follow" this Court's decision in *Kaplan v. Rand*, 192 F.3d 60 (2d Cir. 1999)).

Rule 65(d) "binds all those acting in concert with" the enjoined wrongdoer that non-parties acting in concert "may be named in an injunction"). Those are the prerequisites missing here and the Injunctions against BNY Mellon must be vacated for this reason alone.

B. A Future Contempt Proceeding Cannot Cure The Failure To Provide Due Process Safeguards.

Aurelius and Montreux also dismiss BNY Mellon's arguments about lack of due process by asserting that BNY Mellon's rights can be fully vindicated by a later contempt proceeding. Aurelius Br. at 28-32; Montreux Br. at 30-34. There is no merit to this contention.

First, to comply with due process, the District Court needed to ensure that non-party BNY Mellon was properly served with process and received a meaningful opportunity to offer evidence in its defense before the court issued the Injunctions. The court did neither and no after-the-fact contempt proceeding can cure that failure.

Second, the Injunctions leave no room for any meaningful defense in a future contempt proceeding because the District Court already has declared that BNY Mellon will "surely" be in "active concert" with Argentina if it receives and distributes payments to the Exchange Holders, absent Ratable Payments made by

Argentina to Plaintiffs. SPE-1369-70. There thus is nothing left to adjudicate regarding what acts will bring BNY Mellon into contempt.[3]

This kind of preemptive adjudication, without proper process or the opportunity to protect one's rights and interests, is an incurable due process violation. There is no "shortcut" around the Constitution. *See Virginia v. Black*, 538 U.S. 343, 367 (2003) (plurality opinion). And certainly, none can be tolerated where, as here, courts prospectively extend the contempt power to the lawful and independent conduct of a non-party indenture trustee with no role in the underlying wrongdoing on which the injunction is based.

II. The Injunctions Against BNY Mellon Must Be Vacated Because There Is No "Active Concert Or Participation With" Argentina.

With respect to BNY Mellon, the record establishes that: (1) the Indenture was executed for legitimate commercial purposes long before the Injunctions were issued; (2) BNY Mellon's conduct as Trustee is confined solely to its obligations under the Indenture; (3) BNY Mellon has no role in Argentina's decision whether

[3] In a footnote, Aurelius suggests that the Injunctions against BNY Mellon can be affirmed under injunctive power conferred by the All Writs Act. Aurelius Br. at 32 n.11. Such a footnoted argument need not be considered. *See Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 107 (2d Cir. 2012) (refusing to consider footnoted argument). Even if the argument is considered, it is clear that the All Writs Act cannot salvage injunctions that violate the Due Process Clause and exceed Rule 65(d)(2)(C). *See Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1397 (Fed. Cir. 1996) (holding that the "All Writs Act does not authorize [the] adjudicative shortcut" of enjoining non-parties).

to make Ratable Payments and no duty to Plaintiffs to see that Argentina does so; and (4) once BNY Mellon receives funds from Argentina, only BNY Mellon and the Exchange Holders have property rights in those funds. BNY Br. at 7-9, 29-32. These facts, taken together, refute any notion that BNY Mellon could be in "active concert or participation with" Argentina in its breach of the *pari passu* clause. The decision whether to breach is made solely by Argentina for its own reasons and it does not involve BNY Mellon at all. Aurelius and Montreux nonetheless insist that BNY Mellon's conduct constitutes "active concert or participation," thereby subjecting BNY Mellon to the Injunctions. This argument is contrary to the terms of the Indenture and controlling law.

A. Rule 65(d)(2)(C) Requires Proof Of Purposeful Conduct, Undertaken "With" The Wrongdoer, To Violate The Injunction.

To protect the due process rights of non-parties, courts give the phrase "active concert or participation with" under Rule 65(d)(2)(C) a very limited reach. *Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 674 (3d Cir. 1999) ("active concert" phrase "is a *limitation* built into the Federal Rules of Civil Procedure for reasons of due process") (citation omitted; emphasis added). As Montreux acknowledges (at 13), the phrase was taken from a now-repealed provision of the Clayton Act, which "was designed especially to prevent issuance of blanket injunctions [and whose] proponents were concerned that large numbers of people not be punished for breaching injunctions issued in cases to which they

had not been made parties." Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873, 919 (1975) (citing H.R. Rep. No. 612, 62d Cong., 3d Sess. 4 (1914)).

Consequently, "active concert or participation" by a non-party does *not* extend to routine business conduct, undertaken for independent and lawful purposes, and *not* for the purpose of aiding an enjoined party's breach of an injunction. BNY Br. at 26-32. Justice Brandeis, writing for a unanimous U.S. Supreme Court in *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934), made it clear that district courts may not "make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law." 291 U.S. at 437. The Supreme Court reiterated this exact principle a decade later in *Regal Knitwear*, 324 U.S. at 13; *see also E.A. Renfroe & Co., Inc. v. Moran*, 338 F. App'x 836, 840 (11th Cir. 2009) (same) (citation omitted); *Microsystems Software, Inc.*, 226 F.3d at 43 (same).

As a corollary, a finding of "active concert" requires more than a non-party's knowledge of the injunction, or even that the injunction's terms have been breached. The non-party must act "*with*" the wrongdoer for the purpose of accomplishing the breach. As Justice Brandeis put it, other than agents and employees, only those who are "associates" or "confederate[s]" of the defendant, who act with the purpose of violating an injunction, are covered by an injunction.

Chase Nat'l Bank, 291 U.S. at 437 ("[E]stablished principles of equity jurisdiction and procedure … require that the clause [subjecting nonparties to liability under an injunction] be limited to confederates or associates of the defendant."). Accordingly, there must be proof that the non-party acted in concert with the wrongdoer in a "scheme,"[4] "conspir[acy,]"[5] or "collusion"[6] "for the purpose of advancing [the wrongdoer's] interest"[7] and in order to violate the injunction.[8]

These foundational requirements under Rule 65(d)(2)(C)—a shared purpose to carry out concerted action—align with prevailing statutory and common law principles as well. Writing for this Court, Judge Learned Hand—construing the federal aiding and abetting statute by looking to the common law—reasoned that aiding and abetting "demand[s] that [the purported aider and abettor] in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." *United States*

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4 *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 962 (5th Cir. 1995).

5 *R.M.S. Titanic, Inc.*, 171 F.3d at 958.

6 *Thaxton v. Vaughan*, 321 F.2d 474, 478 (4th Cir. 1963) (citations omitted).

7 *Parker v. Ryan*, 960 F.2d 543, 546 (5th Cir. 1992).

8 *See, e.g., GMA Accessories, Inc. v. Eminent, Inc.*, 2008 WL 2355826, at *14 (S.D.N.Y. May 29, 2008) (finding that the non-party's sales were not in contempt because there was "nothing in the record to suggest that [the non-party] made such sales for the purpose of assisting [the defendant] in evading a court order"); *Lynch v. Rank*, 639 F. Supp. 69, 72 (N.D. Cal. 1985) (looking to whether the defendant and the non-party had a "commonality of incentives and motivations" to violate the injunction in determining whether they were acting in concert); Clearing House Br. (Dkt. 689) at 11-14; ABA Br. (Dkt. 787) at 8-13.

v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.).[9] The Supreme Court later adopted Judge Hand's definition. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). And this Court recently adopted Judge Hand's definition in the context of civil securities fraud. *SEC v. Apuzzo*, 689 F.3d 204, 212, 214 (2d Cir. 2012) (requiring proof that the aider and abettor assisted the wrongful conduct "as something that [it] wished to bring about").

Similarly, courts define "concerted" action as a common plan and purpose to achieve an unlawful objective. This is true in antitrust law,[10] *see, e.g.*, *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) ("concerted action" under Section 1 of the Sherman Act requires proof of "a conscious commitment to a common scheme designed to achieve an unlawful objective") (citation omitted); the common law of torts, *see, e.g.*, *Pittman by Pittman v. Grayson*, 149 F.3d 111,

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[9] The federal aiding and abetting statute, like Rule 65(d)(2)(C), is derived from the common law. *See Peoni*, 100 F.2d at 402 (noting that the "substance of [the] formula" for aiding and abetting, which Congress codified, could be traced to 14th Century English common law); *Regal Knitwear*, 324 U.S. at 14 (observing common law origin of Rule 65(d)(2)(C)). Common law aiding and abetting and concerted action concepts thus are central in construing both provisions. *See Samantar v. Yousuf*, 130 S.Ct. 2278, 2289 n.13 (2010) ("when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law") (citation omitted).

[10] The meaning courts have given to "concerted action" in the antitrust context is particularly relevant given that Rule 65(d)(2)(C) borrowed its "active concert or participation with" phrase from a now-repealed provision of the Clayton Act, an antitrust statute. *See* 11A Charles A. Wright, *et al.*, *Fed. Practice & Proc. Civ.* § 2956 (2d ed.).

122 (2d Cir. 1998) ("[c]oncerted-action liability under New York law" requires proof "of a common plan or design to commit a tortious act") (citations omitted); and federal criminal law, *see, e.g.*, *Dennis v. United States*, 384 U.S. 855, 860 (1966) (defining "concert of action" as "the common decision and common activity for a common purpose").

Aurelius and Montreux offer a construction that undermines these settled requirements. While focusing on Rule 65(d)(2)(C)'s use of the term "participation," Montreux Br. at 17-19, Montreux cites no case that construes "participation" separately and distinctly from "concert," and there is no basis for doing so. Montreux's attempt to isolate "participation" ignores the two important modifiers of that term in Rule 65(d)(2)(C)—"active" and "with." Unless the "participation" in the injunction's violation is both "active" and "with" the enjoined party, it cannot meet Rule 65(d)(2)(C).[11]

Aurelius claims that the standards applied in other "aiding and abetting" or "concerted action" contexts "are out of place here." Aurelius Br. at 18 n.6. But Aurelius cites no authority for rejecting the settled practice of looking to related contexts to help determine the meaning of a rule or statute, and Montreux admits

[11] By omission, Montreux implies that "participation" need not be "active." Montreux Br. at 17-19. Clearly, though, "active" modifies both "concert" and "participation." *See Home Life Ins. Co. v. Dunn*, 86 U.S. 214, 224 (1873) (an "adjective must be taken distributively and applied as well to the second as to the first term, and to both alike").

(at 18) that this Court's decisions refer to "aiding and abetting" when construing Rule 65(d)(2)(C). Moreover, the Supreme Court has made clear that the "active concert" provision was intended to ensure "that defendants may not nullify a decree by carrying out prohibited acts through *aiders and abettors*…." *Regal Knitwear*, 324 U.S. at 14 (emphasis added).

Aurelius and Montreux also erroneously argue that this Court's decision in *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010), rejects the "independent conduct" limitation established by the Supreme Court in *Chase National Bank* and *Regal Knitwear*, and confirms that "Rule 65 covers objective conduct, not subjective intent." Aurelius Br. at 21-22; Montreux Br. at 24. Yet, this Court is bound to follow the Supreme Court's decisions and *Eli Lilly* does so.

The record in *Eli Lilly*, unlike here, showed conclusively that the non-party did *not* act independently of the wrongdoer—rather, the evidence was clear that *after the protective order* in that case was issued, the non-party and the enjoined wrongdoer developed a sham subpoena scheme for the precise purpose of violating that order.[12] In other words, there was no dispute that the non-party was acting in

[12] In *Eli Lilly*, this Court found the record "unequivocal that Gottstein schemed with Egilman to bypass the protective order" and "that the subpoenas issued to Egilman were part of a sham proceeding." *Eli Lilly*, 617 F.3d at 192. It based these findings, in turn, on the evidence that (a) Gottstein and Egilman had a "mutual desire to see" certain documents disseminated to the public, (b) "Gottstein conspired with Egilman to violate" the protective order, (c) "Gottstein and Egilman were in close contact with one another and strategized how best to facilitate the

concert with the wrongdoer in the sham subpoena scheme for the purpose of violating the protective order—exactly what controlling law requires to be an "aider and abettor."[13]

A contrary holding, eliminating the established requirements for concerted action to accomplish a violation of an injunction, would be an unprecedented and improper expansion of the federal courts' equitable jurisdiction through the "limitation" built into Rule 65(d)(2)(C). *Max's Seafood Cafe ex rel. Lou-Ann, Inc.*, 176 F.3d at 674; Fed. R. Civ. P. 82 ("These rules shall not be construed to extend … the jurisdiction of" federal courts). Courts would be empowered to use Rule 65(d)(2)(C) to enjoin remote non-parties—who lack any relevant connection to the dispute in litigation, and who have not acted to help a party to that dispute engage in wrongful conduct—in order to effectuate a result that the court believes cannot be accomplished by coercing the wrongdoer alone. The injunctive power, with the

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dissemination of documents protected by" the order, (d) "[t]hey both understood that issuing a subpoena was a necessary ploy for achieving that distribution" of documents, and (e) Gottstein's intervention was "an end run around the protective order" because the case in which the subpoenas were issued "was wholly unrelated" to the litigation in New York. *Id.* at 190-92.

[13] *New York State National Organization For Women v. Terry*, 961 F.2d 390 (2d Cir. 1992) (*see* Montreux Br. at 25), is inapposite for the same reasons. There, the evidence was indisputable that the non-parties held in contempt purposefully acted in concert with the enjoined party in order to carry out the precise unlawful conduct enjoined by the injunction: blocking access to New York abortion clinics. That those non-parties may also have been "motivated" by their political, social and moral opposition to abortion did not and could not change that.

threat of contempt behind it, would routinely reach lawful and independent non-party conduct in such circumstances. None of this was contemplated by the common law or the rule, Rule 65(d)(2)(C), codifying it. Nor is there any basis in law or equity to countenance that kind of uncabined judicial interference without due process and without proof that truly contumacious has occurred.

B. BNY Mellon's Role As Indenture Trustee Does Not Involve Acts Undertaken In Concert With Argentina To Breach The *Pari Passu* Clause.

1. BNY Mellon's Receipt Of Funds Is Not Done In "Active Concert" With Argentina.

Applying the controlling construction of Rule 65(d)(2)(C), BNY Mellon's receipt of funds is not in "active concert" with Argentina. *See* BNY Br. at 29-30.

First, BNY Mellon's receipt of funds is consistent with its pre-existing contractual obligations set forth in the Indenture. Since there is no evidence that such receipt is undertaken for the purpose of assisting Argentina's violation of the Injunctions, that act does not meet the established test for "active concert" under Rule 65(d)(2)(C). *Supra* at 9-13.

Second, BNY Mellon's supposed awareness that Argentina has violated the Injunctions does not turn receipt into "active concert" with Argentina in a breach. The fact remains that Argentina, and Argentina alone, has the obligations arising from the *pari passu* clause, and BNY Mellon has no influence or control over

whether it decides to comply.[14] BNY Mellon's contractual receipt of funds as an Indenture Trustee changes nothing in that regard. Argentina may pay Plaintiffs or breach its obligation to do so, but BNY Mellon has no influence, control, or role in that decision at the time of receipt, or any other time for that matter.

Article 4-A of New York's Uniform Commercial Code establishes that BNY Mellon's bare receipt of funds cannot be characterized as "active concert" with a transferor. Under § 4-A-212, a receiving bank is not the agent of the sender "or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in this Article or by express agreement." N.Y.U.C.C. § 4-A-212. Moreover, acceptance of payment occurs under § 4-A-209 without any action by the recipient. *See* N.Y.U.C.C. § 4-A-209(2)(b), (c). *See also* § 4-A-209 cmt. 4 ("In the typical case, the beneficiary's bank simply receives payment from the sender of the order …. Acceptance by the beneficiary's bank does not create any obligation to the sender. Acceptance … means that the bank is

[14] Without any explanation, Aurelius states that BNY Mellon "begins facilitating the transfer about one month before Argentina sends its money." Aurelius Br. at 19 (citing SPE-526-37) (emphasis omitted). But all BNY Mellon does—prior to Argentina depositing funds into BNY Mellon accounts at Banco Central de la Republica de Argentina—is send statements of the amounts due on the bonds to Argentina and Banco Central. *See* SPE-526-37, 619-25. That is hardly "facilitating," and more importantly, it plainly is not active conduct done in "concert" with Argentina.

liable to the beneficiary for the amount of the order."); *Id.* cmt. 8 (Acceptance can occur "by passive receipt of payment").[15]

In its tortured effort to turn the passive receipt of funds into "active concert" with a transferor, Montreux makes the extraordinary claim that "[t]o the extent that BNY Mellon 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." Montreux Br. at 21. Translation: BNY Mellon must take the active and affirmative step of rejecting funds from Argentina lest it be in contempt.[16]

Yet, passive conduct by a non-party cannot be transformed into "active concert" with a wrongdoer simply because that non-party theoretically could take preemptive action—here, rejecting payment—to avoid engaging in the passive conduct. That is especially true where, as here, the Injunctions do not impose on BNY Mellon such a mandatory duty to assist Plaintiffs. Moreover, imposing such

[15] To the extent any of the bonds are governed by English law, the result is no different. English law parallels § 4-A-209. Under the European Parliament and Council Directive 2007/64/EC (as implemented in England by the Payment Services Regulations 2009 (U.K.)), receipt of a payment occurs without any action by the recipient. *Accord* UNCITRAL Model Law on International Credit Transfers, Articles 7, 9.

[16] Rejection, unlike acceptance, requires action. *See* N.Y.U.C.C. § 4-A-210(1) ("A payment order is rejected by the receiving bank by a notice of rejection").

a duty on BNY Mellon, on threat of contempt, conflicts with Article 4-A of New York's Uniform Commercial Code. *See* N.Y.U.C.C. § 4-A-212 (stating that a "receiving bank" has no duty, "before acceptance, to take any action, or refrain from taking action, … except as provided in this Article or by express agreement"); *Grain Traders, Inc. v. Citibank, N.A.*, 160 F.3d 97, 103, 106 (2d Cir. 1998) (holding that § 4-A-212 and other provisions of Article 4-A "preclude .. claims when [they] would impose liability inconsistent with the rights and liabilities expressly created by Article 4-A").

2. BNY Mellon's Distribution Of Funds Is Not Done In "Active Concert" With Argentina.

BNY Mellon's distribution of the funds it receives from Argentina is not in "active concert or participation with" Argentina for the same reasons that receipt does not meet that standard. Such distribution also cannot be characterized as meeting that standard for the independent reason that BNY Mellon and the Exchange Holders own those funds and equity does not reach the property of non-parties. *See* BNY Br. at 30-31.

A non-party's conduct with respect to its own (or another non-party's) property, in which neither the plaintiff nor the defendant has a legal interest independent of one created by the injunction itself, is not "active concert or participation" under Rule 65(d)(2)(C). This Court so held in *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971), where it determined that a wife's "genuinely independent

interest" in property in which her enjoined husband likewise had an interest barred the district court from exercising injunctive jurisdiction over her under Rule 65(d).[17] 444 F.2d at 65-66. *See also Parker*, 960 F.2d at 546 ("[I]f a nonparty asserts an independent interest in the subject property and is not merely acting on behalf of the defendant, then rule 65(d) does not authorize jurisdiction over the party") (citing *Heyman*, 444 F.2d 65) (other citation and internal quotations omitted).

Aurelius and Montreux also ignore the fact that courts cannot use their equitable powers to restrain property of non-parties. As applied to BNY Mellon, the Injunctions restrain property that does not belong to Plaintiffs and in which Plaintiffs have no interest independent of any created by the Injunctions themselves—*i.e.*, the funds transferred by Argentina to BNY Mellon. *See* SPE-648, 650 [¶¶ 3.1, 3.5(a)]. The Injunctions therefore violate the recognized "jurisdictional principle that a court's equitable powers do not extend to property unrelated to the underlying litigation…." *Netsphere, Inc. v. Baron*, 2012 WL 6583058, at *9 (5th Cir. Dec. 18, 2012) (holding that "[a] court lacks jurisdiction to impose a receivership over property that is not the subject of an underlying

[17] Aurelius and Montreux nevertheless contend that BNY Mellon's independent interests in the funds it distributes, and in carrying out its lawful obligations under the indenture, somehow are "irrelevant" to whether it is in "active concert or participation" with Argentina when the funds are distributed. Aurelius Br. at 26; Montreux Br. at 23-27. No factual or legal support is supplied for that assertion and none exists.

claim or controversy" and vacating receivership over defendant's personal property that was only connected to the controversy "as a possible fund for paying … unsecured claims" not yet reduced to judgment); *see also Cochrane v. W.F. Potts Son & Co., Inc.*, 47 F.2d 1026 (5th Cir. 1931) (same).[18]

Aurelius and Montreux, in fact, cite no case enjoining the use of property in which neither the plaintiff nor the defendant possesses any interest *independent of the injunction itself*. Of course, an injunction is not itself a source of substantive rights—it is a remedy that flows from, and must be tailored closely to, a violation of law. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005) ("An injunction is a 'remedy potentially available only after a plaintiff can make a showing that some independent legal right is being infringed'") (citation omitted). It therefore cannot create a right or interest that might—in a circular fashion—support the issuance of that very injunction.

[18] NML cites several cases (at 34) for the proposition that "outside the equal treatment context, courts likewise have issued [similar] injunctions" affecting non-parties, but none of those cases arises in contexts remotely like this one. Each one involved the enforcement of an injunction that was authorized by statute or the specific terms of an agreement that related to the property in dispute, and that was limited to the defendant. Plaintiffs cannot claim any such circumstance here. The Injunctions, which enjoin the payment of legitimate debts owed to non-parties, effectively enjoin the receipt and retention of preferential payments. But the Supreme Court—echoing centuries of debtor-creditor law—has made clear that creditors are *not* barred from receiving and retaining preferential payments. *See Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 321-22 (1999).

C. The Rule 65(d)(2)(C) Cases Relied On By Aurelius And Montreux Do Not Involve Independent And Lawful Conduct By A Non-Party And Therefore Are Inapposite.

Aurelius and Montreux cite three decisions—*Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372 (10th Cir. 1996), and *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63 (1st Cir. 2002)—which they claim support their expansive construction of "active concert or participation." None of these cases does so.

To begin with, the injunction in *Reliance Insurance* specifically enjoined "the transfer of funds and other assets of the named defendants 'other than in the normal course of business[,]'" yet the non-party bank worked with the enjoined depositor to carry out a "fairly complicated" and unusual series of transactions for the direct benefit of the enjoined depositor. *Reliance Ins. Co.*, 84 F.3d at 373-74. There was no apparent precedent for this odd series of transactions, and the bank could make no serious claim that it was merely engaging in routine banking conduct.[19] Here, in contrast, BNY Mellon's receipt and distribution is exactly the same conduct it has engaged in under the Indenture since 2005—seven years

[19] The unusual series of transactions included: (1) transferring over $1.3 million to new accounts in different names; (2) withdrawing approximately $500,000 in cashier's checks payable to a company owned by the enjoined defendant; (3) using $200,000 to purchase gold coins; (4) setting up new accounts at the bank; (5) securing a line of credit loan; and (6) later withdrawing or transferring all funds at the bank, using some of them to open new accounts at the bank, then converting some of the funds to precious metals. *Reliance Ins. Co.*, 84 F.3d at 374-75.

before the Injunctions were issued. That conduct also is undertaken not for Argentina's benefit, but for the benefit of other non-parties who have legitimate rights to the funds at issue.

Goya Foods likewise supports BNY Mellon's position. There, the First Circuit confirmed that a non-party's knowledge of an injunction is not sufficient to support a finding of contempt—the moving party also must show that the non-party engaged in the "challenged action … for the benefit of, or to assist, a party subject to the decree." 290 F.3d at 75. The requisite intent was found because the non-parties, with knowledge that the injunction expressly enjoined a specific transaction (alienation of a particular New York City apartment), assisted the sale of that exact apartment. As in *Reliance Insurance*—but unlike here—there was no pre-injunction precedent for this enjoined conduct in *Goya Foods*, and no conceivable claim that the conduct was routine and legitimate.

Finally, *Waffenschmidt*, on its facts, also supports BNY Mellon's position. There, the defendant was found liable for securities fraud and enjoined from dissipating any funds received from plaintiffs in connection with the fraud. Two individuals, who received funds from the enjoined defendant after the injunction issued and willfully dissipated those funds, were found in contempt. The district court found that these individuals "acted as agents for [the enjoined defendant] in dissipating the funds[,]" precisely what the injunction forbade them to do.

Waffenschmidt, 763 F.2d at 718. *See also Lynch*, 639 F. Supp. at 74 (stating that in *Waffenschmidt*, "the party defendant and the two nonparty respondents clearly worked within a *common scheme* to launder illegally obtained proceeds") (emphasis in original). As in *Reliance Insurance* and *Goya Foods*, there likewise was no precedent for the non-party transactions, and no legitimate claim that those transactions were merely routine and normal business activities.

In the end, there is no factual or legal support for extending the Injunctions to BNY Mellon. No case equates its lawful and independent receipt and distribution of funds with "active concert or participation" in Argentina's decision to breach an independent contractual obligation it owes to Plaintiffs. While Argentina breaches the *pari passu* clause once it makes payments to the Indenture Trustee while making no concurrent payments to Plaintiffs, BNY Mellon has no role in, or influence over, that breaching conduct. The Injunctions should be vacated for this reason also.

III. The Injunctions Against BNY Mellon Must Be Vacated Because They Exceed The District Court's Equitable Powers And Substantially Disserve The Public Interest.

In its opening brief, BNY Mellon described how the Injunctions exceed settled limits on a federal court's equitable powers because they enjoin BNY Mellon's lawful conduct as Indenture Trustee in the name of coercing Argentina—an injunction without historical precedent. BNY Br. at 20-23. BNY Mellon also

explained that the Injunctions would substantially disserve several public interests, including the interest in preserving what this Court has called the "essential role" of indenture trustees. BNY Br. at 32-40 (citing *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 815 (2d Cir. 1985)); *see also Grain Traders*, 160 F.3d at 102 (declining to enjoin funds transfer where injunction would lead to "uncertainty as to rights and liabilities, [] create a risk of multiple or inconsistent liabilities, and [] require intermediary banks to investigate the financial circumstances and various legal relations of the other parties to the transfer").

In response, neither Aurelius nor Montreux makes any effort to show that the Injunctions fit within the historical bounds of equity. They do not. Federal courts' equity jurisdiction is that "which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries." *Grupo Mexicano*, 527 U.S. at 318. There is no precedent suggesting that the expansive Injunctions against BNY Mellon were available to chancery courts in the 18th Century or at any time since. Rather, courts repeatedly have stressed that lawful, independent conduct—especially when it relates to the non-party's own property—is beyond the reach of equity.[20] *See* BNY Br. at 20-23,

[20] These settled limits of equity, as well as the fundamental constraints of due process, rebut Aurelius's contention (at 45-47) that N.Y.U.C.C. § 4-A-503 authorizes the Injunctions *against BNY Mellon*. Section 503 applies only upon "proper cause and in compliance with applicable law," but there is no "proper cause" against BNY Mellon, Plaintiffs assert no claim against BNY Mellon or the

29-31; Dan B. Dobbs, *Dobbs Law of Remedies: Damages-Equity-Restitution*, at 27 (2d ed. 1993) ("[I]f the right is a right against A, then the remedy must not run against B. B may be unavoidably affected by what happens to A, but no remedy should run against B when B has violated no rights.").

Aurelius and Montreux are just as silent when it comes to their burden to show that the Injunctions against BNY Mellon do not disserve the public interest. But this Court insists that plaintiffs "'seeking a permanent injunction … must demonstrate … that the public interest would not be disserved by a permanent injunction.'" *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 694 F.3d 155, 160-61 (2d Cir. 2012) (citation omitted). More specifically, courts "must also consider the public interest in terms of the consequences of granting or denying the injunction to non-parties." *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994).

In this case, the public interest supports:

- Protecting the constitutional and procedural rights of non-parties such as BNY Mellon (BNY Br. at 33-34);
- Preserving the "essential role" of indenture trustees such as BNY Mellon from disruptive injunctions (BNY Br. at 34-35) (quoting *Meckel*, 758 F.2d at 815));
- Avoiding uncertainty in debtor-creditor relationships and restricting courts to their statutory and procedural limits (BNY Br. at 36-40); and

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funds it holds, and the "applicable [federal] law" precludes the Injunctions against it. *See also* Argentina Br. (Dkt. 657) at 33-40; Clearing House Br. at 18-19.

- Promoting the resolution of disputes and deterring unwarranted litigation (BNY Br. at 40).

The Injunctions against BNY Mellon undermine each one of these recognized interests and they should be vacated on that basis also.

IV. Alternatively, This Court Should Expressly Declare That BNY Mellon Cannot Be Held Liable For Complying With The Injunctions.

Aurelius and Montreux assure BNY Mellon that its compliance with the Injunctions will not expose it to liability under the Indenture. Aurelius Br. at 27; Montreux Br. at 26-27. While BNY Mellon appreciates their assurances, the only view that matters is that of a court. BNY Mellon therefore respectfully requests that, if the Court determines that the Injunctions apply to BNY Mellon, it should clarify and confirm that BNY Mellon cannot be liable, in any capacity related to the Indenture, to bondholders or any other party based on its compliance with the Injunctions. BNY Br. at 40-43.

CONCLUSION

BNY Mellon should never have been a target of the Injunctions. Controlling law establishes that this Court should rectify that error and vacate the Injunctions against it.

Dated: February 1, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,926 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I, Kersuze Morancy, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age.

On February 1, 2013

deponent served the within: **Reply Brief for Non-Party Appellant The Bank of New York Mellon, as Indenture Trustee**

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