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.,

(For Continuation of Caption See Inside Cover)

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

PETITION FOR REHEARING *EN BANC*

O'SHEA PARTNERS LLP
521 Fifth Avenue, 25th Floor
New York, New York 10175
(212) 682-4426

– and –

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue, 7th Floor
New York, New York 10022
(212) 446-2300

Attorneys for Non-Party Appellants Exchange Bondholder Group

ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

– v. –

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

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

Non-Party Appellants,

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

RULE 35(b) STATEMENT

Interested Non-Party Appellants the Exchange Bondholder Group ("EBG") petition for rehearing *en banc* of the panel's August 23, 2013 decision (the "Decision") dismissing the EBG's appeal and affirming various orders of the district court entered on November 21, 2012 (collectively, the "Injunction"). The EBG consists of third-party holders of over $1.5 billion in Exchange Bonds[1] issued by the Republic of Argentina (the "Republic")[2] whose property rights are directly injured by the Injunction. Specifically, the Injunction bars the Republic from making payments on the EBG's bonds unless it also pays NML. *See* Amended February 23, 2012 Order dated November 21, 2012 ¶ 2(d). The Injunction further enjoins the EBG's trustee, the Bank of New York Mellon ("BNYM"), from transmitting any payments to the EBG unless NML is also paid, even though it is undisputed that those funds are the property of the EBG as soon BNYM receives the money from the Republic. *Id.* ¶¶ 2(e), 2(f); *see also infra* at 5-6. Despite these

[1] In total, Exchange Bondholders whose property rights are injured by the Injunction (including Fintech Advisory Inc., the Euro Bondholders, and others) hold over $65 billion in Exchange Bonds and related securities. *See supra* at 2 & n.4.

[2] Between 1994 and 2001, the Republic issued debt securities in the aggregate amount of approximately $82 billion pursuant to a Fiscal Agency Agreement (the "FAA Bonds"). *NML Capital, Ltd. v. Republic of Argentina,* 699 F.3d 246, 251 (2d. Cir. 2012). The Republic defaulted on the FAA Bonds in 2001. In 2005 and 2010, the Republic initiated exchange offers pursuant to which holders of FAA Bonds, including plaintiffs below (collectively, "NML") were permitted to exchange them for new, unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar (the "Exchange Bonds"). *Id.* at 252.

direct injuries to the EBG's interests, a divided panel concluded that the EBG lacked appellate standing and dismissed its appeal. *See* Decision at 10 & n.7.[3]

En banc rehearing is necessary because this proceeding involves questions of exceptional importance. Because the Decision conflicts with controlling precedent of the United States Supreme Court and this Court, *en banc* rehearing is further necessary to maintain uniformity of this Court's decisions. *See* Fed. R. App. P. 35(b)(1). If the Decision is not reversed, the Injunction is likely to trigger a default on ***$65 billion*** worth of Exchange Bonds held by innocent third parties.[4] Such a default would have devastating consequences for the EBG, Exchange Bondholders generally, and for the global economy and the entire system of international sovereign debt restructurings.[5]

Moreover, because the Injunction makes payment by the Republic to NML an express condition precedent to payment of the specifically identified Exchange Bonds, the EBG's position is, in legal contemplation, far different from the

---

[3] By Order dated November 28, 2012, the panel had previously granted the EBG leave to intervene as interested non-parties. *See* Docket Entry 482: Order dated Nov. 28, 2012.

[4] The $65 billion figure includes GDP-linked securities, which the panel concluded are Exchange Bonds. *See* Decision at 13 n.9; SPE-621-22.

[5] Furthermore, there is no decision from any New York court endorsing the panel's interpretation of *pari passu*, which conflicts with the generally accepted understating of that term. *See* EBG Appeal Br. at 40; Docket Entry 653 at 2-3. Presented with the opportunity to certify this unsettled and momentous issue to New York's highest court by the EBG, the panel declined to do so. *See* Docket Entry 777.

undifferentiated mass of the Republic's creditors. Accordingly, the Panel erred when it treated this case as merely one where one creditor is "not cognizably affected by an order for a debtor to pay a different creditor." Decision at 10.

First, the Decision conflicts with this Court's and the Seventh Circuit's decisions requiring courts to weigh the possible effects of an injunction on the rights of third parties. *See* Decision at 13; *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993); *see also Cook Inc. v. Boston Sci. Corp.*, 333 F.3d 737, 743-44 (7th Cir. 2003); *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 280 (7th Cir. 1986) (Posner, J.). The Injunction's purpose, expressly acknowledged by the district court, is to use the threat of default on the Exchange Bonds as leverage to pressure the Republic to meet separate obligations to NML. *See, e.g.*, Brief for Non-Party Appellants Exchange Bondholder Group dated December 28, 2012 ("EBG Appeal Br.") at 22-23 & n.12. In effect, the property rights of the innocent third party EBG are being held as a hostage to pressure the Republic to pay NML. For this reason, the EBG's position – and its equitable arguments – cannot be ignored as if the EBG were merely one of thousands of creditors of the Republic who have not sued. Such an injunction is unprecedented and wholly inequitable, particularly because the Exchange Bondholders have already been forced to accept discounts of over 70 cents on the dollar on the defaulted bonds. The Exchange Bondholders' rights should not be

further infringed by the courts for the private benefit of a few FAA Bond speculators. *See NML Capital, Ltd.*, 699 F.3d at 252; EBG Appeal Br. at 11.

Second, the Decision violates the EBG's due process rights under the Fifth Amendment and constitutes an unconstitutional taking. Addressing this issue in a portion of a footnote, *see* Decision at 14 n.10, the panel asserted that the Fifth Amendment does not apply because the Injunction does not deprive the EBG of any property. The panel's assertion is flat wrong: The Injunction expressly alters and injures the EBG's property rights by (i) imposing new conditions on the Republic's legal ability to make payments on the Exchange Bonds in accordance with their terms; and (ii) directly interfering with the EBG's property in the hands of its trustee, BNYM. *See infra* at 5-6. The Injunction thus constitutes a deprivation of private property for private purposes that violates the Fifth Amendment. *See, e.g.*, *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 76-80 (1937); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984). It also constitutes an unconstitutional taking without just compensation. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2601-02 (2010).

Third, a divided panel dismissed the EBG's appeal in conflict with *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.2d 73, 77-78 (2d Cir. 2006) and other cases recognizing non-party appellate standing where a

non-party has an interest plausibly affected by the judgment. *Compare* Decision at 10 & n.7 *with Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127-28 (2d Cir. 2009); *Karaha Bodas Co. L.L.C. v. Pertamina*, 313 F.3d 70, 82 (2d Cir. 2002); *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999); *WorldCom, Inc.*, 467 F.2d at 77. Because the EBG's property rights are uniquely affected by the Injunction, the EBG has appellate standing.

REASONS FOR GRANTING REHEARING

I. The Decision Conflicts with Circuit Decisions by Failing to Recognize the Impermissible Effects of the Injunction on Third Parties

The Decision presents a question of exceptional importance and is necessary to maintain uniformity of this Court's decisions because the Injunction infringes the equitable rights of innocent third party Exchange Bondholders in derogation of this Court's prior holdings, as well as those of other Circuits. *See* Fed. R. App. P. 35(a). The panel asserted that the EBG's interests are "not plausibly affected" by the Injunction because it is a mere "order for a debtor to pay a different creditor." Decision at 10. That assertion is plainly wrong: The Injunction goes far beyond ordering the Republic to pay a creditor, by expressly singling out – and thereby uniquely burdening – the Exchange Bonds, in enjoining the Republic "from … ***making any payment under the … Exchange Bonds*** without … concurrently or in advance making a Ratable Payment to NML." Amended February 23, 2012 Order dated November 21, 2012 ¶ 2(d) (emphasis added). In addition to imposing this

express condition on payment, the Injunction explicitly forbids the Exchange Bondholders' trustee, BNYM, from transmitting any payments from the Republic to the Exchange Bondholders unless the Republic pays NML. *Id.* ¶¶ 2(e) & 2(f). This requirement acts directly against the EBG's property because under the Exchange Bond indenture, when the Republic transmits payments to BNYM, those funds immediately become the property of the Exchange Bondholders. EBG Appeal Br. at 12-13, 20; A-2285; A-2288. Neither the panel nor NML cited a single case that upheld an injunction even remotely similar to this one. *See* Reply Brief for Non-Party Appellants Exchange Bondholder Group dated February 1, 2013 ("EBG Reply") at 6.

As the panel acknowledged, "equitable relief is inappropriate where it would cause unreasonable hardship or loss to third parties." Decision at 13 (citing *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993)). "[T]he consequences to third parties of granting an injunctive remedy, such as specific performance, must be considered, and in some cases may require that the remedy be withheld." *N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co.*, 799 F.2d 265, 280 (7th Cir. 1986) (Posner, J.) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The panel's analysis under this standard was erroneous, for at least four reasons.

First, the panel stated that the Injunction only conditionally burdens the EBG's property if the Republic refuses to pay NML, and it was "unwilling to permit Argentina's threats" of continued non-payment to affect its decision. Decision at 14. The panel's conclusion was in conflict with the Seventh Circuit, which has found that mere conditionality of harm does not excuse this Court from weighing it when balancing the equities. *See Cook Inc. v. Boston Sci. Corp.*, 333 F.3d 737, 743-44 (7th Cir. 2003) ("in determining the appropriate scope of an injunction the judge must give due weight to [its] … ***possible*** effect on third parties.") (Emphasis added) (citing *Association of Community Organizers for Reform Now v. Edgar*, 56 F.3d 791, 797 (7th Cir. 1995); *Kasper v. Bd. of Election Commissioners*, 814 F.2d 332, 340 (7th Cir. 1987)).

This insistence that any injury to the EBG is conditional (as opposed to certain) is redolent of a formalism bordering on willful blindness. The Republic has refused to make payments on the FAA Bonds since 2001; its domestic law prohibits such payments; its officials have repeatedly announced that it will refuse to pay; and its counsel stated as much at oral argument. *See NML Capital, Ltd.*, 699 F.3d at 252-254, 260; Decision at 6-7 & n.4. This is not a mere "threat[]" of non-payment (Decision at 14), but a demonstrated track record. Decision at 14. When the Republic continues its unbroken twelve-year policy of non-payment, as it inevitably will, the Injunction will preclude paying the EBG. It is wholly

inequitable to single out innocent holders of some $65 billion in face value of Exchange Bonds in a symbolic attempt to coerce payment on FAA Bonds with a face value of $428 million. Unlike other creditors of the Republic who are not singled out by the Injunction, the EBG have already been forced to incur discounts of over 70 cents on the dollar, while NML has incurred none. *See* EBG Reply at 7; *Texas v. New Mexico*, 482 U.S. 124, 131 (1987) ("Specific performance will not be compelled 'if under all the circumstances it would be inequitable to do so.'") (quoting *Wesley v. Eells*, 177 U.S. 370, 376 (1900)). [6]

Second, the panel erroneously suggested that any harm to the EBG could be ignored because the Republic would bear ultimate responsibility for a default on the Exchange Bonds. Decision at 14. This rationale conflicts with this Court's prior admonitions to avoid interference with payments to the EBG ***regardless of the Republic's wrongdoing***. *See Capital Ventures Int'l v. Republic of Argentina*, 282 Fed. Appx. 41, 42 (2d Cir. 2008) (directing the district court to take care in crafting attachment orders so as not to interfere with payments under the Exchange Bonds). Other courts have taken similar approaches in nearly identical situations. *See, e.g.*, *Kensington Int'l Ltd. v. Republic of the Congo*, [2003] EWCA Civ. 709

[6] Compounding this unfairness is the panel's interpretation of "ratable payment," which awards NML 100% of the full face value of the FAA Bonds, plus interest and penalties totaling approximately 200% of their face value, when the Republic makes a single interest payment on the heavily-discounted Exchange Bonds. *See* EBG Appeal Br. at 27-29.

(affirming refusal to enter injunction directing sovereign defendant to comply with *pari passu* clause in part because it was "likely to disrupt arrangements which the defendant has already made for the payment of creditors"). *Kensington* specifically noted that it "did not accept [the premise] that the sole consideration in deciding whether to grant … [injunctive] relief is … whether compliance with the order of the court will benefit the claimant, or achieve the purpose for which it is sought." *Id.* The Injunction radically and inequitably departs from these established principles.

Third, the Decision suggests it is "[]fair" to interfere with the Republic's payments on Exchange Bonds because the EBG was "expressly warned by Argentina" about that possibility in a bond prospectus. Decision at 14. This is illogical; past notice of the risk a court ***could*** enter an inequitable injunction says nothing about the Injunction at issue in this case. *See generally* EBG Reply at 4-5 & n.6. Moreover, any risks disclosed by the Republic in a prospectus paled in comparison to the risks of which NML was aware when it purchased its bonds at pennies on the dollar for a blatantly speculative purpose many years after default. *See* EBG Appeal Br. at 26-27; EBG Reply at 7; A-465; A-705; A-707. And the "warn[ing]" was included only in the prospectus that accompanied the Exchange Bonds issued in 2005; the 2010 Exchange Bond prospectus contained no similar warning. *See* EBG Reply at 4-5.

Fourth, the panel suggested that the Injunction did not impinge the EBG's rights because, if the Republic defaults, the Exchange Bondholders will "retain their rights to sue." Decision at 10. This conflicts with the panel's own conclusion that NML has no adequate remedy at law because Argentina can "refuse to pay any judgments."[7] *NML Capital, Ltd.*, 699 F.3d at 262. There is no conceivable reason to believe (and the panel cited none) that the EBG would be more successful than NML in seeking to collect a judgment. Nor is there another group of innocent non-parties whose interests the Exchange Bondholders will be able to leverage to coerce payment—which means the Injunction will put the EBG in an even worse position than NML is in currently.[8]

II. The Decision Conflicts with Supreme Court Authority Establishing a Violation of the EBG's Fifth Amendment Rights

Rehearing *en banc* also is necessary because the Injunction violates the Fifth Amendment. *See* Fed. R. App. P. 35(a)(1). "Contract rights are a form of property" protected by the Fifth Amendment. *U.S. Trust Co. of N.Y. v. New*

---

[7] The panel appears to have decided that NML *must* be granted an equitable remedy for the Republic's wrong, in conflict with *FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373 (D.C. Cir. 2011), which recognized that, in light of the FSIA, "a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment," concluding that in such cases, plaintiffs "must rely on the government's diplomatic efforts, or a foreign sovereign's generosity, to satisfy a judgment." *Id.* at 377.

[8] The panel's analysis was similarly flawed when it relied on the EBG's supposed ability to sue the Republic in the event of a default to conclude that its members were not necessary parties under Fed. R. Civ. P. 19. *See* Decision at 14 n.10.

Jersey, 431 U.S. 1, 19 n. 16 (1977). *See Lynch v. United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."). And the Injunction infringes upon the EBG's property rights in several ways.

First, the Injunction conflicts with controlling Supreme Court authority holding that the deprivation of private property for a private use is a *per se* violation of the Due Process Clause. *See Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 76-80 (1937) (invalidating administrative order requiring private gas producers to curtail production and purchase shortfall from other private producers who had no available market); *Chi., St. Paul, Minn. & Omaha Ry. Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (due process barred order requiring railroad to build underground pass for benefit of private landowners); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (due process prevented requiring railroad to allow private party to construct elevator on its property for private use); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand … scrutiny …; it would serve no legitimate purpose of government and would thus be void."). That is precisely what is occurring here: The Injunction burdens and restrains the EBG's property solely in an attempt to force the Republic to make payments for the private benefit of NML. *See supra* at 3. The Injunction therefore violates the Due Process Clause.

Second, by imposing new conditions on the EBG's rights to receive payments, the Injunction effectively re-writes their contractual rights and thus violates the Due Process Clause. Judicial orders constitute "state action" for purposes of Fifth Amendment limitations on governmental power. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2601-02 (2010) ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."). [9] As Justice Kennedy recognized in *Stop the Beach*, a judicial decision eliminating an established property right violates the Due Process Clause. *Stop the Beach*, 130 S. Ct. at 2614-15 ("The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights … is 'arbitrary or irrational' under the Due Process Clause").

Finally, the Injunction effects an unconstitutional taking of private property without just compensation. A plurality in *Stop the Beach* recognized a claim for a

---

[9] *See also Shelly v. Kraemer*, 334 U.S. 1, 18 (1948) ("[I]t has never been suggested that state court action is immunized . . . simply because the act is that of the judicial branch"); *Virginia v. Rives*, 100 U.S. 313, 318 (1879) ("doubtless … a State may act through different agencies, [including] its judicial authorities; and the prohibitions of the [Fourteenth] amendment extend to all action of the State"); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (court enforcement of promissory estoppel principles constituted state action Fourteenth Amendment purposes); *Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968) ("There can now be no doubt that the application by the judiciary of the state's common law … may constitute state action which must conform to the constitutional strictures which constrain the government.") (Skelly Wright, J.).

"judicial taking." 130 S. Ct. at 2601-02. None of the justices rejected the concept. *Id.* at 2614-15 (Kennedy, J., concurring), 2618-19 (Breyer, J., concurring). Although the EBG's property is not being seized outright, the practical effect of the Injunction will inevitably be, at a minimum, a "significant restriction … placed upon the [Exchange Bondholders'] use of their property." *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012). This amounts to a taking.[10] The fact that the taking is temporary or conditional is of no moment.[11]

The panel dismissed the EBG's Fifth Amendment arguments with a footnote declaration that the Injunction does not "deprive [the EBG] of any property." Decision at 14 n.10. That conclusion is erroneous. As demonstrated above, the Injunction infringes upon the EBG's property rights by imposing new conditions on the Republic's ability to pay the Exchange Bondholders, and further enjoins the EBG's trustee from transmitting funds ***that are indisputably the EBG's property***. *See supra* at 5-6. The EBG is therefore being deprived of its property in violation of the Fifth Amendment.

---

[10] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[T]here will be instances when government actions … affect and limit [property] use to such an extent that a taking occurs.").

[11] *See First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987) (compensation required for period that regulation deprived plaintiffs of use of their land); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (government's wartime use of laundry business constituted compensable temporary taking).

III. The Decision Erroneously Denies Appellate Standing to the EBG in Conflict with Prior Decisions of This Court

Rehearing *en banc* further is necessary to maintain uniformity of this Court's decisions because the panel wrongfully dismissed the EBG's appeal of the Injunction in contravention of this Court's prior holdings. *See* Fed. R. App. P. 35(a); Decision at 10. Indeed, the panel was divided on this critical issue, with one judge effectively dissenting from the dismissal. *See* Decision at 10 n.7.

This Court previously has recognized a non-party's standing to appeal where the nonparty has (i) "a plausible affected interest" in a judgment; or (ii) is bound by it. *Official Comm. Of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77 (2d Cir. 2006). Non-parties with similar or more attenuated interests than the EBG have been found to have "plausible affected interest[s]." *See, e.g.*, *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127-28 (2d Cir. 2009) (standing found where order sought to attach and execute upon funds administered by non-party appellant); *Karaha Bodas Co. L.L.C. v. Pertamina*, 313 F.3d 70, 82 (2d Cir. 2002) (allowing appeal of garnishment order where non-party alleged ownership of property encompassed by order); *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999) (allowing non-party shareholder to appeal fee award to be paid from corporation's funds). Similarly, the Injunction imposes new, unbargained-for conditions on the EBG's rights to be paid and enjoins the EBG's trustee from transmitting funds that indisputably belong to them.

Overlooking these facts and citing inapposite caselaw, the panel asserted that the EBG's interests are "not cognizably affected" by the Injunction because they are mere "creditors" and the Injunction is an "order for a debtor to pay a different creditor." Decision at 10; *see Dish Network Corp. v. DBSD N. Am., Inc.*, 634 F.3d 79, 90 (2d Cir. 2010) (holding unsecured creditor ***did*** have standing to appeal from bankruptcy court orders but rejecting arguments concerning priority of claims); *Evanston Ins. Co. v. Fred A. Tucker & Co., Inc.*, 872 F.2d 278, 280 (9th Cir. 1989) (not even addressing appellate standing). Neither the panel nor NML has identified any Second Circuit case denying appellate standing to a party with interests similar to those of the EBG, whose interests are being singled out and infringed unlike the great mass of the Republic's creditors.

CONCLUSION

The EBG respectfully requests that the Court grant its petition.

Dated: September 6, 2013

By: /s/ Sean F. O'Shea

Sean F. O'Shea
Michael E. Petrella
Daniel M. Hibshoosh
O'SHEA PARTNERS LLP
521 Fifth Avenue, 25th Floor
New York, New York 10175
Tel.: (212) 682-4426
soshea@osheapartners.com

David Boies
David A. Barrett
Nicholas A. Gravante, Jr.
Steven I. Froot
BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
Tel.: (212) 446-2300

Attorneys for the Exchange Bondholder Group

12-105(L)
NML Capital, Ltd. v. Republic of Argentina

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: February 27, 2013 Decided: August 23, 2013)

Docket Nos. 12-105(L), 12-109 (CON), 12-111 (CON), 12-157 (CON), 12-158 (CON), 12-163 (CON), 12-164 (CON), 12-170 (CON), 12-176 (CON), 12-185 (CON), 12-189 (CON), 12-214 (CON), 12-909 (CON), 12-914 (CON), 12-916 (CON), 12-919 (CON), 12-920 (CON), 12-923 (CON), 12-924 (CON), 12-926 (CON), 12-939 (CON), 12-943 (CON), 12-951 (CON), 12-968 (CON), 12-971 (CON), 12-4694 (CON), 12-4829 (CON), 12-4865 (CON)*

NML CAPITAL, LTD., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., BLUE ANGEL CAPITAL I LLC, AURELIUS OPPORTUNITIES FUND II, LLC, PABLO ALBERTO VARELA, LILA INES BURGUENO, MIRTA SUSANA DIEGUEZ, MARIA EVANGELINA CARBALLO, LEANDRO DANIEL POMILIO, SUSANA AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant,

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

Non-Party Appellants,

---

* Appeals numbered 12-105, 12-109, 12-111, 12-157, 12-158, 12-163, 12-164, 12-170, 12-176, 12-185, 12-189, and 12-214 were dismissed as of October 26, 2012. Appeals numbered 12-909, 12-914, 12-916, 12-919, 12-920, 12-923, 12-924, 12-926, 12-939, 12-943, 12-951, 12-968, 12-971, 12-4829 are decided by this opinion. Appeals numbered 12-4694 and 12-4865 are dismissed by this opinion.

EURO BONDHOLDERS, ICE CANYON LLC,

Intervenors.

Before: POOLER, B.D. PARKER, and RAGGI, *Circuit Judges*.

Defendant-Appellant the Republic of Argentina, Non-Party Appellants, and Intervenors appeal from amended orders issued by the United States District Court for the Southern District of New York (Griesa, *J.*). The amendments explain certain aspects of those orders which were designed to remedy Argentina's breach of a promise to pay bondholders after a 2001 default on its sovereign debt. We hold that the district court did not abuse its discretion in issuing the orders.

AFFIRMED.

THEODORE B. OLSON (Matthew D. McGill, Jason J. Mendro, *on the brief*), Gibson, Dunn & Crutcher LLP, Washington, D.C.; Robert A. Cohen, Eric C. Kirsch, Dechert LLP, New York, N.Y., *for Plaintiff-Appellee NML Capital, Ltd.*

Leonard F. Lesser, Simon Lesser, P.C., New York, N.Y., *for Plaintiff-Appellee Olifant Fund, Ltd.*

Michael C. Spencer, Milberg LLP, New York, N.Y., *for Plaintiffs-Appellees Pablo Alberto Varela, et al.*

Edward A. Friedman, Daniel B. Rapport, Friedman Kaplan Seiler & Adelman LLP, New York, N.Y.; Roy T. Englert, Jr., Mark T. Stancil, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, Washington, D.C., *for Plaintiffs-Appellees Aurelius Capital Master, Ltd., ACP Master, Ltd., Blue Angel Capital I LLC,* and *Aurelius Opportunities Master Fund II, LLC.*

JONATHAN I. BLACKMAN (Carmine D. Boccuzzi, Ezequiel Sanchez-Herrera, Sara A. Sanchez, Michael M. Brennan, *on the brief*), Cleary Gottlieb Steen & Hamilton LLP, New York, N.Y., *for Defendant-Appellant the Republic of Argentina*.

JAMES C. MARTIN (Colin E. Wrabley, *on the brief*), Reed Smith LLP, Pittsburg, Penn.; Eric A Schaffer, Reed Smith LLP, New York, N.Y., *for Non-Party Appellant The Bank of New York Mellon, as Indenture Trustee*.

DAVID BOIES (David A. Barrett, Nicholas A. Gravante, Jr., Steven I. Froot, *on the brief*), Boies, Schiller & Flexner LLP, New York, N.Y.; Sean F. O'Shea, Michael E. Petrella, Daniel M. Hibshoosh, O'Shea Partners LLP, New York, N.Y., *for Non-Party Appellants the Exchange Bondholder Group*.

William F. Dahill, Wollmuth Maher & Deutsch LLP, New York, N.Y., *for Non-Party Appellant Fintech Advisory Inc*.

Christopher J. Clark, Craig A. Batchelor, Michael E. Bern, Latham & Watkins, LLP, New York, N.Y., *for Intervenors Euro Bondholders*.

Bruce Bennett, James O. Johnston, Beong-Soo Kim, Jones Day, Los Angeles, Cal.; Meir Feder, Jones Day, New York, N.Y., *for Intervenor ICE Canyon LLC*.

David W. Rivkin, Suzanne M. Grosso, Debevoise & Plimpton LLP, New York, N.Y., *for Amicus Curiae EM Ltd., in support of Plaintiffs-Appellees*.

Ronald Mann, Esq., New York, N.Y., *Amicus Curiae pro se, in support of Plaintiffs-Appellees*.

Jack L. Goldsmith III, Cambridge, Mass.; Judd B. Grossman, Grossman LLP, New York, N.Y., *for Amici Curiae Montreux Partners, L.P. and Wilton Capital, in support of Plaintiffs-Appellees*.

Richard A. Samp, Cory L. Andrews, Washington Legal Foundation, Washington, D.C., *for Amicus Curiae the Washington Legal Foundation, in support of Plaintiffs-Appellees*.

Kevin S. Reed, Quinn Emanuel Urquhart & Sullivan, LLP, New York, N.Y., *for Amicus Curiae Prof. Kenneth W. Dam, in support of Plaintiffs-Appellees*.

Anthony J. Costantini, Rudolph J. Di Massa, Jr., Suzan Jo, Mary C. Pennisi, Duane Morris LLP, New York, N.Y., *for Duane Morris Individual Plaintiffs-Appellees*.

Paul Saltzman, Joseph R. Alexander, The Clearing House Association L.L.C., New York, N.Y.; H. Rodgin Cohen, Michael M. Wiseman, Sergio J. Galvis, Joseph E. Neuhaus, Michael J. Ushkow, Jared P. Roscoe, Sullivan & Cromwell LLP, New York, N.Y., *for Amicus Curiae The Clearing House Association L.L.C., in support of Defendant-Appellant*.

Eugenio A. Bruno, Estudio Garrido, Buenos Aires, Argentina; M. Darren Traub, Akerman Senterfitt, LLP, New York, N.Y. *for Amicus Curiae Alfonso Prat-Gay, in support of Defendant-Appellant*.

Edward Scarvalone, Doar Rieck Kaley & Mack, New York, N.Y., *for Amicus Curiae Prof. Anne Krueger, in support of Defendant-Appellant*.

Paul T. Shoemaker, Greenfield Stein & Senior LLP, New York, N.Y., *for Amicus Curiae Euroclear Bank SA/NV, in support of Defendant-Appellant*.

Marco E. Schnabl, Timothy G. Nelson, Skadden, Arps, Slate, Meagher & Flom LLP, New York, N.Y., *for Amicus Curiae Puente Hnos. Sociedad de Bolsa S.A., in support of Defendant-Appellant*.

Matthew D. Ingber, Chrisopher J. Houpt, Mayer Brown LLP, New York, N.Y.; Charles A. Rothfeld, Paul W. Hughes, Mayer Brown LLP, Washington, D.C., *for Amicus Curiae the American Bankers Association, in support of Non-Party Appellant The Bank of New York Mellon*.

BARRINGTON D. PARKER, *Circuit Judge*:

This is a contract case in which the Republic of Argentina refuses to pay certain holders of sovereign bonds issued under a 1994 Fiscal Agency Agreement (hereinafter, the "FAA" and the "FAA Bonds"). In order to enhance the marketability of the bonds, Argentina made a series of promises to the purchasers. Argentina promised periodic interest payments. Argentina promised that the bonds would be governed by New York law. Argentina promised that, in the event of default, unpaid interest and principal would become due in full. Argentina promised that any disputes concerning the bonds could be adjudicated in the courts of New York. Argentina promised that each bond would be transferrable and payable to the transferee, regardless of whether it was a university endowment, a so-called "vulture fund," or a widow or an orphan. Finally, Argentina promised to treat the FAA Bonds at least equally with its other external indebtedness. As we have held, by defaulting on the Bonds, enacting legislation specifically forbidding future payment on them, and continuing to pay interest on subsequently issued debt, Argentina breached its promise of equal treatment. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (*NML I*).

Specifically, in October 2012, we affirmed injunctions issued by the district court intended to remedy Argentina's breach of the equal treatment obligation in the FAA. *See id.* Our opinion chronicled pertinent aspects of Argentina's fiscal history and the factual background of this case, *see id.* at 251-57, familiarity with which is assumed.[1] Those injunctions, fashioned

[1] For a more comprehensive narrative of Argentina's long history of defaulting on its debts, see Judge José Cabranes's opinion in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007).

by the Hon. Thomas P. Griesa, directed that whenever Argentina pays on the bonds or other obligations that it issued in 2005 or 2010 exchange offers (the "Exchange Bonds"), the Republic must also make a "ratable payment" to plaintiffs who hold defaulted FAA Bonds. We remanded, however, for the district court to clarify the injunctions' payment formula and effects on third parties and intermediary banks, and retained jurisdiction pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994).

On November 21, 2012, the district court issued amended injunctions with the clarifications we requested,[2] as well as an opinion explaining them, which are challenged on this appeal by Argentina as well as by non-party appellants and intervenors. *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012) (*NML II*). Recognizing the unusual nature of this litigation and the importance to Argentina of the issues presented, following oral argument, we invited Argentina to propose to the appellees an alternative payment formula and schedule for the outstanding bonds to which it was prepared to commit. Instead, the proposal submitted by Argentina ignored the outstanding bonds and proposed an entirely new set of substitute bonds.[3] In sum, no productive proposals have been forthcoming. To the contrary, notwithstanding its commitment to resolving disputes involving the FAA in New York courts under New York law, at the February 27, 2013 oral argument,

---

[2] *See NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG), 2012 WL 5895784 (S.D.N.Y. Nov. 21, 2012); *Aurelius Capital Master, Ltd. & ACP Master, Ltd. v. Republic of Argentina*, No. 09 Civ. 8757 (TPG), Dkt. No. 312 (S.D.N.Y. Nov. 26, 2012); *Olifant Fund, Ltd. v. Republic of Argentina*, No. 10 Civ. 9587, Dkt. No. 40 (S.D.N.Y. Nov. 26, 2012); *Varela v. Republic of Argentina*, No. 10 Civ. 5338, Dkt. No. 64 (S.D.N.Y. Nov. 26, 2012). We refer to these collectively as the "amended injunctions."

[3] *See* Dkt. No. 935 (Argentina's Proposal of March 29, 2013); *see also* Dkt. No. 950 (Appellees' April 22, 2013 Response to Argentina's Proposal).

counsel for Argentina told the panel that it "would not voluntarily obey" the district court's injunctions, even if those injunctions were upheld by this Court. Moreover, Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree.[4] It is within this context that we review the amended injunctions for abuse of discretion and, finding none, we affirm.[5] However, in view of the nature of the issues presented, we will stay enforcement of the injunctions pending resolution of a timely petition to the Supreme Court for a writ of *certiorari*.[6]

In its opinion, the district court first explained that its "ratable payment" requirement meant that whenever Argentina pays a percentage of what is due on the Exchange Bonds, it must pay plaintiffs the same percentage of what is then due on the FAA Bonds. *Id.* at *2. Under the express terms of the FAA, as negotiated and agreed to by Argentina, the amount currently due on

---

[4] Argentine President Cristina Fernández de Kirchner is quoted as announcing that Argentina will pay on the Exchange Bonds "but not one dollar to the 'vulture funds,'" referring to FAA Bondholders such as plaintiff NML Capital, Ltd. Argentina to Blast 'Vulture Funds' at the G20 Ministerial Meeting in Mexico, MercoPress, Nov. 4, 2012, Supp. App. 391. The Republic's Economy Minister Hernan Lorenzino is quoted as echoing that "Argentina isn't going to change its position of not paying vulture funds . . . . We will continue to follow that policy despite any ruling that could come out of any jurisdiction, in this case New York." Ken Parks & Charles Roth, Argentina Grapples with Credit-Rating Challenges, Wall St. J., Oct. 31, 2012, Supp. App. 395. In a speech apparently posted to a presidential website, President Kirchner criticized the "justice system" overseen by this Court, stating that it "evidently is unaware of its own legislation." Supp. App. 553.

[5] *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 142 (2d Cir. 2011). A district court abuses its discretion when it bases a ruling "on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation marks omitted).

[6] Apparently, Argentina filed a petition for *certiorari* in this matter on June 24, 2013, notwithstanding that, as of that date, no final order had yet issued in this case. *See* Supreme Court Dkt. 12-1494.

the FAA Bonds, as a consequence of its default, is the outstanding principal and accrued interest. *See id.*; *NML I* at 254 n.7; *see also* Appellant Argentina 2012 Br. at 26 ("[T]he contractually agreed upon remedy [for default] is acceleration of principal, an action already taken by these plaintiffs."). Thus, as the district court explained, if Argentina pays Exchange Bondholders 100% of what has come due on their bonds at a given time, it must also pay plaintiffs 100% of the roughly $1.33 billion of principal and accrued interest that they are currently due. *See NML II* at *3.

Second, the district court explained how its injunctions would prevent third parties from assisting Argentina in evading the injunctions. Though the amended (and original) injunctions directly bind only Argentina, the district court correctly explained that, through the automatic operation of Federal Rule of Civil Procedure 65(d), they also bind Argentina's "agents" and "other persons who are in active concert or participation" with Argentina. *See id.* at *4; Fed. R. Civ. P. 65(d)(2). Those bound under the operation of Rule 65(d) would include certain entities involved in the system through which Argentina pays Exchange Bondholders. As the district court stated:

> Argentina transfers funds to the Bank of New York Mellon ("BNY"), which is the indenture trustee in a Trust Indenture of 2005. Presumably there is a similar indenture for the 2010 exchange offer. BNY then forwards the funds to the "registered owner" of the Exchange Bonds. There are two registered owners for the 2005 and 2010 Exchange Bonds. One is Cede & Co. and the other is the Bank of New York Depositary ("BNY Depositary"). Cede and BNY Depositary transfer the funds to a "clearing system" such as the Depository Trust Company ("DTC"). The funds are then deposited into financial institutions, apparently banks, which then transfer the funds to their customers who are the beneficial interest holders of the bonds.

NML II at *5. Of these, the amended injunctions cover Argentina, the indenture trustee(s), the registered owners, and the clearing systems. *See id.* The amended injunctions explicitly exempt

intermediary banks, which enjoy protection under Article 4A of New York's Uniform Commercial Code (U.C.C.), and financial institutions receiving funds from the DTC. *See id.*

In accordance with our October 2012 opinion, the litigation then returned to our Court. Argentina has challenged certain aspects of the amended injunctions, and appeals have also followed from other entities: a group of Exchange Bondholders, styling themselves as the Exchange Bondholder Group ("EBG"); the Bank of New York Mellon ("BNY"), indenture trustee to Exchange Bondholders; and Fintech Advisory Inc., a holder of Exchange Bonds. We further received briefing (but no notices of appeal) from two intervenors: a group of bondholders calling themselves the Euro Bondholders, and ICE Canyon LLC, a holder of GDP-linked securities issued by Argentina.

APPELLATE STANDING

Neither BNY, EBG, Fintech, Euro Bondholders, nor ICE Canyon intervened below, but each seeks to participate here as a non-party. As a general rule, only parties may appeal, but we have recognized non-party appellate standing in two situations: where the non-party is bound by the judgment and where the non-party has an interest plausibly affected by the judgment. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77-78 (2d Cir. 2006).

The amended injunctions provide that BNY, as a participant in the payment process of the Exchange Bonds, "shall be bound by the terms of this ORDER as provided by [Federal Rule of Civil Procedure] 65(d)(2)." 2012 WL 5895784, at *2. Accordingly, BNY has standing to appeal. *See NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 175 n.1 (2d Cir. 2011) (holding that non-party Banco Central de la República Argentina had standing

to challenge attachment and execution order). In contrast, EBG, Fintech, Euro Bondholders, and ICE Canyon are not bound by the amended injunctions. They are creditors, and, as such, their interests are not plausibly affected by the injunctions because a creditor's interest in getting paid is not cognizably affected by an order for a debtor to pay a different creditor. *Cf. Dish Network Corp. v. DBSD N. Am., Inc.*, 634 F.3d 79, 90 (2d Cir. 2010); *Evanston Ins. Co. v. Fred A. Tucker & Co., Inc.*, 872 F.2d 278, 280 (9th Cir. 1989). If Argentina defaults on its obligations to them, they retain their rights to sue. And, as discussed below, their interests are not cognizably affected in any other way. Consequently, EBG, Fintech, Euro Bondholders, and ICE Canyon have no appellate standing, and the appeals from EBG and Fintech are hereby dismissed. (Euro Bondholders and ICE Canyon did not file appeals of their own.)

At the same time, their arguments are not lost because they requested that, in the event they were not deemed appellants, the court consider their arguments as coming from *amici curiae*. Because Argentina contends in its own appeal that the amended injunctions should be vacated because, among other reasons, they are inequitable to Exchange Bondholders, we will consider the arguments of EBG, Fintech, Euro Bondholders, and ICE Canyon as arguments from *amici curiae* in support of Argentina. *See* Fed. R. App. P. 29(a).[7]

[7] Judge Pooler disagrees with the majority decision to dismiss the appeals of EBG, Fintech, Euro Bondholders, and ICE Canyon. However, as the arguments of the dismissed appellants are treated as made by *amici*, and as the status of the non-appellants matters little to the outcome here, Judge Pooler has agreed to note her disagreement for the record in this footnote, rather than dissent.

DISCUSSION

Argentina advances a litany of reasons as to why the amended injunctions unjustly injure itself, the Exchange Bondholders, participants in the Exchange Bond payment system, and the public. None of the alleged injuries leads us to find an abuse of the district court's discretion.

I. Alleged Injuries to Argentina

Argentina argues that the amended injunctions unjustly injure it in two ways. First, Argentina argues that the amended injunctions violate the Foreign Sovereign Immunities Act ("FSIA") by forcing Argentina to use resources that the statute protects. As discussed in our October opinion, the original injunctions—and now the amended injunctions—do not violate the FSIA because "[t]hey do not attach, arrest, or execute upon any property" as proscribed by the statute.[8] *NML I* at 262-63. Rather, the injunctions allow Argentina to pay its FAA debts with whatever resources it likes. Absent further guidance from the Supreme Court, we remain convinced that the amended injunctions are consistent with the FSIA.

Second, Argentina argues that the injunctions' ratable payment remedy is inequitable because it calls for plaintiffs to receive their full principal and all accrued interest when

---

[8] As we noted,

> [a]n "attachment" is the "seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment." Black's Law Dictionary 123 (9th ed.2009); *see also* 6 Am. Jur. 2d Attachment and Garnishment § 1. An arrest is "[a] seizure or forcible restraint." Black's Law Dictionary 124 (9th ed. 2009). "Execution" is "an act of dominion over specific property by an authorized officer of the court . . . which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his or her judgment creditor." 30 Am. Jur. 2d Executions § 177; *see also* Black's Law Dictionary (9th ed. 2009) ("Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property.").

NML I at 262 n.13.

Exchange Bondholders receive even a single installment of interest on their bonds. However, the undisputed reason that plaintiffs are entitled immediately to 100% of the principal and interest on their debt is that the FAA guarantees acceleration of principal and interest in the event of default. *See NML I* at 254 n.7; *NML II* at *4. As the district court concluded, the amount currently owed to plaintiffs by Argentina as a result of its persistent defaults is the accelerated principal plus interest. We believe that it is equitable for one creditor to receive what it bargained for, and is therefore entitled to, even if other creditors, when receiving what they bargained for, do not receive the same thing. The reason is obvious: the first creditor is differently situated from other creditors in terms of what is currently due to it under its contract. *See Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005). Because the district court's decision does no more than hold Argentina to its contractual obligation of equal treatment, we see no abuse of discretion.

Argentina adds that the amended injunctions are invalid because a district court may not issue an injunctive "remedy [that] was historically unavailable from a court of equity." *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). However, English chancery courts traditionally had power to issue injunctions and order specific performance when no effective remedy was available at law. *See* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2944 (2d ed. 1994). As we explained in our October 2012 opinion, the plaintiffs have no adequate remedy at law because the Republic has made clear its intention to defy any money judgment issued by this Court. *See NML I* at 261-62. Moreover, Argentina has gone considerably farther by passing legislation, the Lock Law, specifically barring payments to FAA bondholders. And it is unremarkable that a court

empowered to afford equitable relief may also direct the timing of that relief. Here, that timing requires that it occur before or when Argentina next pays the Exchange Bondholders.

II. Alleged Injuries to Exchange Bondholders

Invoking the proposition that equitable relief is inappropriate where it would cause unreasonable hardship or loss to third persons, *see Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 436 (2d Cir. 1993), Argentina, EBG, and Fintech argue that the amended injunctions are inequitable to Exchange Bondholders.[9] But this case presents no conflict with that proposition. EBG argues, notwithstanding our affirmance of the district court's finding that Argentina has the financial wherewithal to pay all of its obligations, *see NML I* at 256, 263, that the amended injunctions will harm Exchange Bondholders because Argentina "has declared publicly that it has no intention of ever paying holdout bondholders like NML" and, as a result, neither plaintiffs nor Exchange Bondholders will be paid if the amended injunctions stand. Appellant EBG Br. 2.

---

[9] Intervenor ICE Canyon urges that the amended injunctions should not apply to euro-denominated GDP-linked securities that Argentina issued in its 2005 and 2010 exchanges. The gist of ICE Canyon's argument is that the amended injunctions require payment to plaintiffs whenever Argentina pays on the Exchange *Bonds*, not when it pays on GDP-linked securities which yield revenue only if the Republic's GDP grows. By their terms, however, the amended (and original) injunctions require payment to plaintiffs whenever Argentina pays on "Exchange Bonds," defined as including both bonds *and "other obligations"* issued in the exchange offers. 2012 WL 5895784, at *2 (emphasis added). The inclusion of other obligations like GDP-linked securities is unsurprising, given that the FAA required that the FAA Bonds be treated at least equally with all "obligations (other than the [FAA Bonds]) for borrowed money or evidenced by securities, debentures, notes or other similar instruments denominated or payable, or which at the option of the holder thereof may be payable, in a currency other than the lawful currency of the Republic. . . ." J.A. 171. The euro-denominated GDP-linked securities fit this description because they are "obligations . . . evidenced by securities . . . denominated . . . in a currency other than the lawful currency of the Republic." Accordingly, we see no need to clarify the amended injunctions, and we consider the term Exchange Bonds to include the euro-denominated GDP-linked securities.

This type of harm—harm threatened to third parties by a party subject to an injunction who avows not to obey it—does not make an otherwise lawful injunction "inequitable." We are unwilling to permit Argentina's threats to punish third parties to dictate the availability or terms of relief under Rule 65. *See Reynolds v. Int'l Amateur Athletic Fed'n*, 505 U.S. 1301, 1302 (1992) (Stevens, *J.*, in chambers). Argentina's contention that the amended injunctions are unfair to Exchange Bondholders is all the less persuasive because, before accepting the exchange offers, they were expressly warned by Argentina in the accompanying prospectus that there could be "no assurance" that litigation over the FAA Bonds would not "interfere with payments" under the Exchange Bonds. J.A. 466. Under these circumstances, we conclude that the amended injunctions have no inequitable effect on Exchange Bondholders and find no abuse of discretion.[10]

[10] The remaining arguments pertaining to Exchange Bondholder interests are similarly without merit. Exchange Bondholders have suffered no denial of procedural due process because there is no right to process for non-parties in their position. *See Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 42 (1st Cir. 2009) ("Impact and legal rights are not the same thing. A decision in a contract dispute or antitrust case can have drastic effects on suppliers, stockholders, employees and customers of the company that loses the case; no one thinks the Constitution requires all of them to be parties."). EBG's substantive due process and Takings Clause arguments fail because the amended injunctions do not deprive Exchange Bondholders of any property. And lastly, non-parties—even those whose enjoyment of contractual rights may be affected by a judicial decision—are not necessary parties for Rule 19 joinder if they can protect their rights in subsequent litigation. *See MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 386 (2d Cir. 2006). Here, Exchange Bondholders will be affected if, after we affirm the amended injunctions, Argentina decides to default on the Exchange Bonds, but Exchange Bondholders would then be able to sue over that default. Accordingly, we find no abuse of discretion in the amended injunctions with respect to the Exchange Bondholders' rights.

III. Alleged Injuries to Participants in the Exchange Bond Payment System

Argentina, BNY, Euro Bondholders, and ICE Canyon raise additional issues concerning the amended injunctions and their effects on the international financial system through which Argentina pays Exchange Bondholders. The arguments include that (1) the district court lacks personal jurisdiction over payment system participants and therefore cannot bind them with the amended injunctions, (2) the amended injunctions cannot apply extraterritorially, (3) payment system participants are improperly bound because they were denied due process, and (4) the amended injunctions' application to financial system participants would violate the U.C.C.'s protections for intermediary banks. None of these arguments, numerous as they are, has merit.[11]

First, BNY and Euro Bondholders argue that the district court erred by purporting to enjoin payment system participants over which it lacks personal jurisdiction. But the district court has issued injunctions against no one except Argentina. Every injunction issued by a district court automatically forbids others—who are not directly enjoined but who act "in active concert or participation" with an enjoined party—from assisting in a violation of the injunction. *See* Fed. R. Civ. P. 65(d). In any event, the Supreme Court has expressed its expectation that, when questions arise as to who is bound by an injunction though operation of Rule 65, district courts will not "withhold a clarification in the light of a concrete situation." *Regal Knitwear Co.*

[11] We also note that some payment system participants, ostensibly concerned about being sued for obeying the injunctions, apparently enjoy the protection of exculpatory clauses in their contracts. *See e.g.*, Trust Indenture of June 2, 2005, §5.2(xvi), Supp. App. 662 ("[BNY] will not be liable to any person if prevented or delayed in performing any of its obligations . . . by reason of any present or future law applicable to it, by any governmental or regulatory authority or by any circumstance beyond its control . . . .").

v. N.L.R.B., 324 U.S. 9, 15 (1945). The doors of the district court obviously remain open for such applications.

The amended injunctions simply provide notice to payment system participants that they could become liable through Rule 65 if they assist Argentina in violating the district court's orders. Since the amended injunctions do not directly enjoin payment system participants, it is irrelevant whether the district court has personal jurisdiction over them. And of course, "[t]here will be no adjudication of liability against a [non-party] without affording it a full opportunity at a hearing, after adequate notice, to present evidence." *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 180 (1973). In such a hearing, before any finding of liability or sanction against a non-party, questions of personal jurisdiction may be properly raised. But, at this point, they are premature. Similarly, payment system participants have not been deprived of due process because, if and when they are summoned to answer for assisting in a violation of the district court's injunctions, they will be entitled to notice and the right to be heard. *See id.* at 181.

Euro Bondholders and ICE Canyon next argue that the amended injunctions are improper or at a minimum violate comity where they extraterritorially enjoin payment systems that deliver funds to Exchange Bondholders. But a "federal court sitting as a court of equity having personal jurisdiction over a party [here, Argentina] has power to enjoin him from committing acts elsewhere." *Bano v. Union Carbide*, 361 F.3d 696, 716 (2d Cir. 2004) (internal quotation marks omitted). And federal courts can enjoin conduct that "has or is intended to have a substantial effect within the United States." *United States v. Davis*, 767 F.2d 1025, 1036 (2d Cir. 1985).

The district court put forward sufficient reasons for binding Argentina's conduct, regardless of whether that conduct occurs here or abroad. *See NML II* at *4 (noting that if Argentina is able to pay Exchange Bondholders while avoiding its obligations to plaintiffs, "the Injunctions will be entirely for naught"); *see also* Oral Arg. Tr. Nov. 9, 2012, 16:16-18, Supp. App. 461 ("[T]he Republic has done everything possible to prevent those judgments that have been entered [against it] from being enforced."). And the district court has articulated good reasons that the amended injunctions must reach the process by which Argentina pays Exchange Bondholders. *See NML II* at *4 (noting that, to prevent Argentina from avoiding its obligations to plaintiffs, "it is necessary that the *process* for making payments on the Exchange Bonds be covered"); *id.* at *5 (explaining that "if Argentina attempts to make payments . . . contrary to law," then "third parties should properly be held responsible for making sure that their actions are not steps to carry out a law violation"). The amended injunctions do not directly enjoin any foreign entities other than Argentina. By naming certain foreign payment system participants (such as Clearstream Banking S.A., Euroclear Bank S.A./N.V., and Bank of New York (Luxembourg) S.A), the district court was, again, simply recognizing the automatic operation of Rule 65.

If ICE Canyon and the Euro Bondholders are correct in stating that the payment process for their securities takes place entirely outside the United States, then the district court misstated that, with the possible exception of Argentina's initial transfer of funds to BNY, the Exchange Bond payment "process, without question takes place in the United States." *NML II* at *5 n.2. But this possible misstatement is of no moment because, again, the amended injunctions enjoin no one but Argentina, a party that has voluntarily submitted to the jurisdiction of the district

court. If others in active concert or participation with Argentina are outside the jurisdiction or reach of the district court, they may assert as much if and when they are summoned to that court for having assisted Argentina in violating United States law.

Argentina and Fintech further argue that the amended injunctions violate Article 4A of the U.C.C., which was enacted to provide a comprehensive framework that defines the rights and obligations arising from wire transfers. *See Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 118 (2d Cir. 2010). Two sections of that article are at issue: § 502, concerning creditor process, and § 503, requiring "proper cause" before a party to a fund transfer (but not an intermediary bank) may be enjoined.

Section 502(1) defines creditor process as a "levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account." Within the context of electronic funds transfers ("EFTs"), § 502 requires that creditor process must be served on the bank of the EFT beneficiary who owes a debt to the creditor. N.Y. U.C.C. § 4-A-502(4). The Republic argues that the district court impermissibly skirts § 502's bar to creditor process except against a beneficiary's bank because the amended injunctions purport to affect multiple banks and other financial institutions in active concert and participation with Argentina.

Section 502 is not controlling because the amended injunctions do not constitute, or give rise to, "creditor process," essentially defined in the statute as a levy or attachment. The cases cited by Argentina are inapposite because they deal with attachments, and as we have seen, none has occurred here. *See Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 70

(2d Cir. 2009); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124 (2d Cir. 2009).

Section 503, however, does apply. It provides that only "[f]or proper cause" may a court

> restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an [EFT] originator's bank from executing the payment order of the originator, or (iii) the [EFT] beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.

N.Y. U.C.C. § 4-A-503. This section "is designed to prevent interruption of a funds transfer after it has been set in motion," and "[i]n particular, intermediary banks are protected" from injunctions that would disrupt an EFT. *Id.* § 4-A-503 cmt.

Argentina argues that plaintiffs purport to have cause for an injunction only with respect to Argentina, and therefore any transfers not involving Argentina cannot be enjoined. But as discussed above, the district court explained why it had good cause to issue injunctions that cover Argentina as well as the Exchange Bond payment system. *See NML II* at *4-5. Moreover, taking into account § 503's ban on injunctions against intermediary banks, the district court expressly excluded intermediary banks from the scope of the amended injunctions. Nonetheless, Fintech argues that BNY, BNY's paying agents, and DTC all act as intermediary banks and are all bound by the amended injunctions. We need not determine now what entities may or may not act as intermediary banks in an EFT that violates the amended injunctions. Whether or not an institution has assisted Argentina in a payment transaction solely in the capacity of an intermediary bank will be a question for future proceedings.

We note, however, that the record does not support Fintech's assertions. BNY does not route funds transfers originated by Argentina to Exchange Bondholders. Rather, BNY accepts

funds as a beneficiary of Argentina's EFT and then initiates new EFTs as directed by its indenture. *See* Supp. App. 529, 535, 537, 628-759; *see also* Appellant Argentina Br. 35 ("[BNY] initiates its *separate* funds transfer to distribute payment . . . .") (emphasis in original). It is noteworthy that neither Argentina nor BNY argue that BNY is an intermediary bank.

Similarly, the clearing systems such as DTC and Euroclear appear from the record and from their own representations to be other than intermediary banks. DTC does not route wire transfers but accepts funds that it then allocates "only to the [participant banks and brokerage houses] who have deposited the respective securities with DTC." Supp. App. 1289-90. Euroclear receives "payments from paying agents" and then "credits such amounts to its account holders." *Amicus* Euroclear Br. 3. These are not the functions of an intermediary bank under § 503. *See In re Contichem LPG*, No. 99 Civ. 10493, 1999 WL 977364, at *2 n.2 (S.D.N.Y. Oct. 27, 1999) (McKenna, *J.*), *aff'd sub nom. ContiChem LPG v. Parsons Shipping Co., Ltd.*, 229 F.3d 426 (2d Cir. 2000) (explaining that a bank was "not an intermediary bank for purposes of U.C.C. § 4-A-503 because it did not transfer by wire, or attempt to transfer by wire, the funds in question, but simply, as a receiving bank, credited them to [its customer]").

IV. Alleged Injuries to the Public Interest

In our October opinion, we considered the dire predictions from Argentina that enforcing the commitments it made in the FAA would have cataclysmic repercussions in the capital markets and the global economy, and we explained why we disagreed. *See NML I* at 263. On this appeal, Argentina essentially recycles those arguments. We are mindful of the fact that courts of equity should pay particular regard to the public consequences of any injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). However, what the

consequences predicted by Argentina have in common is that they are speculative, hyperbolic, and almost entirely of the Republic's own making. None of the arguments demonstrates an abuse of the district court's discretion.

The district court found that Argentina now "has the financial wherewithal to meet its commitment of providing equal treatment to [plaintiffs] and [Exchange Bondholders]." 2012 WL 5895784, at *1. However, Argentina and the Euro Bondholders warn that Argentina may not be able to pay or that paying will cause problems in the Argentine economy, which could affect the global economy. But as we observed in our last opinion, other than this speculation, "Argentina makes no real argument that, to avoid defaulting on its other debt, it cannot afford to service the defaulted debt, and it certainly fails to demonstrate that the district court's finding to the contrary was clearly erroneous." *NML I* at 263. Moreover, and perhaps more critically, Argentina failed to present the district court with any record evidence to support its assertions.

Argentina and *amici* next assert that, by forcing financial institutions and clearing systems to scour all of their transactions for payments to Exchange Bondholders, the amended injunctions will delay many unrelated payments to third parties. But the financial institutions in question are already called on to navigate U.S. laws forbidding participation in various international transactions. *See, e.g.*, 31 C.F.R. § 560.206 (forbidding trade by U.S. persons, including financial institutions, with Iran); 31 C.F.R. § 560.208 (forbidding dealings between foreign persons engaged in trade with Iran and U.S. persons); *United States v. HSBC Bank USA, N.A.*, No. 12 Crim. 763, 2013 WL 3306161, at *8 (E.D.N.Y. July 1, 2013) (approving settlement of criminal charges against bank for violations of U.S. law that allowed money laundering by drug traffickers); U.S. Dep't of Treasury, Settlement Agreement, MUL-488066, *available at*

http://www.treasury.gov/resource-center/sanctions/ofac-enforcement/documents/08182010.pdf (settling allegations that a foreign bank violated U.S. prohibitions on payments to Cuba, Iran, Burma, and Sudan).[12] Indeed, the record in this case appears to belie those concerns and suggests that payment system participants know when Exchange Bond payments are to arrive, because each is identified by a unique code assigned to a particular Exchange Bond. *See* Supp. App. 1290. In this context, we view Argentina's concerns as speculative. In any event, a district court always retains the power to adjust the terms of an injunction as unforseen problems or complexities involving entities such as the clearing systems present themselves. *See United States v. Diapulse Corp. of Am.*, 514 F.2d 1097, 1098 (2d Cir. 1975).

Also unpersuasive is Argentina's warning that we should vacate the injunctions because future plaintiffs may "move against multilateral and official sector entities" like the IMF. Appellant Argentina Br. 47. As we have observed, this case presents no claim that payments to the IMF would violate the FAA. *NML I* at 260. A court addressing such a claim in the future will have to decide whether to entertain it or whether to agree with the appellees that subordination of "obligations to commercial unsecured creditors beneath obligations to multilateral institutions like the IMF would *not* violate the Equal Treatment Provision for the simple reason that commercial creditors never were nor could be on equal footing with the multilateral organizations." *Id.* Speculation that a future plaintiff might attempt recovery affecting the IMF simply provides no reason to withhold relief here.

---

[12] We have never been presented with the question whether U.S. sanctions legally apply to non-U.S. persons or institutions, and we do not answer that question today. We merely note that both foreign and domestic financial institutions are already required to police their own transactions in order to avoid violations of potentially applicable United States laws and regulations.

Next, Argentina and various *amici* assert that the amended injunctions will imperil future sovereign debt restructurings. They argue essentially that success by holdout creditors in this case will encourage other bondholders to refuse future exchange offers from other sovereigns. They warn that rather than submitting to restructuring, bondholders will hold out for the possibility of full recovery on their bonds at a later time, in turn causing second- and third-order effects detrimental to the global economy and especially to developing countries. *See generally Amicus* Anne Krueger Br. 11-16.

But this case is an exceptional one with little apparent bearing on transactions that can be expected in the future. Our decision here does not control the interpretation of all *pari passu* clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights. *See NML I* at 264 n.16. We simply affirm the district court's conclusion that Argentina's extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA. *Id.*

We further observed that cases like this one are unlikely to occur in the future because Argentina has been a uniquely recalcitrant debtor[13] and because newer bonds almost universally include collective action clauses ("CACs") which permit a super-majority of bondholders to

[13] *See also* Robin Wigglesworth & Jude Webber, An Unforgiven Debt, Fin. Times, Nov. 28, 2012 (characterizing Argentina as an "outlier in the history of sovereign restructurings"); Hung Q. Tran, The Role of Markets in Sovereign Debt Crisis Detection, Prevention and Resolution, Remarks at Bank of International Settlements Seminar, Sovereign Risk: A World Without Risk-Free Assets?, Jan. 8, 2013 ("Argentina . . . remain[s] a unique example of a sovereign debtor pursuing a unilateral and coercive approach to debt restructuring . . . .").

impose a restructuring on potential holdouts. *See NML I* at 264. Argentina and *amici* respond that, even with CACs, enough bondholders may nonetheless be motivated to refuse restructurings and hold out for full payment—or that holdouts could buy up enough bonds of a single series to defeat restructuring of that series. But a restructuring failure on one series would still allow restructuring of the remainder of a sovereign's debt. And, as one *amicus* notes, "if transaction costs and other procedural inefficiencies are sufficient to block a super-majority of creditors from voting in favor of a proposed restructuring, the proposed restructuring is likely to fail under any circumstances." *Amicus* Kenneth W. Dam Br. 14 n.5.

Ultimately, though, our role is not to craft a resolution that will solve all the problems that might arise in hypothetical future litigation involving other bonds and other nations. The particular language of the FAA's *pari passu* clause dictated a certain result in this case, but going forward, sovereigns and lenders are free to devise various mechanisms to avoid holdout litigation if that is what they wish to do. They may also draft different *pari passu* clauses that support the goal of avoiding holdout creditors. If, in the future, parties intend to bar preferential payment, they may adopt language like that included in the FAA. If they mean only that subsequently issued securities may not explicitly declare subordination of the earlier bonds, they are free to say so. But none of this establishes why the plaintiffs should be barred from vindicating their rights under the FAA.

For the same reason, we do not believe the outcome of this case threatens to steer bond issuers away from the New York marketplace. On the contrary, our decision affirms a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to

those terms. We believe that the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts. *See Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's orders as amended.[14] The appeals from Exchange Bondholder Group, No. 12-4694, and from Fintech Advisory Inc., No. 12-4865, are hereby dismissed. Enforcement of the amended injunctions shall be stayed pending the resolution by the Supreme Court of a timely petition for a writ of *certiorari*.

[14] The orders affirmed here are listed in footnote 2 of this opinion.