

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Aurelius Capital Master, Ltd., ACP Master Ltd.,

Plaintiffs-Appellants,

v.

Republic of Argentina,

Defendant-Appellee,

Bank of America, N.A.,

Respondent,

Banco Bilbao Vizcaya Argentaria, S.A., BBVA
Compass Bancshares, Inc., BBVA Securities
Inc.,

Third-Party-Defendants.

Docket No. 16-628

**REPLY BRIEF IN FURTHER SUPPORT OF THE
EURO BONDHOLDERS'
EMERGENCY MOTION FOR LEAVE TO INTERVENE**

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Appellants’ opposition to the Euro Bondholders’ motion to intervene is premised on the fundamentally flawed claims that (1) the Injunction “do[es] not aggrieve the Euro Bondholders” and (2) the Euro Bondholders lack an “interest in either possible outcome of this appeal.” Opp’n at 4. That ignores the District Court’s express findings to the contrary: (1) that the Injunction has caused “*damage* to ‘very innocent third parties,’”—specifically “exchange bondholders” like the Euro Bondholders—and (2) that Exchange Bondholders like the Euro Bondholders are “[t]he most notable third parties *affected* by the Injunctions.” Indicative Ruling at 18, *NML Capital, Ltd. v. Republic of Arg.*, No. 14-cv-8947 (Feb. 19, 2016), Dkt. No. 47 (SPA-64) (emphasis added). Appellants do not contend that those findings are clearly erroneous, nor do they deny that the Euro Bondholders have substantial contractual and property interests that will be directly affected by the outcome of these appeals. Those affected interests mandate intervention under this Court’s precedents, and Appellants’ arguments to the contrary are unavailing.

ARGUMENT

Appellants argue that because this Court relegated the Euro Bondholders to *amici* status in an appeal *before* the Injunction became effective (interfering with their receipt of hundreds of millions of euros of contractually owed payments), the

Court must do so again here.¹ That argument ignores the significantly different posture of the present appeals, which come *after* the Injunction has taken effect, *after* an English Court of competent jurisdiction issued a definitive ruling that the Euro Bondholders have a cognizable property interest in payments blocked by operation of the Injunction, and *after* the District Court itself specifically found that the Euro Bondholders are affected and harmed by the Injunction. The Euro Bondholders therefore have far more than a “plausible” interest in vacatur of the Injunction. Indeed, if intervention is not warranted here, it is difficult to fathom circumstances where it *would* be warranted.

Until the Injunction took effect, the Euro Bondholders’ injuries remained hypothetical because they continued to receive interest payments owing on their bonds. Although this Court recognized the *possibility* that the Republic *could* decide not to pay Exchange Bondholders after the Injunction took effect, Opp’n 5-6, at that time, that outcome was merely theoretical. Indeed, Appellant NML Capital represented to this Court that “the likelihood that the Republic would

¹ Appellants incorrectly assert that this Court “denied intervention,” Opp’n at 6, to the Euro Bondholders in the appeal concerning the District Court’s decision to impose the Injunction. In fact, this Court *granted* the Euro Bondholders leave to intervene in that appeal. *See NML Capital, Ltd. v. Republic of Arg.*, No. 12-105 (2d Cir. Dec. 6, 2012), Dkt. No. 552. The panel subsequently concluded in a 2-1 decision that the Euro Bondholders lacked non-party appellate *standing* on the facts of that appeal, and therefore considered their arguments only as *amicus curiae*. As explained here and in the Euro Bondholders’ motion to intervene, the Euro Bondholders now meet this Court’s test for appellate standing.

default on the Exchange Bonds” was “overstate[d],” and that it was “hard to believe” and “deeply implausible” that such harm would come to pass. *NML Capital, Ltd. v. Republic of Arg.*, No. 12-105 (2d Cir. Jan. 25, 2013), Dkt. No. 821 at 32, 35. Likewise, Appellants represented to the District Court that “there was ‘no evidence’” the Injunction would “stop or interfere or impair in any way” payments due to Exchange Bondholders. Indicative Ruling at 18 (SPA-64). As the District Court recently recognized, however, and notwithstanding Appellants’ representations to the contrary, “*that is precisely what has happened.*” *Id.* at 18-19 (SPA-64-65) (emphasis added). There is no dispute that for nearly two years, the Injunction *has* prevented the Euro Bondholders and other Exchange Bondholders from receiving over \$3 billion dollars of interest payments they are due. *See id.* at 19 (SPA-65); Decl. of Christopher J. Clark ¶ 4, *NML Capital, Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y Feb. 29, 2016), Dkt. No. 896-1 (A-1791).² In fact, if the settlements the Republic has agreed to are consummated, missed payments to Exchange Bondholders will represent the largest unpaid claim against the Republic.³ In other words, the Euro Bondholders have suffered, and continue to

² The District Court’s findings of altered circumstances that have affected and harmed Exchange Bondholders, such as the Euro Bondholders, without more justify the Euro Bondholders’ intervention. *See* Indicative Ruling at 18-19 (SPA-64-65).

³ *See* Conditional Order at 4, *NML Capital, Ltd. v. Republic of Arg.*, No. 08-cv-6978 (S.D.N.Y Mar. 2, 2016), Dkt. No. 912 (SPA-83) (noting the Republic has

suffer, significant harm by the continued operation of the Injunction. Thus, their interests are directly affected by the District Court's order conditionally vacating the Injunction and this Court's decision on appeal.

Appellants, moreover, ignore a more fundamental difference between the current circumstances and those that existed during the initial appeal from the District Court's imposition of the Injunction. At that time, this Court found that "the amended injunctions do not deprive Exchange Bondholders of any property." *NML Capital, Ltd. v. Republic of Arg.*, 727 F.3d 230, 242 n.10 (2d Cir. 2013). That is no longer the case. In June 2014, after the Injunction took effect, the Republic deposited an interest payment of hundreds of millions of euros for the benefit of the Euro Bondholders and other similarly-situated exchange bondholders. Those funds have been blocked in a third-party intermediary's account for nearly two years. In February 2015, an English Court, applying English law, which governs the Euro Bondholders' bonds, resolved "the status of th[ose] funds," finding that they are held in trust for the benefit of the Euro Bondholders and other similarly-situated exchange bondholders. *See Knighthead Master Fund LP v. The Bank of New York Mellon*, [2015] EWHC (Ch) 270 (Eng.) (Feb. 13, 2015) ¶¶ 12-13, 36-47 (A-2185-85, 2191-93). Because it is undisputed

reached agreements in principle worth at least \$6.2 billion, accounting for over 85% of plaintiffs who hold claims covered by the Injunction); Clark Decl. ¶ 4, (A-1791).

that those funds are the property of the Euro Bondholders, and that they are prevented from possessing or using those funds solely by operation of the Injunction, the English Court's holding definitively establishes that the Injunction *now directly deprives* the Euro Bondholders of millions of euros of their property. That significantly changed circumstance, and the comity due the English Court's decision, similarly compel the conclusion that intervention is justified.⁴

Appellants' other arguments against intervention are equally meritless. Their assertion that the Euro Bondholders' interests are affected less by an order lifting the Injunction than an order issuing the Injunction not only defies common sense, it is also inconsequential. A non-party has appellate standing where it has an interest "plausibly affected by the judgment." *NML v. Republic of Arg.*, 727 F.3d 230, 239 (2d Cir. 2013) (citing *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 77-78 (2d Cir. 2006)). Whether the non-party benefits or is harmed by the district court's order does not affect the analysis. Indeed, the Euro Bondholders' interests in their contractually owed payments are *directly* affected by the District Court's order precisely *because* vacating the Injunction benefits the Euro Bondholders.

⁴ All the appeals on which Appellants rely to suggest that this Court has resolved that the Euro Bondholders lack standing to participate in these appeals, *see* Opp'n at 5 & n.1, precede the English Court's judgment.

Finally, Appellants complain that too many briefs have been filed by other parties. If this is so, it is because of the number of Appellants clamoring to be heard. The argument that no party supporting the District Court’s decision to vacate the Injunction should be permitted to intervene because these appeals already “involve hundreds of appellants” seeking to overturn that decision is deeply unpersuasive. If anything, that imbalance—and the importance of ensuring that all parties affected by the District Court’s decision have a meaningful opportunity to be heard—strongly favor intervention by the Euro Bondholders.⁵ In any event, the number of appellants has no bearing on the Euro Bondholders’ standing and is neither a valid nor equitable reason to deny intervention.

CONCLUSION

Accordingly, the Euro Bondholders respectfully request that this Court grant their Motion for Leave to Intervene. Should the Court deny the motion for any reason, the Euro Bondholders respectfully request that the Court grant them leave

⁵ Appellants also claim that intervention is unnecessary because the Republic can “adequately represent the [Euro Bondholders’] interests.” Opp’n at 7. Not only is that claim unsupported, it is also irrelevant. The fact that another party also seeks affirmation of the District Court’s decision does not serve to deny another party with an interest affected by that decision an opportunity to be heard.

to join the appeals by filing a brief of *amicus curiae* pursuant to Fed. R. App. P. 29(a).

Dated: March 17, 2016
New York, New York

Respectfully submitted,

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