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## In the United States Court of Appeals for the Second Circuit

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

(*caption continued on inside cover*)

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

# BRIEF OF PLAINTIFFS-APPELLEES AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., AURELIUS OPPORTUNITIES FUND II, LLC, BLUE ANGEL CAPITAL I LLC, AND PABLO ALBERTO VARELA ET AL.


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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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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellees state as follows:

Aurelius Capital Master, Ltd. ("ACM") is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital International, Ltd., is the parent of ACM. No publicly held corporation owns 10% or more, directly or indirectly, of the stock of ACM.

Aurelius Opportunities Fund II, LLC ("AOF") is a limited liability company organized and existing under the laws of the State of Delaware. AOF is not a corporation and therefore Rule 26.1 does not require any disclosures with respect to it.

ACP Master, Ltd., is an exempted company with limited liability incorporated in the Cayman Islands. Aurelius Capital Partners, LP is the parent of ACP Master, Ltd. Aurelius Capital GP, LLC is the sole general partner of Aurelius Capital Partners, LP, and is the indirect parent of ACP Master, Ltd. No publicly held corporation owns 10% or more of the stock of ACP Master, Ltd.

Blue Angel Capital I LLC ("Blue Angel") is a limited liability company organized and existing under the laws of the State of Delaware. Blue Angel is not a corporation and therefore Rule 26.1 does not require any disclosures with respect to it.

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, and Marta Azucena Vazquez are not corporations, and therefore Rule 26.1 does not require any disclosures with respect to them.

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## PRELIMINARY STATEMENT[1]

This Court's October 26 decision directed the district court to clarify how the injunction would apply to third parties and to verify that any "intermediary banks" (as that term is defined by Article 4-A of the U.C.C.) would not be bound by it. The district court followed that direction to the letter. The court confirmed what Fed. R. Civ. P. 65(d) has always commanded – that nonparties with notice of the injunction may not assist or facilitate Argentina's unlawful payments to the exchange bondholders. In the interests of clarity, the district court identified certain nonparties – such as the Indenture Trustee, registered owners of the exchange bonds, and clearing corporations and systems – most likely to satisfy those criteria. The district court also expressly excluded intermediary banks from the order.

Appellants and *amici* now offer a chorus of complaints regarding the scope of the injunction. Unsurprisingly, they would prefer that it apply only against Argentina – to be catalogued with the volumes of other judicial decrees that Argentina has openly disregarded. Even President Obama has gone so far as to sanction Argentina for "not act[ing] in good faith" with respect to orders of

[1] Appellees – Aurelius Capital Master, Ltd., ACP Master, Ltd., Aurelius Opportunities Fund II, LLC, Blue Angel Capital I LLC, and Pablo Alberto Varela *et al.* – join the arguments made by NML and the other Appellees in support of affirmance. We do not rehearse those arguments here; they are incorporated by reference. See Fed. R. App. P. 28(i).

competent tribunals. Presidential Proclamation 8788, 77 Fed. Reg. 18,899, 18,899 (Mar. 26, 2012). Appellants and *amici* thus advocate for yet another mandate that Argentina might ignore, but they offer no basis to confine the district court's order in this way.

Indeed, the briefs filed by Argentina and its supporters are most telling for what they *don't* say. For instance, Appellants and *amici* protest that the injunction will unfairly restrain nonparties that are merely honoring their lawful obligations on the exchange bonds. What they fail to mention is that payment on the exchange bonds is not always "lawful." Here, in the absence of a ratable payment to Appellees, such a payment would violate the injunction that this Court already affirmed. Nor do Appellants and *amici* acknowledge the irony of heralding the sacredness of *other* contracts to justify ignoring the court-ordered remedy for breaches of *this* one. They also assert that the injunction restrains intermediary banks and contravenes the limitations of "creditor process" set forth in U.C.C. Article 4-A. Yet they do not explain how an intermediary bank could be embraced by an order that expressly excludes intermediary banks. Nor do they offer a satisfying rationale (much less legal authority) for the remarkable proposition that a federal court's injunctive power is coterminous with a creditor's ability to attach property under the U.C.C.

Appellants and *amici* also routinely mischaracterize the nature of the injunction and the proceedings below. More than once, they assert that the district court "broadened" its injunction when it identified the nonparties to which the injunction likely would apply. That is wrong. The district court identified – at this Court's request – those entities that, based on the current payment process, would be subject to contempt *by operation of law* if they assisted Argentina's violation of the injunction. The district court merely articulated the function of Rule 65(d), which applies to every injunction by its own terms.

Another prominent canard in the submissions from Appellants and *amici* is that the district court "enjoined" domestic nonparties without due process, and foreign nonparties without personal jurisdiction. Wrong again. Only Argentina is enjoined; the district court did not enjoin *any* nonparties, in the United States or abroad. Rather, those entities – like *all* nonparties – are prohibited from assisting any violation of the injunction. Should they do so, they – like *all* nonparties – would have the opportunity to contest jurisdiction and application of the injunction. Unless and until that occurs, final determinations of questions of personal jurisdiction and due process concerning nonparties are premature.

Most fundamentally, Appellants and *amici* never grapple with the controlling standard of review. The injunction – which this Court has affirmed – is an equitable remedy that this Court will uphold "so long as it achieves a fair result

under the totality of the circumstances." Oct. 26 Opinion ("Op."), SPE-290 (quotation marks omitted).[2] On that issue, the district court said it best: "[I]t is hardly an injustice to have legal rulings which, at long last, mean that Argentina must pay the debts which it owes. After ten years of litigation this is a just result." Nov. 21 Order, SPE-1367-68.

## COUNTER-STATEMENT OF JURISDICTION

Appellees adopt and incorporate by reference the Counter-Statement of Jurisdiction in NML's brief.

## ISSUES PRESENTED

1. Did the district court abuse its discretion by entering an injunction that would apply to various nonparties by operation of Fed. R. Civ. P. 65, or by

[2] "SPE-" refers to pages of the Supplemental Appendix, filed December 28, 2012. "A-" refers to pages of the Joint Appendix, filed March 21, 2012. "ABA Br." refers to the brief of the American Bankers Association, Dkt. 787. "Arg. Br." refers to the brief of the Republic of Argentina, Dkt. 657. "BNY Br." refers to the brief of the Bank of New York Mellon, Dkt. 637. "Clearing House Br." refers to the brief of the Clearing House Association L.L.C., Dkt. 689. "Euro Bondholders Br." refers to the brief of the Euro Bondholders, Dkt. 702. "Euroclear Br." refers to the brief of Euroclear Bank SA/NV, Dkt. 780. "Fintech Br." refers to the brief of Fintech Advisory Inc., Dkt. 652. "ICE Canyon Br." refers to the brief of ICE Canyon LLC, Dkt. 698. "Italian Bondholders Br." refers to the brief of the Italian Holders of Argentine Sovereign Bonds, Dkt. 707-2. "Mann Br." refers to the brief of Ronald Mann and EM Ltd., Dkt. 703. "Montreux Br." refers to the brief of Montreux Partners, L.P. and Wilton Capital, Dkt. 781. "Prat-Gay Br." refers to the brief of Alfonso Prat-Gay, Dkt. 697-2. "Puente Br." refers to the brief of Puente Hnos. Sociedad de Bolsa S.A., Dkt. 791.

specifying the likely identity of those parties in response to this Court's request that it do so?

2. Did the district court abuse its discretion by excluding intermediary banks from the scope of its order under U.C.C. Article 4-A but otherwise restraining nonparties from actively facilitating Argentina's unlawful payments on the exchange bonds?

3. Does the FAA contract's definition of "External Indebtedness," which includes "obligations . . . evidenced by securities," require this Court – despite Appellants' forfeiture of this argument – to carve GDP-linked securities out of the injunction?

## COUNTER-STATEMENT OF THE CASE

Appellees adopt and incorporate by reference the Counter-Statement of the Case in NML's brief.

## COUNTER-STATEMENT OF FACTS

Appellees adopt and incorporate by reference the Counter-Statement of Facts in NML's brief. Below, we briefly summarize the process by which Argentina makes payments on the exchange bonds and the district court's clarification of the injunction's application to nonparties under Rule 65(d).

### A. The Exchange Bond Payment Process

Each of the different series of exchange bonds is nominally a single global security held by a nominee on behalf of a depositary.[3] Therefore, the exchange bondholders hold and trade not the exchange bonds themselves, but rather beneficial interests in those global securities. The payment process for the exchange bonds varies slightly depending on the series of the bond, but follows the same basic pattern:

(i) At least one day before a payment is due, Argentina transfers funds to Bank of New York Mellon (BNY), which serves as the Registrar, Indenture Trustee, and Trustee Paying Agent for the exchange bonds. (In addition, Cede & Co. and BNY affiliates serve as the registered holders for the exchange bonds.) See Binnie Decl. ¶¶ 3, 7, 10-12, SPE-621, 623-25.[4]

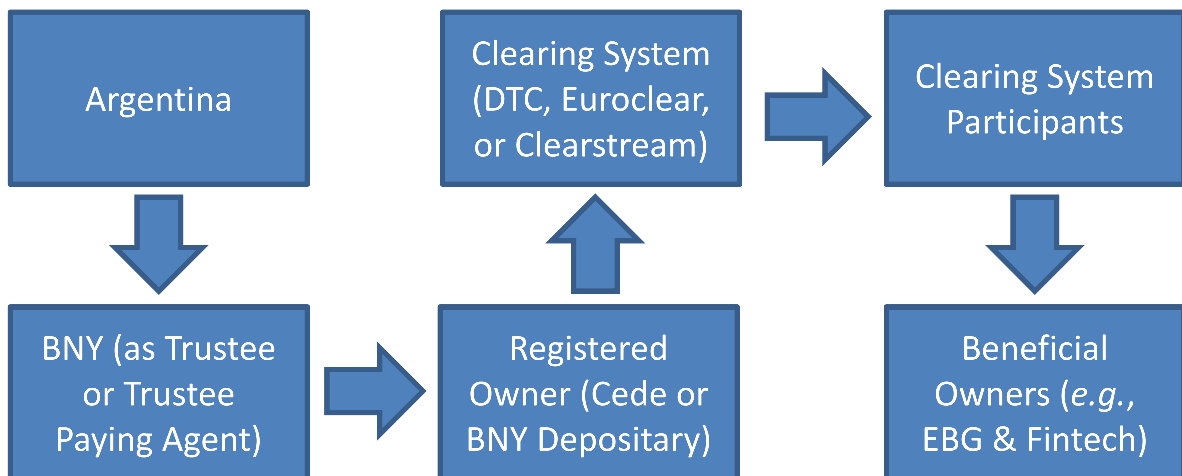
(ii) On the day a payment is due, BNY transfers the funds (directly or through the registered holder) to the relevant clearing system. The

[3] There is no difference between a "depository" and a "depositary." The Indenture uses "depositary," SPE-634, and Appellees have chosen that spelling for consistency.

[4] These facts are drawn principally from the declaration of Kevin F. Binnie, Vice President of BNY's Corporate Trust Division. We assume solely for present purposes that the Binnie Declaration is a complete and accurate depiction of the payment process. BNY and its affiliates act in many roles with respect to the payment process, and further discovery may shed additional light on the full extent of their participation.

Depository Trust Company (DTC), Euroclear, and Clearstream are the clearing systems for U.S. Dollar-denominated bonds, and Euroclear and Clearstream are the clearing systems for Euro-denominated bonds. See *id.* ¶¶ 8, 9, SPE-623. Each of the clearing systems has a presence in New York. See DTC Ltr. to Judge Griesa dated Nov. 16, 2012, SPE-1290; Euroclear Br. 2.

(iii) Each of the clearing systems has "participants," which are financial institutions. When a clearing system receives a payment from BNY, it credits the funds to its participants that hold interests in the exchange bonds on behalf of their customers or for their own account. See Binnie Decl. ¶¶ 10-12, SPE-623-25. The participants, in turn, distribute the funds to their customers, who are the ultimate holders of beneficial interests in the exchange bonds. See *ibid.*



### B. The Proceedings on Remand

This Court's October 26 decision remanded this case under *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), amid what it described as "some confusion as to how the challenged order will apply to third parties generally." Op., SPE-295. In particular, the district court was asked to "more precisely determine the third parties to which the Injunctions will apply" under Fed. R. Civ. P. 65(d), and to verify that intermediary banks are excluded. See *ibid*.

On November 9, the district court held a hearing on the remanded issues. In addition to argument from the parties, the court heard argument from the Exchange Bondholder Group (EBG). Nov. 9 Tr., SPE-446-78. At the court's invitation, interested nonparties – including BNY, the Clearing House Association, DTC, EBG, the Federal Reserve Bank of New York, and Fintech – submitted briefs and letters. After considering the arguments of the parties and nonparties, the district court provided (in opinions and an order dated November 21) the clarification that this Court requested:

*First*, the district court outlined (as set forth above) the mechanism by which Argentina makes payments on the exchange bonds and the nonparties most directly involved in that payment process. SPE-1369.

*Second*, the court confirmed that, by operation of Fed. R. Civ. P. 65(d), any nonparty with notice of the injunction may not assist or facilitate Argentina's

unlawful payments on the exchange bonds. SPE-1368-69. It recognized that, "if Argentina is able to make the payments on the Exchange Bonds without making the payments to plaintiffs, the District Court and Court of Appeals' rulings and the Injunctions will be entirely for naught." SPE-1368. The district court therefore determined that the process should "be covered by the Injunctions, and that the parties participating in that process be so covered." *Ibid.*

For the sake of clarification – and given the degree to which these payments are choreographed in advance – the court specifically identified the persons most likely implicated by Rule 65(d). Specifically, the district court identified as "participants" the "persons and entities who act in active concert or participation with the Republic, . . . including":

> (1) the indenture trustees and/or registrars under the Exchange Bonds (including but not limited to The Bank of New York Mellon f/k/a/ The Bank of New York); (2) the registered owners of the Exchange Bonds and nominees of the depositaries for the Exchange Bonds (including but not limited to Cede & Co. and The Bank of New York Depositary (Nominees) Limited) and any institutions which act as nominees; (3) the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds (including but not limited to the Depository Trust Company, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear System); (4) trustee paying agents and transfer agents for the Exchange Bonds (including but not limited to The Bank of New York (Luxembourg) S.A. and The Bank of New York Mellon (including but not limited to the Bank of New York Mellon (London)); and (5) attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds.

SPE-1382-83. In the event "that Argentina would refuse to comply with the Injunctions," Op., SPE-278, specifying these nonparties in advance would minimize the risk of contempt proceedings.

*Third*, the court expressly excluded any nonparty "acting solely in its capacity as an 'intermediary bank,' under Article 4A of the U.C.C. and N.Y.C.L.S. U.C.C. § 4-A-104" from the scope of its order. SPE-1383.

*Fourth*, the court stated that it would "promptly provide[]" whatever additional clarification is requested by nonparties concerning their duties, "if any," under the injunction. SPE-1383-84.

## STANDARD OF REVIEW

This Court reviews the district court's issuance of an injunction for abuse of discretion. "It is axiomatic that the contours of an injunction are shaped by the sound discretion of the trial judge." *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1542 (2d Cir. 1992). The abuse-of-discretion standard applies equally to injunctions that affect nonparties by operation of Fed. R. Civ. P. 65. *Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 272-73 (2d Cir. 2011). In crafting such injunctions, "[a] district court has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct." *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997) (quotation marks omitted).

## SUMMARY OF ARGUMENT

I. A. Appellants insist that the district court lacked the authority to enjoin "lawful" exchange bond payments that are "separate" from Argentina's nonpayment to Appellees. They miss the point of this Court's October 26 holding. The Equal Treatment Provision requires Argentina to rank its obligations to Appellees "at least equally" with its exchange bond obligations. As a remedy for Argentina's six-year-long breach of that provision by ranking its obligations under the exchange bonds above its obligations to Appellees under the FAA bonds, the district court issued – and this Court affirmed – an injunction mandating that Argentina may make a payment on the exchange bonds only if it also makes a ratable payment to Appellees. In light of that injunction, payment on the exchange bonds without a ratable payment to Appellees simply is not "lawful" or "separate."

B. Appellants next propound various theories as to why their supposedly "ordinary" business activities, pursuant to contracts that postdate Appellees' contract, cannot constitute acting in "concert or participation with" Argentina. But most of those theories have no basis in the Rule 65 context – indeed, Rule 65 authority is to the contrary. Other theories – like the notion that processing payments constitutes "inaction" beyond the scope of Rule 65 – defy the facts, common sense, or both.

C. Appellants again mischaracterize the district court's order when claiming that it enjoins nonparties without due process. In reality, the order directly enjoins only Argentina; it merely identifies the nonparties who likely would be assisting Argentina with any violation under the established payment mechanism – and who thereby would be subject to contempt *by operation of Rule 65*. It is thus in keeping with this Court's remand instructions – and with Supreme Court precedent encouraging such "clarification."

D. Certain *amici* contend that foreign entities must be beyond the scope of the injunction. But they have not even tried to show that those entities are outside the injunction's terms, or that they would be outside of the district court's jurisdiction. And any purported conflict with foreign law remains hypothetical at best.

E. Argentina boldly claims that, if the injunction does not bind nonparties, it should not issue at all because this Court would lack the practical power to enforce Argentina's compliance. But Argentina has voluntarily submitted to the jurisdiction of U.S. courts and is fully able to comply with the injunction. Accordingly, Argentina's reliance on case law in which the cooperation of a *nonparty* sovereign would be necessary to comply with a federal court order is misplaced. Argentina's threat to ignore this Court's authority is no basis for refusing to exercise it; if anything, that threat illustrates the wisdom

underlying Rule 65(d)'s prohibition on nonparties' participation in violations of injunctions.

II. A. Fintech claims that the district court unlawfully enjoined intermediary banks in violation of U.C.C. Article 4-A. Argentina and *amici* make similar assertions. This argument is something of a head-scratcher, as the district court expressly excluded any nonparty "acting solely in its capacity as an 'intermediary bank'" from the scope of its injunction. And the district court did not abuse its discretion in identifying nonparties that act as originators, beneficiaries, or their banks – and thus are *not* intermediary banks – in connection with exchange bond payments. But again, even if the district court's current assessment were wrong, the capacity in which a nonparty might ultimately be subject to contempt is a question for another day.

B. Argentina and *amici* erroneously rely on the "creditor process" provisions of U.C.C. Article 4-A (§ 502) to urge that the injunction unlawfully restrains funds that do not belong to Argentina. Those provisions have no relevance here. The district court did not enter an order of attachment; it entered an injunction. And the "injunction" process provision of Article 4-A (§ 503) expressly contemplates an injunction so long as intermediary banks are exempted (as they are). To the extent that Argentina and *amici* invite the Court to rewrite the

statute, and hold that a federal court's injunctive power is no broader than a judgment creditor's attachment power, the Court should decline that invitation.

III. Finally, ICE Canyon asserts that Argentina's GDP-linked securities – an integral part of the exchange bond deals – must be exempted from the injunction. Not only is this argument forfeited, but Argentina and the Exchange Bondholder Group also have conceded that it is wrong. And for good reason: The GDP-linked securities plainly fall within the relevant definition of "External Indebtedness."

## ARGUMENT

### I. THE INJUNCTION PROPERLY APPLIES TO NONPARTIES THAT ACT IN CONCERT WITH ARGENTINA IN ANY VIOLATION OF THE INJUNCTION

This Court has already affirmed the district court's injunction, forbidding Argentina from paying on the exchange bonds without making a ratable payment to Appellees. Any person who knowingly acts in "concert or participation with" Argentina in thwarting that edict does so on pain of contempt. Fed. R. Civ. P. 65(d)(2)(C). Appellants and *amici* contend that this rule cannot apply to the banks and other nonparties who would help process the forbidden payments.

Each of their arguments fails. Payments on the exchange bonds without appropriate payments to Appellees are not "lawful." Conducting "ordinary" business pursuant to contracts that postdate Argentina's contract with Appellees

can violate Rule 65. The district court did not deprive anyone of due process merely by following this Court's remand instructions. And, although there are no final determinations of personal jurisdiction or purported conflicts of law, the district court has jurisdiction over the relevant entities – and Argentina cannot secure foreign judgments to subvert its duties under New York law.

### A. Payment On The Exchange Bonds Without A Ratable Payment On The FAA Bonds Is A Violation Of The Injunction, And Any Person That Participates In Such A Payment Would Be Acting In Concert With Argentina To Violate The Injunction

As this Court held in its October 26 opinion, the point of the injunction is to require Argentina to "specifically perform its obligations" under the FAA contract. Op., SPE-289. This Court has held that the Equal Treatment Provision in the FAA contract forbids "discriminating against the FAA Bonds in favor of other unsubordinated, foreign bonds." Op., SPE-286.

Recognizing that "monetary damages are an ineffective remedy" for Argentina's breaches of the FAA contract, Op., SPE-291, this Court affirmed the relief fashioned by the district court. In essence, the injunction forbids Argentina from making a payment on its exchange bonds unless it also makes a ratable payment on its FAA bonds. See Op., SPE-277-80. That proscription is intended to remedy Argentina's breach of contract, which consists of ranking its obligations on the exchange bonds above its obligations on the FAA bonds for the last six years; it

merely "direct[s] Argentina to comply with its contractual obligations not to alter the rank of its payment obligations." Op., SPE-292.

Yet it is Appellants' premise that a payment on the exchange bonds, without a payment on the FAA bonds, is an act with no bearing on this case. Bank of New York Mellon (BNY), for example, contends that "[t]here is no dispute that the Injunctions bar BNY Mellon from engaging in purely lawful conduct – the receipt of funds from Argentina and the distribution of those funds to the Exchange Holders." BNY Br. 21; see also Arg. Br. 41 (deeming these payments "a legal, arms-length business transaction"); Euro Bondholders Br. 11 ("[T]he Republic violates the Injunction when it *fails to pay Plaintiffs*.").[5]

Not so – those payments are the crux of the dispute. It is *not* "lawful" to pay on the exchange bonds without regard to payment *vel non* on the FAA bonds, as Appellants maintain – that is the very act prohibited by the injunction. A nonparty

[5] Appellants and their *amici* ground point after point on this flawed premise. See Arg. Br. 43 (defining the wrongful conduct as "the Republic's non-payment of plaintiffs" and, separately, "its payment to BNYM"); *id.* at 44 (characterizing payment mechanism as "normal business functions"); BNY Br. 22 ("There is nothing unlawful in BNY Mellon's receipt or distribution of funds from Argentina to the Exchange Holders."); *id.* at 29 (insisting that BNY's processing of payments on exchange bonds "has nothing to do with Plaintiffs"); Fintech Br. 25 (identifying the wrongful conduct as "the Republic's wholly separate and independent decision to pay or refrain from paying the Original Bondholders"); ABA Br. 13 ("In simply adhering to existing rights and duties, the Indenture Trustee is not acting wrongfully . . . ."); Euro Bondholders Br. 14 (characterizing payments on exchange bonds, without regard to payments on FAA bonds, as "lawful").

that plays a role in executing that act would be part and parcel of Argentina's violation of the injunction. Assuming that Argentina does not change the established payment mechanism for the exchange bonds – which the injunction forbids, Nov. 21 Order ¶ 4, SPE-1384 – then Argentina requires the participation of nonparties to complete a payment on its exchange bonds without a ratable payment on its FAA bonds. See Nov. 21 Opinion, SPE-1369 (citing roles of BNY, Cede & Co., and DTC).

Participating in the execution of an enjoined act would put these nonparties squarely within the ambit of Rule 65. The "essence" of that rule is that "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). A defendant like Argentina that effects a prohibited act "through" nonparties who are aware that the injunction prohibits the act implicates those nonparties in its wrong. In *Goya Foods, Inc. v. Wallack Management Co.*, 290 F.3d 63 (1st Cir. 2002), for example, a court enjoined the sale of an apartment, but its owner sold it anyway. To complete the transaction, the owner's broker and co-op board had to go along with her, despite their knowledge that the court had enjoined the sale. *Id.* at 75-76. In the First Circuit's view, it was "open-and-shut" that the broker and co-op board had "played

an essential role in consummating the forbidden transaction" – and, therefore, that Rule 65 covered their conduct. *Id.* at 76.

Other courts likewise have held that executing the nuts and bolts of a forbidden act is actionable under Rule 65. *E.g.*, *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) ("Although First Security claims it was 'merely . . . carrying out its own independent contractual obligation to allow a depositor's withdrawal upon request,' . . . the fact is that Ronald Mast could not have completed the transactions, thereby violating the October 21 order, without the aid and assistance of First Security."); *Waffenschmidt v. MacKay*, 763 F.2d 711, 715 (5th Cir. 1985) (affirming the application of Rule 65 because nonparties "had notice of the court's orders" and "acted in active concert and participation with [the defendant] in dissipating the stock proceeds").

Nonetheless, Appellants insist that, because Argentina's transfer of funds to BNY is the first step in the payment process, those who participate in subsequent steps in that process cannot *cause* Argentina's breach – and that Argentina's initial transfer of funds is the end of the matter. Arg. Br. 42-44; BNY Br. 30; Clearing House Br. 14; Euro Bondholders Br. 12-13.[6] Wrong again. To begin with, the

[6] As *amici* Montreux Partners, L.P. and Wilton Capital explain, these standards from the "aiding and abetting" context are out of place here. Montreux Br. 16-19. But Appellants' contentions miss the mark even by their own proffered standards. See *infra* pp. 21-24.

defendants in *Goya Foods*, *Reliance Insurance*, and *Waffenschmidt* were only the first step in the payment process. But that was no matter – under Rule 65, the injunction in each case encompassed all of the defendant's intended transaction; the same is true here. See *Goya Foods*, 290 F.3d at 68; *Waffenschmidt*, 763 F.2d at 717. And it simply is not the case that Argentina sends its money to BNY before anyone else lifts a finger. BNY, for one, begins facilitating the transfer about *one month* before Argentina sends its money. See SPE-526-37 (documenting BNY's role).

Appellants' causation argument also fails because Argentina has a keen interest in the functioning of the exchange bond payment process. The Form of Security for the exchange bonds states: "Notwithstanding anything herein to the contrary, . . . the Republic's obligation to make payments of principal of and interest on the Securities shall not have been satisfied until such payments are received by the Holders of the Securities." SPE-544. In other words, Argentina remains on the hook well beyond its initial funds transfer. The nonparties are thus indispensable to Argentina's fulfillment of its obligations on its exchange bonds – and, if it declines to pay on its FAA bonds, to Argentina's violation of the injunction.

Moreover, the nonparties are subject to the injunction insofar as they take part in Argentina's violation. As Judge Learned Hand wrote, courts can hold

nonparties in contempt when they have "helped to bring about . . . an act of a party" in violation of an injunction. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930). In *Alemite*, the plaintiff tried to hold a nonparty in contempt even though there was no evidence that the defendant in the initial suit had violated the injunction.[7] Here, by contrast, the nonparties can be liable only if Argentina violates the injunction. They cannot violate the injunction on their own, as Joseph Staff – not a party to the initial suit against John Staff – was alleged to have done in *Alemite*. Argentina's payment on the exchange bonds and the nonparties' processing of payments are inextricably linked.

At bottom, Appellants are litigating a case that is fundamentally different from the one actually before the Court. To hear Argentina tell it, this Court cautioned the district court to "'take care to craft [] orders so as to avoid interrupting Argentina's regular payments to bondholders.'" Arg. Br. 42 (quoting *Capital Ventures Int'l v. Republic of Argentina*, 282 F. App'x 41, 42 (2d Cir. 2008)) (omission in Arg. Br.). What this Court actually cautioned the district court to do in *Capital Ventures* was to "take care to craft *attachment* orders so as to avoid interrupting Argentina's regular payments to bondholders." 282 F. App'x at

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[7] See also *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) ("The district court erroneously held that [a nonparty] aided and abetted a violation . . . without reaching the predicate question of whether [the defendant] itself committed contempt."); *Herrlein v. Kanakis*, 526 F.2d 252 (7th Cir. 1975) (same).

42 (emphasis added). The word that Argentina omits – "attachment" – makes all the difference. No one in *this* case is attaching anything. This case is about specific performance of the Equal Treatment Provision, an issue not before the Court in *Capital Ventures* – and "payments to [exchange] bondholders" are at the core of the injunction that this court already affirmed.

### B. Acting Pursuant To A Contract That Postdates The FAA Does Not Excuse Participation In The Violation Of The Injunction

The nonparties (and their *amici*) resort to claiming that, by executing an unlawful payment on the exchange bonds, they simply would be doing their jobs, not participating in Argentina's contempt. They articulate this Hydra-headed claim in various ways: that the nonparties do not subjectively wish to bring about the forbidden result, ABA Br. 9; Clearing House Br. 11-12; that they would be performing "routine business services," BNY Br. 28; Clearing House Br. 13 & n.11, 14 & n.14; Euro Bondholders Br. 13-14; that their participation is really nothing more than "inaction" resulting from contracts that antedate the injunction (but postdate the FAA), Fintech Br. 21, 23 n.9; ABA Br. 9, 12-13; and that the nonparties' obligations are "independent," BNY Br. 30-31; Fintech Br. 22; Clearing House Br. 13 & n.13; Euro Bondholders Br. 10-11. No matter the guise, though, this effort founders on this Court's Rule 65 jurisprudence.

For starters, Rule 65 covers objective conduct, not subjective intent. As this Court has explained twice, Rule 65 concerns the "'actuality of concert or

participation,'" not "'the motives that prompt'" it. *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 193 (2d Cir. 2010) (quoting *N.Y. State Nat'l Org. for Women v. Terry*, 961 F.2d 390, 397 (2d Cir. 1992), vacated on other grounds, 507 U.S. 901 (1993)). Whether the nonparties intend merely to do their jobs or to aid Argentina is of no moment. Yet Argentina and the third parties that assist it now encourage the Court to adopt the opposite position – that the nonparties can be in concert with Argentina only if nonpayment on the FAA bonds is "something that [they] wish[] to bring about." *SEC v. Apuzzo*, 689 F.3d 204, 214 (2d Cir. 2012); see ABA Br. 9; Clearing House Br. 11-12. That purported rule, grounded in subjective intent, lacks a basis in the Rule 65 precedent of this Court or any other.

Appellants and their *amici* urge this Court to abandon its Rule 65 cases by drawing their preferred rule from cases on the independent wrong of aiding and abetting. See *Apuzzo*, 689 F.3d at 212. But this Court has never held that the panoply of aiding-and-abetting standards applies to Rule 65. See *Eli Lilly*, 617 F.3d at 193; Montreux Br. 16-19. The use of the term "aiding and abetting" in Rule 65 cases – and in the district court's opinion here – is mere shorthand for the requirement of "active concert and participation" under Rule 65(d), a prohibition that looks at objective facts, not the "motives that prompte[d]" the misconduct. *Eli Lilly*, 617 F.3d at 193 (quotation marks omitted).

Even if the "aiding and abetting" case law applied under Rule 65 (which it clearly does not), the standard articulated in that case law would be easily satisfied here. The third parties named in the injunction are aware of Argentina's unlawful objective. If they do not receive a certification that Argentina has made a ratable payment to Appellees, they would know that they are substantially assisting Argentina in accomplishing that objective if they process payments on the exchange bonds.

Equally meritless is Appellants' insistence that their conduct is protected as routine business services. BNY Br. 28; Clearing House Br. 13 & n.11; Euro Bondholders Br. 13-14. In the first place, some of the violations that the injunction contemplates – such as helping Argentina "tak[e] action to evade the directives of this ORDER," Nov. 21 Order ¶ 4, SPE-1384 – are anything but routine. And the cases from which they draw their desired rule are aiding-and-abetting cases, not Rule 65 cases. See *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376 (S.D.N.Y. 2009) (aiding and abetting violation of Commodity Exchange Act); *Rosner v. Bank of China*, 528 F. Supp. 2d 419 (S.D.N.Y. 2007) (aiding and abetting common-law fraud).[8] Once again, Rule 65 cases have held the opposite – that business services can constitute "concert or participation." *E.g.*, *Goya Foods*,

[8] Even outside the Rule 65 context, courts have held that providing routine business services *can* constitute aiding and abetting. *E.g.*, *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975).

290 F.3d at 75-76; *Reliance Ins.*, 84 F.3d at 376-77. So long as a nonparty with knowledge of the injunction acts in concert or participation with the defendant, it can be subject to contempt – whether or not its actions are within its job description.

Appellants' next error distorts not Rule 65 law but its application to this case. Rule 65 limits its scope to nonparties in "*active* concert or participation" with the defendant or its privy. Fed. R. Civ. P. 65(d)(2)(C) (emphasis added). The various acts that comprise the payment mechanism are affirmative acts that would offend Rule 65. For example, under the Indenture, BNY would authenticate the bonds, Indenture § 2.2, SPE-642, keep certain records, *id.* § 2.6, SPE-645-47, and apply Argentina's payments to the payment due, *id.* § 3.5(a), SPE-650 – and Argentina pays BNY fees accordingly, *id.* § 5.6, SPE-665-66. These and similar acts, done without Argentina's certification that it had made a ratable payment, would constitute "active concert or participation" with Argentina. Nov. 21 Order ¶ 2(e), SPE-1382.[9]

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[9] Contrary to the suggestion by some *amici*, *e.g.*, Clearing House Br. 21-23, CHIPS and Fedwire are outside the scope of the injunction because those payment networks are merely the highways on which payments flow. They thus do not actively participate in processing payments under the exchange bonds. Accordingly, these payment networks are not among the categories of entities that the district court identified in its November 21 Order.

Appellants, however, would have this Court believe that the district court was faulting the nonparties for entering into the exchange-bond-related contracts with Argentina in the first place. Fintech Br. 21, 23 n.9; ABA Br. 9, 12-13. Observing that the contracts antedate the injunction, they assert that any acts taken pursuant to those contracts are some kind of inert "*inaction*." ABA Br. 9 (emphasis in original). In other words, their argument is: A defendant with a contract that it does not like can make a second contract that interferes with the first. Then, the argument must go, a subsequent injunction requiring specific performance of the first contract could not reach the parties that help the defendant perform the second contract. But that is not the law – the defendant would thereby "nullify" the injunction "by carrying out prohibited acts through" the help of nonparties, regardless whether there is a second contract involved. *Regal Knitwear*, 324 U.S. at 14.

The "pre-existing contract" cases that Appellants and *amici* cite are not to the contrary because they involve situations where the purported "participant" took no further action once the injunction was issued. If a publisher's sale to retailers "became final" before an injunction, and the publisher had no further role in the dissemination of the book, then the *publisher* does not violate the injunction when a *retailer* sells the offending book to consumers. *Paramount Pictures Corp. v. Carol Publ'g Grp., Inc.*, 25 F. Supp. 2d 372, 375-76 (S.D.N.Y. 1998); see ABA

Br. 12-13 (citing same case). Likewise, if a web site has declined to remove a pre-injunction posting, then it has taken no action that could trigger Rule 65. *Blockowicz v. Williams*, 630 F.3d 563, 568-69 (7th Cir. 2010); see Fintech Br. 23 n.9 (citing same case). Whereas the publisher and the web site in those cases merely sat on their hands, the nonparties here would be actively executing payments.

Finally, in receiving and processing exchange bond payments, the nonparties here serve both the exchange bondholders *and* Argentina. Whatever its "independent contractual duty" to the bondholders, BNY Br. 30, BNY also has a contract with Argentina – the Indenture. See SPE-759. And, as discussed above, the nonparties' receipt and execution of payments would be necessary for Argentina to violate the injunction. By contrast, to say that a "person" "act[s] independently," *Heyman v. Kline*, 444 F.2d 65, 66 (2d Cir. 1971) (quoting *Regal Knitwear*, 324 U.S. at 13) (quotation marks omitted), is to say nothing more than that the person is not acting in "concert or participation" with the defendant. See *Eli Lilly*, 617 F.3d at 193; *Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 43 (1st Cir. 2000); Montreux Br. 23-27. The nonparties here cannot assist Argentina with its breach of contract merely because some other contract would have them do so.

In fact, the specter of conflicting obligations is illusory. We agree with BNY that its duties as Indenture Trustee are limited to the four corners of the Indenture. See *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985). We further agree that the Indenture itself would exculpate BNY for abiding by the injunction. See Indenture § 5.2(xx), SPE-662. And that exculpation negates any purported "conflict" between the Indenture and the injunction; indeed, the very existence of that exculpation confirms that a contractual duty under the Indenture cannot trump the district court's injunction. Nor are the other nonparties who lack the Indenture's protection any worse off – compliance with a court order is a defense to any potential suit by exchange bondholders. See *Organizacion JD Ltda. v. U.S. Dep't of Justice*, 18 F.3d 91, 95 (2d Cir. 1994) (per curiam). Thus, BNY's plea to be held harmless, BNY Br. 40-43; ABA Br. 15-18, is merely a restatement of the protection that both the law and its contract already provide.

### C. In Following This Court's Express Instructions, The District Court Did Not Enjoin Nonparties In Violation Of Due Process

BNY next contends that the district court enjoined nonparties in violation of their due process rights. BNY Br. 15-20, 23-26.[10] That claim, too, distorts the holding of the district court and ignores the holding of this Court. *Any time* a court enjoins a party – as the district court enjoined Argentina – nonparties who act in

[10] Some *amici* join in or echo this argument. See Clearing House Br. 10 n.9; Euro Bondholders Br. 15; Puente Br. 13.

concert with that party in violating the injunction face the threat of contempt by operation of Rule 65(d). Those nonparties would receive all the process that is due in a subsequent contempt proceeding. That is all that has happened here.

In February 2012, the district court enjoined Argentina from violating the Equal Treatment Provision. Without naming particular nonparties, it ordered that Argentina's "Agents and Participants . . . as provided by Rule 65(d)(2)" were "prohibited from aiding and abetting any violation of this ORDER, including any further violation by the Republic of its obligations under Paragraph 1(c) of the FAA." Feb. 23 Order, A-2347-48. This Court remanded, in part instructing that the district court "should more precisely determine the third parties to which the Injunctions will apply." Op., SPE-295. On remand, the district court did just that, defining "Participants" as "those persons and entities *who act in active concert or participation with the Republic*, to assist the Republic in fulfilling its payment obligations under the Exchange Bonds," including BNY and others. Nov. 21 Order, SPE-1382 (emphasis added).

BNY now contends that the November injunction – but apparently *not* the February injunction, of which also it had notice – "permanently enjoined BNY Mellon, just as it permanently enjoined Argentina." BNY Br. 16. It refers, evidently, to the fact that the November injunction *names* BNY as a "Participant," whereas the February injunction did not. But that naming no more enjoined BNY

than the February injunction did. To claim otherwise is not just to put form over substance but to neglect substance altogether.

As this Court recognized when it remanded for the district court to spell out the "third parties to which the Injunctions will apply," Op., SPE-295, injunctions reach beyond the persons enjoined. By operation of Rule 65 – no matter what the injunction says – "a person who knowingly assists a defendant in violating an injunction subjects himself to . . . contempt." *Alemite*, 42 F.2d at 832; accord *Regal Knitwear*, 324 U.S. at 14; *Waffenschmidt*, 763 F.2d at 717. Injunctions do therefore prohibit certain actions by nonparties – but that prohibition does not render the nonparties "enjoined." Courts have long distinguished between "entering an injunction against a non-party, which is forbidden, and holding a non-party in contempt for aiding and abetting in the violation of an injunction that has been entered against a party, which is permitted." *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1395 (Fed. Cir. 1996) (Bryson, J.).

This careful distinction between enjoined defendants and affected nonparties does not contravene due process. Nonparties receive all of the process due them in the second stage of proceedings – the contempt hearing. *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180-81 (1973). And, by concluding that a nonparty has transgressed the boundaries fixed by Rule 65, a court can exercise jurisdiction over

that nonparty. *Parker v. Ryan*, 960 F.2d 543, 546 (5th Cir. 1992); *Paramount Pictures*, 25 F. Supp. 2d at 375-76. The contempt hearing is the nonparty's "day in court." *Microsystems Software*, 226 F.3d at 43. There, the nonparty has a full opportunity to contest its alleged concert or participation with the defendant. See *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 129-30 (2d Cir. 1979).

The contempt hearing, of course, cannot take place until *after* the nonparty's alleged contempt has taken place. The question of concert or participation "depends upon the facts and circumstances of the case." *People ex rel. Vacco v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996). Until there is a "concrete set of facts" to which to apply the law, the words of an injunction alone present no controversy. *Regal Knitwear*, 324 U.S. at 16.

In its typical operation, then, Rule 65 fixes the rights of nonparties *ex post*. But nonparties may want clarity *ex ante* concerning what will and will not constitute contempt. Recognizing exactly that, the Supreme Court has instructed that courts should "not be apt to withhold a clarification in the light of a concrete situation" testing the boundaries of Rule 65. *Regal Knitwear*, 324 U.S. at 15. It is perfectly permissible, in other words, for an order to "attempt to define its own effect on others than parties to the action when the law has already done so" by operation of Rule 65. *Id.* at 16. Such an attempt does nothing more than "make[]

explicit as to [the nonparties in question] that which the law already implies." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 437 (1934).

Thus, by remanding the nonparty issue in part, this Court simply requested the "clarification" that the Supreme Court envisioned – and that is exactly what the district court provided. The record in this case lays out the steps that nonparties like BNY would take to effect Argentina's violation of the injunction. The district court therefore could determine which nonparties likely would fall within its definition of "Participants." But the district court did not thereby *enjoin* those nonparties. To be a "Participant," the district court explained, a nonparty must "act in active concert or participation with the Republic," Nov. 21 Order ¶ 2(f), SPE-1382, and that final determination must be made *ex post*. The district court's "attempt to define [the] effect" of the injunction, *Regal Knitwear*, 324 U.S. at 16, does not purport to supplant an evidentiary showing. The district court's solicitude to third parties in this case – giving them additional guidance and instruction – has, ironically, been met with a slew of complaints.

*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), and its progeny are in full accord. *Zenith Radio* held only that it is improper to enjoin a nonparty without due process – that is, to enter judgment against it, *id.* at 111, or to "impose obligations directly" on it, *Lake Shore Asset Mgmt. Ltd. v. CFTC*, 511 F.3d 762, 767 (7th Cir. 2007). Here, the injunction imposes no obligations directly

on BNY and other nonparties. Their sole obligation is to avoid aiding Argentina in a violation of the injunction, Nov. 21 Order, SPE-1382 – an obligation that exists by operation of Rule 65 whether the injunction names them or not. Those nonparties will have the process required by *Zenith Radio* when and if they are accused of contempt. See *Waffenschmidt*, 763 F.2d at 718.

For all of these reasons, BNY and its *amici* err when they claim that the district court *enjoined* nonparties without due process. All it did was clarify the likely operation of Rule 65 in accordance with the Supreme Court's suggestion in *Regal Knitwear* and this Court's express command.[11] And the district court has invited requests for further clarification. Nov. 21 Order ¶ 2(h), SPE-1383-84. It defies the law and common sense to suggest that the district court should have remained silent on the subject.

### D. The Injunction Properly Can Bind Nonparties Abroad

That some of the nonparties who may act in concert with Argentina are located overseas does nothing to undermine the injunction. It is "well established"

[11] In any event, "[a] court may bind non-parties to the terms of an injunction . . . to preserve its ability to render a judgment in a case over which it has jurisdiction." *United States v. Paccione*, 964 F.2d 1269, 1274-75 (2d Cir. 1992). Argentina's relentless campaign to flout (in the words of its Economy Minister) "any ruling that could come out of any jurisdiction," SPE-395, threatens any relief that does not encompass third parties. See *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977) (recognizing the power of a court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained"); see also 28 U.S.C. § 1651 (All Writs Act).

that federal courts can enjoin conduct (i) of an American national, even when abroad; or (ii) 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). Neither Appellants nor *amici* contest the injunction on these grounds.

*Amici* nonetheless assert that the district court erred in naming foreign entities in its injunction because it did not overcome a presumption against extraterritorial application. See ICE Canyon Br. 30-32. But all such a presumption could require, as *amici* concede, *id.* at 32, is that the injunction clearly state that it applies abroad. Unlike the statute in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), the injunction here speaks to a particular controversy. What is more, it specifically *names* entities – Clearstream Banking S.A., Euroclear Bank S.A./N.V., The Bank of New York (Luxembourg) S.A., Nov. 21 Order, SPE-1383 – that are not American corporations. It escapes us how the district could have indicated more plainly its extraterritorial ambitions.[12]

*Amici* next complain that the district court lacks personal jurisdiction over foreign nonparties. Euro Bondholders Br. 18-20. This charge is both wrong and, in any event, premature. "[T]he existence of personal jurisdiction is dependent on the facts." *Ins. Co. of N. Am. v. ABB Power Generation, Inc.*, 690 N.E.2d 1249,

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[12] The attempt of *amici* to transform the district judge's comments at a hearing in a different case into a "finding" in this case, ICE Canyon Br. 31; Euro Bondholders Br. 20, merits no comment.

1252, 91 N.Y.2d 180, 187 (1997); accord *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 570 (2d Cir. 1996). Unaided by fact, however, *amici* assume that the court "cannot obtain personal jurisdiction" over *any* of the foreign entities. Euro Bondholders Br. 19. That is puzzling – Euroclear and Clearstream have offices in New York, which subjects them to jurisdiction here. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95-97 (2d Cir. 2000). Likewise, BNY is an American citizen that controls its subsidiaries and foreign affiliates. These undisputed facts confirm that the entities are within the district court's reach. In any event, the question will be resolved – if ever – at a future contempt hearing, where the parties can develop any additional facts that could bear on the question. See *Waffenschmidt*, 763 F.2d at 722-23.

The same is true of *amici*'s argument that the injunction cannot compel nonparties to act in ways that conflict with foreign law. ICE Canyon Br. 33-36; Euro Bondholders Br. 20-26; Clearing House Br. 25-27. This plaint is a red herring for at least three reasons. First, how a foreign court would interpret a bond agreement under foreign law (*e.g.*, English courts interpreting English law exchange bonds) cannot control how this Court should review an injunction enforcing a bond agreement governed by New York law and enforceable in federal courts in New York. The whole point of the FAA's selection of New York law and a New York forum was to ensure that this forum's rules would govern

application and enforcement of the agreement even if – indeed, *because* – other jurisdictions might do something different. It would turn that choice on its ear to hold that New York law and the remedial mechanism authorized by Rule 65(d) should not be given full force simply because a foreign court might reach a different decision if it were applying foreign law to different bonds.

Second, and in any event, would-be proceedings brought by nonparties in foreign courts are wholly speculative, and their outcome is far from certain. BNY, Clearstream, and Euroclear all have exculpation clauses in their contracts, which stand in the way of any suits against them. Furthermore, Appellees would expect a foreign court to give comity and respect to well-considered decisions rendered by U.S. courts. See *The Sennar* (No. 2), [1985] 2 All E.R. 104, 111 ("[T]his is a classic case of issue estoppel created by the judgment of a foreign court of competent jurisdiction."). That is especially true where, as here, Argentina has submitted to New York law as administered by New York courts. FAA Contract, A-184-85. Vague premonitions about what may or may not happen elsewhere do nothing to change that.

Third, potential foreign judgments are unlikely to affect U.S. judgments. It is "well established" that foreign judgments lack force if "the litigants who procure them have 'deliberately courted legal impediments' to the enforcement of a federal court's orders." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 60 (2d Cir. 2004)

(quoting *Société Internationale v. Rogers*, 357 U.S. 197, 208-09 (1958)). And, if any litigant would procure a foreign judgment in bad faith, it is Argentina. As the Italian Bondholders – 54,000 people, many retirees – document, Argentina has for years played jurisdictions against one another. Italian Bondholders Br. 6-12. Those efforts should reach their end here; the world's courts are not a Borgesian labyrinth in which all plaintiffs with acknowledged rights would become lost.[13]

### E. Compliance With The Injunction Is Practicable

In addition to fitting comfortably within the law's limits, the injunction makes practical sense. Tellingly, neither Appellants nor *amici* seriously contend that nonparties' compliance with the injunction would be impracticable. Any payments would arrive at various points in the payment chain from known accounts on known dates in known sums.[14] And, to the extent that any problems should arise, their real cause would not be the form or scope of the injunction, but Argentina's failure to make ratable payments.

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[13] Jorge Luis Borges, "Argentina's great gift to literature," *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196 (2d Cir. 2011), imagined structures including "a labyrinth in which all men would become lost." Jorge Luis Borges, *The Garden of Forking Paths* (James E. Irby, trans.), in LABYRINTHS 19, 23 (Donald A. Yates & James E. Irby eds., 1997).

[14] See SPE-537 (communication between BNY and Banco Central indicating the date, time, payment amount, and identification number of particular exchange bond payments); see also SPE-527, 529, 531-32, 535; SPE-1291-92 (letter from DTC acknowledging that payments on the exchange bonds indicate the CUSIP identification number for each exchange-bond issue and that DTC could stop those payments).

For its part, Argentina asserts not that *compliance* with the injunction is impracticable but that *enforcement* is impracticable, and therefore (Argentina claims) the injunction should not issue at all. Arg. Br. 44-45 (citing *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004)). But *Bano* cannot bear the weight of Argentina's argument. The injunction at issue in *Bano* did not pass muster because it would have "require[d] the cooperation of" a sovereign that was not before the Court. 361 F.3d at 716. Here, Argentina is before the Court, having submitted to its jurisdiction. And the only explanation that Argentina offers for why compliance is "impossible" is a self-imposed impediment that it simultaneously proposes to lift – the Lock Law.

More fundamentally, Argentina's assertion boils down to the claim that it is so far beyond the reach of accountability – again, despite submitting to jurisdiction here – that the Court should not bother. Argentina's threat to ignore valid decrees illustrates precisely why Rule 65(d) is an essential component of courts' injunctive powers. A party that thumbs its nose at judicial orders should at least be denied the knowing assistance of nonparties when doing so.

## II. THE INJUNCTION IS AUTHORIZED BY ARTICLE 4-A OF THE UNIFORM COMMERCIAL CODE

Argentina and Fintech challenge the injunction based on Article 4-A of New York's Uniform Commercial Code. Their arguments are confused and erroneous,

as shown below and in Professor Mann's *amicus* briefs in this appeal and the prior appeal.

Article 4-A governs a specific method of moving money from point A to point B: the electronic funds transfer ("EFT"). N.Y.U.C.C. §§ 4-A-102, 4-A-104. A single EFT is one "overall transaction . . . in which the originator, X, is making payment to the beneficiary, Y." See *id*. § 4-A-104 cmt. 1. To initiate an EFT, the originator transmits an instruction ("payment order") to a bank, either to make payment to the beneficiary or to instruct some other bank to do so. *Id*. §§ 4-A-103(1)(a), 4-A-104(1) & cmt. 1.

A single EFT, however, "may encompass a series of payment orders" and may require one or more "intermediary bank[s]" to effectuate that payment. See *id*. § 4-A-104 cmt. 1. For example, if the originator's bank and the beneficiary's bank do not have a direct clearing relationship, they often will route EFTs through an intermediary bank where they both maintain accounts. *Ibid*. In practice, the intermediary bank is a transitory component of the underlying transaction: The intermediary bank debits the originator bank's account, credits the beneficiary bank's account, and issues a payment order to the beneficiary's bank to credit the beneficiary's account. See *ibid*. That process is often instantaneous. See *Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE Ltd*., 585 F.3d 58, 60-61 & n.1 (2d Cir.

2009). Under New York law, "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *Id*. at 71.

Article 4-A of the U.C.C. affords intermediary banks certain legal protections to account for their limited roles in the EFT process. See *Grain Traders, Inc. v. Citibank, N.A*., 160 F.3d 97, 101-02 (2d Cir. 1998). In particular, Section 503 provides that a court may not restrain an intermediary bank from fulfilling a payment order. See N.Y.U.C.C. § 4-A-503. While a court may enjoin originators and beneficiaries (and their respective banks), given the narrow duties of intermediary banks – and the practical difficulties of restraining EFTs as they flit across their ledgers – Section 503 "is designed to prevent interruption of a funds transfer after it has been set in motion." See *id*. § 4-A-503 & cmt.

Separately, Section 502 protects intermediary banks from attachments and other "creditor process." See *id*. § 4-A-502.[15] This provision flows naturally (and necessarily) from the fact that an EFT (and any funds it transfers) is neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank. See *Jaldhi*, 585 F.3d at 71. A creditor of the beneficiary may not attach an EFT until the funds reach the beneficiary's bank, because, until that point, "the beneficiary has no property interest in the funds transfer." N.Y.U.C.C.

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[15] "[C]reditor process" is defined 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." N.Y.U.C.C. § 4-A-502(1).

§ 4-A-502 cmt. 4. Conversely, a creditor of the originator may attach funds in the originator's bank *before* an EFT is initiated but, after an EFT is sent, "no property of the originator is being transferred." *Ibid.*

* * *

Appellants argue that the injunction violates Article 4-A for two reasons. *First*, Fintech contends that the injunction restrains intermediary banks in violation of Section 503. *Second*, Argentina argues that the injunction contravenes the limitations on creditor process set forth in Section 502. Both arguments are meritless.

**A. The Injunction Does Not Restrain Intermediary Banks**

Fintech argues that the injunction restrains intermediary banks in violation of Section 503. See Fintech Br. 30-33.[16] This argument is baffling – the district court *expressly excluded* intermediary banks from the scope of its order. See Nov. 21 Order ¶ 2(g), SPE-1383 ("Nothing in this ORDER shall be construed to extend to the conduct or actions of a nonparty acting solely in its capacity as an 'intermediary bank' [under Article 4-A] implementing a funds transfer in connection with the Exchange Bonds.").

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[16] Argentina made an identical argument in its prior briefing to this Court. Br. of Argentina, Mar. 21, 2012, Dkt. 143, at 54-56. Argentina has largely retreated from that stance, but it asserts in passing that "the Amended Injunctions expressly *do* apply to numerous intermediaries." Arg. Br. 39. Argentina offers no explanation for that conclusory assertion. In any event, it is demonstrably false.

Not satisfied with that express carve-out, Fintech asserts that the injunction nevertheless applies to intermediary banks because entities "such as the Trustee, its paying agents and DTC are acting in the roles of 'intermediary banks' in this situation." Fintech Br. 31. That is so, Fintech surmises, because the "Injunction Opinion expressly describes a process in which funds are transferred from one financial institution to another (namely, the intermediary banks), and ultimately to the beneficial owners of the bonds." *Id*. at 32 (citing SPE-1369).

Fintech's *ipse dixit* conclusion has no basis in the U.C.C. or in reality. Quite obviously, not every "process in which funds are transferred from one financial institution to another" entails EFTs governed by Article 4-A, much less does the entire series of payments under the exchange bonds constitute a *single* EFT involving one or more intermediary banks. And the record refutes Fintech's assertion that the entities identified by the district court are intermediary banks.

BNY is not an intermediary bank. As the Indenture Trustee and Trustee Paying Agent, BNY does not route EFTs originated by Argentina, but accepts funds on terms set forth in the Indenture. See SPE-628-759.[17] BNY receives funds from Argentina at least one business day before a payment is due on the exchange bonds. See Binnie Decl. ¶¶ 3, 7, 12, SPE-621, 623, 625; Indenture § 3.5, SPE-650.

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[17] Even if (contrary to the record) BNY or an affiliate somehow acted as an intermediary bank in some capacity, that would not exempt BNY from the injunction in performing its many other non-EFT functions in the payment process.

BNY is the express *beneficiary* of Argentina's transfer. See SPE-528-29, 534-37; Indenture § 3.5, SPE-650. BNY then originates new EFTs to distribute funds as directed by the Indenture. Tellingly, BNY does not bother to argue that it is an intermediary bank. And Argentina concedes that BNY is not. See Arg. Br. 35 ("BNYM initiates its *separate* funds transfer to distribute payment . . ."); see also Clearing House Br. 7 (DTC "receives the proceeds of EFTs *originated by BNY Mellon*") (emphasis added).

The clearing systems for the exchange bonds (DTC, Euroclear, and Clearstream) are not intermediary banks, either.[18] When BNY distributes funds, it is not "making payment" to Fintech and other beneficial owners of the exchange bonds. See N.Y.U.C.C. § 4-A-104 cmt. 1. Rather, BNY (as originator) transmits funds either to the registered holder or to DTC, Euroclear, or Clearstream (as the beneficiary), and it is the responsibility of the clearing systems to allocate the funds among their participants. See Binnie Decl. ¶¶ 10-12, SPE-624-25; see also DTC Ltr. to Judge Griesa dated Nov. 16, 2012, SPE-1290 (DTC allocates funds among its participants as part of their "net settlement" at the end of each day); Euroclear Br. 2 (Euroclear receives "payments from paying agents . . . and then

[18] Euroclear is the only clearing system to make this argument. See Euroclear Br. 2. While no Appellant or *amicus* has claimed that the registered holders, such as Cede & Co., are intermediary banks, this analysis would apply with equal force to them.

credits such amounts to its account holders"). That is not the function of an intermediary bank. See *In re Contichem LPG*, No. 99 Civ. 10493, 1999 WL 977364, at *2 n.2 (S.D.N.Y. Oct. 27, 1999) (recipient of an EFT is "not an intermediary bank" where it does "not transfer by wire, or attempt to transfer by wire, the funds in question, but simply, as a receiving bank, credit[s] them to" its customer).

In any event, it is unnecessary for this Court to determine *ex ante* whether these entities *might* somehow act as intermediary banks to assist Argentina's hypothetical violation of the injunction. Should they assist such a violation, it will ultimately be a question for a future contempt hearing whether they did so "solely in [their] capacit[ies]" as intermediary banks. In the meantime – and in light of record evidence that these entities do *not* act as intermediary banks – the district court did not abuse its "wide range of discretion" in responding to this court's instruction to clarify the metes and bounds of its injunction "in terms it deem[ed] reasonable to prevent wrongful conduct." See *Forschner Grp.*, 124 F.3d at 406 (quotation marks omitted).

**B. The "Creditor Process" Provisions Of Section 502 Are Irrelevant**

Argentina argues that the injunction runs afoul of Article 4-A because it restrains nonparties concerning funds that it says no longer belong to Argentina. See Arg. Br. 33-40. Argentina principally relies on Section 502, which applies to

attachments and other forms of "creditor process," and specifies that creditors may attach EFTs only at the banks of their debtors. See *id*. at 34-38; N.Y.U.C.C. § 4-A-502 & cmt. 4. Because Argentina is the "only party against which [P]laintiffs purport to have 'proper cause,'" Argentina declares, only it and its bank may be restrained. See Arg. Br. 35.

This is incorrect. Argentina's argument relies on the flawed premise – repeated throughout this litigation – that the injunction *attaches* funds for the benefit of Appellees. This Court has firmly rejected that proposition:

> [W]e see no merit to Argentina's argument that the Injunctions violate New York trust or attachment law on the theory that they "execute upon" funds that do not belong to Argentina. Nothing in the Injunctions suggests that plaintiffs would "execute upon" any funds, much less those held in trust for the exchange bondholders.

Op. 25 n.14, SPE-292 (citation omitted).[19]

The limitations on attachments and creditor process in Section 502 therefore have no bearing here. Appellees are not creditors trying to satisfy a judgment by seizing EFTs that belong to Argentina, as Section 502 contemplates. This is a *pre*-judgment case, and the injunction attaches nothing. Rather, Argentina is enjoined from continuing to violate the Equal Treatment Provision by making payments on the exchange bonds without making ratable payments to Appellees. In fact, the

[19] Fintech's argument that the injunction improperly seizes money held in trust, Fintech Br. 25-28, likewise is answered by this Court's previous decision and fails for the same reason.

injunction is agnostic as to whether *any* money changes hands – Argentina may comply with the injunction by paying none of its bondholders.

Because this is an injunction – not an attachment – it is *Section 503* that controls.[20] And *that* provision authorizes a court to restrain originators, beneficiaries, and their respective banks from acting in connection with EFTs. See N.Y.U.C.C. § 4-A-503 & cmt. As Argentina has acknowledged in prior briefing to this Court, Section 503 protects only *intermediary banks*. See Br. of Argentina, Mar. 21, 2012, Dkt. 143, at 55 ("The official commentary to [Section 503] expressly states that it protects intermediary banks from injunctions . . . ."). The injunction satisfies Section 503 to the letter.

In an effort to evade the plain language of Section 503, Argentina asserts that limitations on *creditor* process (in Section 502) should be grafted onto the provisions governing *injunctive* process (in Section 503). Argentina claims that Sections 502 and 503, when "read in conjunction," imply that "a creditor of the originator of a funds transfer is entitled to injunctive relief only with respect to its debtor's property – not the property of a third party." Arg. Br. 34, 35.[21]

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[20] The attachment cases that Argentina cites (Arg. Br. 36) are therefore beside the point.

[21] The Clearing House Association likewise argues (in a footnote) that injunctions under Section 503 are "subject to the same limitations as those to which attachments and other creditor process are subject under [Section 502]." Clearing House Br. 19 n.16. The only support that it offers for that assertion is the

The Court should reject Argentina's proposed revision to the statute. It is not for the parties to mix and match statutory provisions until they reach a desired result. By design, Article 4-A imposes different limitations on creditor process than it does on injunctions. Argentina's proposed construction would flout that plain language. See *Lloyd v. Grella*, 634 N.E.2d 171, 174, 83 N.Y.2d 537, 545-46 (1994).

Nor is it happenstance that Article 4-A treats creditor process and injunctions differently. An attachment for the benefit of a creditor presupposes an enforceable debt, and a property interest of the debtor in the funds to be attached. See *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 476 n.13 (2d Cir. 2007) (a "party seeking to enforce a judgment . . . cannot reach . . . assets in which the judgment debtor has no interest") (quotation marks omitted). Section 502 simply reflects that principle: A creditor of the originator may attach only funds that constitute property of the originator (in the originator's bank), and a creditor of the beneficiary may attach only EFTs bringing associated funds that belong to the beneficiary (in the beneficiary's bank). See N.Y.U.C.C. § 4-A-502(2)-(4) &

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official comment to Section 503, which notes that "[t]his section is related to [Section 502(d) & cmt. 4]." But, as the official comment goes on to explain, Section 502 and Section 503 are "related" only insofar as they both protect *intermediary banks*. See N.Y.U.C.C. § 4-A-503 cmt. (explaining that Section 503, like Section 502, is "designed to prevent interruption of a funds transfer after it has been set in motion" and that, "[i]n particular, intermediary banks are protected").

cmt. 4. Conversely – and quite naturally – neither creditor may attach an EFT (or its associated funds) while in the custody of an intermediary bank, because it is not the property of the originator or the beneficiary. See *ibid.*; *Jaldhi*, 585 F.3d at 70-71.

An injunction, by contrast, presupposes none of that. A federal court's injunctive power is expansive. See, *e.g.*, 28 U.S.C. § 1651 (All Writs Act). Section 503 properly reflects that a court's equitable power to grant injunctions is not coterminous with a creditor's ability to attach property.[22]

The injunction that the district court crafted – and that this Court has affirmed in essential part – forbids Argentina from paying on the exchange bonds without making a ratable payment to the FAA Bondholders. By operation of law, the injunction binds nonparties (including originator and beneficiary banks) who facilitate such unlawful payments. Nothing in Article 4-A prohibits that relief.

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[22] The lone authority cited by Argentina in support of its contrived reading of Section 503 – an unpublished district court decision from two decades ago – is not to the contrary. See Arg. Br. 37 (citing *Weston Compagnie de Finance et D'Investissement, S.A. v. La República del Ecuador*, No. 93 Civ. 2698 (LMM), 1993 WL 267282, at *3 (S.D.N.Y. July 14, 1993)). In fact, the *Weston* court correctly observed that Section 503 protects only intermediary banks. See 1993 WL 267282, at *3-4.

## III. THE INJUNCTION ENCOMPASSES THE GDP-LINKED SECURITIES THAT FORMED PART OF ARGENTINA'S 2005 AND 2010 EXCHANGE OFFERS

As a "sweetener bonus" to induce investors to accept its bond exchanges, Argentina included "GDP-linked securities." Prat-Gay Br. 4; Binnie Decl., SPE-621-22. These securities now trade independently of the par and discount bonds, but they were an integral part of – and a large inducement to buyers in – the 2005 and 2010 deals. Indeed, the three December 2012 exchange bond payments included $42 million on global U.S. dollar bonds, almost $500 million on discount bonds, and $3 *billion* on GDP-linked securities. Nov. 9 Tr., SPE-450-51; Argentine Ministry Spreadsheet, SPE-605.

ICE Canyon and Puente now seek to carve the GDP-linked securities out of the injunction. ICE Canyon Br. 19-30; Puente Br. 15-16. Their effort is a nonstarter. In the first place, no one has made this argument before – not in the initial district court proceedings, not in the initial appeal, and not on remand. This Court therefore should not consider it now. *Millea v. Metro-North R.R.*, 658 F.3d 154, 163 (2d Cir. 2011).[23]

Nor was this forfeiture inadvertent. Argentina's own counsel characterized the GDP-linked security payments as part of the exchange bond payments. See

[23] That *amici* and an intervenor now make the argument does not change forfeiture analysis. An appellant cannot circumvent a forfeiture problem by tasking an *amicus* with a forfeited argument. *United States v. Buculei*, 262 F.3d 322, 333 n.11 (4th Cir. 2001).

Nov. 9 Tr., SPE-450-51; Arg. Mot. for Stay, Dkt. 459, at 6 (describing GDP-linked security payment as a "scheduled payment to holders of its restructured debt"). The Exchange Bondholder Group conceded the same thing more directly. EBG Opp. to Mot. to Amend, Dkt. 509, at 17 ("[O]ver $65 billion in Exchange Bonds and GDP Warrants . . . will be immediately imperiled."). *Amici* cannot now take the opposite stance.

Even should the Court opt to consider the GDP-linked securities argument, it fails on the merits. The Equal Treatment Provision requires that the FAA bonds "at all times rank at least equally with all [of Argentina's] other present and future unsecured and unsubordinated External Indebtedness (as defined in [the FAA])." A-157. The question, then, is whether the GDP-linked securities constitute "External Indebtedness" – and they do. That term is defined as "obligations . . . for borrowed money *or* evidenced by *securities*, debentures, notes or other similar instruments" not payable in Argentine pesos. A-171 (emphasis added). The disjunctive "or" means that *any* of the specified types of obligations qualifies. See *Portside Growth & Opportunity Fund v. Gigabeam Corp.*, 557 F. Supp. 2d 427, 431 (S.D.N.Y. 2008). And the GDP-linked securities are without a doubt obligations "evidenced by securities." Whether they are also obligations "for borrowed money" is therefore irrelevant.

Furthermore, the exchange bond Indenture suggests (if anything) that the GDP-linked securities *are* "External Indebtedness." To begin with, the Indenture is a contract separate from the FAA contract and does not purport to revise the latter's definitions. Hence, what it says about the GDP-linked securities is hardly relevant. Even so, it expressly governs both the GDP-linked securities *and* the other bonds – which it groups under the term "Debt Securities." Indenture, SPE-633; see also A-694 (2005 Prospectus Supplement referring to "New Securities or *other* debt obligations") (emphasis added). The GDP-linked securities arrived hand in hand with the exchange bonds and are governed by the same documents. See Binnie Decl., SPE-621-22 (designating the GDP-linked securities as "bonds" under the Indenture).

Finally, there is no substance to ICE Canyon's assertion that "it is impossible to apply the concept of proportionality to the GDP-Linked Securities when those instruments have no fixed payment amount or schedule." ICE Canyon Br. 26. To illustrate, if Argentina owes $3 billion to holders of GDP-linked securities for a given year, and pays all $3 billion, it must pay plaintiffs 100% of what it owes them. For all of these reasons, the Court should not modify the injunction to exclude the GDP-linked securities.

## CONCLUSION

For the foregoing reasons and for those stated in NML's brief, the district court's order should be affirmed.

Dated: January 25, 2013

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,137 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

Dated: January 25, 2013

/s/ Roy T. Englert, Jr.
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2013, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by e-mail.

/s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.