

MOTION INFORMATION STATEMENT

Docket Number(s): 12-105(L) Caption [use short title] _____

Motion for: Exchange Bondholder Group

Set forth below precise, complete statement of relief sought:

NML Capital, Ltd. v. Republic of Argentina

Emergency Motion for Stay Pending Appeal of
Injunctions preventing Dec. 2012 bond payments
to third party Movants and threatening
irreparable harm to business and market disruption.

MOVING PARTY: Exchange Bondholder Group

OPPOSING PARTY: NML Capital, Ltd.

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Sean F. O'Shea

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Court-Judge/Agency appealed from: Southern District of New York, District Judge Thomas P. Griesa

Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has movant notified opposing counsel (required by Local Rule 27.1):

Has request for relief been made below? Yes No

Yes No (explain): _____

Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency: 11/28/2012

Opposing counsel's position on motion:

Unopposed Opposed Don't Know

Request for stay of Injunctions prohibiting payments

Does opposing counsel intend to file a response:

Yes No Don't Know

to Movants beginning December 2012.

Is oral argument on motion requested?

Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set?

Yes No If yes, enter date: _____

Signature of Moving Attorney:

/s/ Sean F. O'Shea

Date: 11/26/2012

Service by: CM/ECF

Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

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

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

Plaintiffs-Appellees,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

ORAL ARGUMENT REQUESTED

EMERGENCY MOTION FOR STAY PENDING APPEAL

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The interested non-parties listed in Appendix A (collectively, the “Exchange Bondholder Group” or “EBG”) submit this Emergency Motion for Stay Pending Appeal Pursuant to F.R.A.P. 8(a)(2). The EBG respectfully requests oral argument on this Motion.

PRELIMINARY STATEMENT

This emergency stay application arises out of a well-intentioned but misguided attempt by the district court (Thomas P. Griesa) to assist Plaintiffs (who are notorious market speculators) in collecting a judgment from the Republic of Argentina (the “Republic”) through a revised injunction dated November 21, 2012 (the “Injunction”). The Injunction, however, unlawfully and unconstitutionally burdens the rights of innocent creditors, including the EBG, to collect payments the Republic owes to them. The Injunction prohibits the Republic from making periodic interest payments on the EBG’s bonds unless it also pays the Plaintiffs 100% of principal, penalties and interest owed to them (something the Republic has emphatically refused to do), and further prohibits the trustee for the EBG’s bonds, The Bank of New York Mellon (“BNYM”), from remitting any payments from the Republic to the EBG absent concurrent payments to Plaintiffs.

Just one month ago, this Court expressed “concerns” about the district court’s original injunction, particularly its “application to third parties,” and remanded under *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), for further

development of the record. The district court, acting on an accelerated schedule despite the absence of exigent circumstances, then gave the EBG (which had never been served or appeared) one week to present arguments—including just three days to respond to Plaintiffs’ submission. The Court issued the Injunction three business days later, virtually ignoring the EBG’s arguments (as well as most arguments raised by other interested third parties) and never expressly addressing its Rule 60 motion. At the same time, effective December 15, 2012, the district court vacated a stay pending appeal that had been in place for nine months. The absence of a stay threatens the EBG (not to mention international financial markets) with irreparable harm for no reason but the district court’s anger at the Republic’s insistence on invoking sovereign immunity. This Court made it clear that it is to be the final arbiter of whether the Injunction is reasonable in its application to third parties. The district court’s decision to lift the stay before this Court can rule on the issue exceeds its mandate, and frustrates the further appellate review that this Court specifically ordered in its October 26, 2012 ruling.

The Injunction is an unconstitutional judicial taking of the EBG’s property for private purposes. It also must be vacated under Rule 60(b) for failure to join Exchange Bondholders as necessary parties. If scheduled bond payments are not received on December 15, 2012 or thereafter—a foregone conclusion absent a stay—the EBG’s bonds will irretrievably lose value, while Plaintiffs will suffer no

material harm whatever if the stay is reimposed. Given those facts, and the clear public interest considerations, this Court should stay the Injunction pending appeal.

BACKGROUND

The relevant factual background is set forth in the Declaration of Sean F. O’Shea, Esq., dated November 26, 2012 (the “O’Shea Dec.”), submitted herewith.¹

ARGUMENT

I. THE DISTRICT COURT HAD NO RATIONAL BASIS FOR LIFTING THE STAY.

The district court lifted the stay based on its finding of an “extraordinary circumstance” consisting solely of public statements by Argentine officials that the Republic would not pay the Plaintiffs, regardless of any court order. Ex. 15: 11/21/12 Stay Op., at 4. The court found those statements to be an active attempt to “evade” its injunction, but upon analysis, its reasoning makes no sense. *Id.* at 3-4. *First*, saying the Republic will not pay the Plaintiffs does not show intent to “evade” the Injunction by paying the EBHs alone; if anything, it signals an intent to default on the Exchange Bonds, as reflected in falling market prices. *See* Supplemental Declaration of Stephen Choi dated Nov. 26, 2012 (“Supp. Choi Dec.”) ¶¶ 14-21. *Second*, the Republic’s statements are not a new “extraordinary circumstance,” but rather existed when the original stay was entered. As the

¹ All Exhibits cited herein are attached to the O’Shea Dec. Capitalized terms and abbreviations not defined herein shall have the meanings assigned in the O’Shea Dec.

district court recognized then, the Republic has refused to pay the Plaintiffs for the past eleven years. Ex. 7: 2/23/12 Hearing, T13:18-23, T17:20-18:2-9. *Third*, the district court disregarded affidavits from both the EBG and the Republic confirming that no efforts to evade the stay had been or would be undertaken. *See* Ex. 8: Eggers Dec. ¶ 4; Ex. 19: Koenigsberger Dec. ¶ 5. *Fourth*, the terms of the district court stay effectively made it impossible for the Republic to “evade” the Injunction. The Republic cannot modify the payment mechanism for the Exchange Bonds unilaterally. Other parties, such as BNYM and the Depository Trust Company (“DTC”), must cooperate to make that possible, and such cooperation was expressly barred by the stay order. Supp. Choi Dec. ¶¶ 5-13. It is highly unlikely that BNYM, DTC or any other party would risk violating a court order. Moreover, to replace BNYM as trustee, the numerous EBHs would have to initiate and conduct a vote, which could not be done surreptitiously and could easily be enjoined. Ex. 3: Indenture § 5.9(c). In sum, there was no real risk of “evasion” and the district court’s sole basis for vacating the stay was without foundation.²

² The district court also lacked jurisdiction to lift the stay. This Court remanded under *United States v. Jacobson* solely to enable the district court to supplement the record for limited purposes, while providing that the case should “automatically return to this Court” Ex. 1: 2d Cir. Op., at 28-29. Thus, under *Ex parte Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838), the district court’s decision to lift the stay exceeded its limited authority to “settle [only] so much as has been remanded.”

II. THE EBG'S APPEAL IS LIKELY TO SUCCEED ON THE MERITS.³

As a preliminary matter, this Court did *not* affirm the district court's injunction with respect to its impact on innocent non-parties, including the EBHs. Rather, it directed the district court to reconsider the Injunction's effects on them:

Oral argument and, to an extent, the briefs revealed some confusion as to how the challenged order will apply to third parties generally. Consequently, *we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable.* Accordingly, we remand . . . for such further proceedings as are necessary to address the Injunctions' application to third parties

Ex. 1: 2d Cir. Op., at 28 (emphasis added). In response to this Court's directive, the EBG's November 16, 2012 Memorandum raised numerous legal and equitable issues concerning the Injunction's effect on them. *See* Ex. 9: EBG Remand Memorandum. The district court, however, failed to address those issues, thereby ignoring this Court's instructions.

A. The Injunction is Unreasonable in Its Inevitable Effect on the EBHs' Property.

The law prohibits injunctions that place an unreasonable burden on third

³ In determining whether to grant a stay under Fed. R. App. P. 8(a)(2), this Court considers four factors: (1) likelihood of success on the merits; (2) irreparable injury to the applicant absent a stay; (3) "whether issuance of the stay will substantially injure the other parties interested in the proceedings;" and (4) whether the public interest would be served. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

parties. *See Cook Inc. v. Boston Sci. Corp.*, 333 F.3d 737, 744 (7th Cir. 2003) (injunction provision that prevented defendant from using certain information to seek regulatory approval of medical device “violate[d] the principle that in determining the appropriate scope of an injunction the judge must give due weight to the injunction’s possible effect on third parties.”); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1141-42, 1144 (D.C. Cir. 2009) (vacating injunction causing “a potentially serious detriment to innocent persons not parties to or otherwise heard” where third party retailers might lose substantial revenue, and noting “third parties may be so adversely affected by an injunction as to render it improper.”). The conscription of the EBHs’ property into the service of collecting a civil contract judgment for entirely unrelated parties (namely, the Plaintiffs), to whom the EBHs owe nothing and have done no harm, violates this fundamental equitable principle.

Neither Plaintiffs nor the district court cited any case granting a comparable injunction. There is no dispute that the EBHs are entitled to full and timely payments under the Exchange Bonds, or that those payments, once transferred from the Republic to BNYM in Argentina, are the legal and exclusive property of the EBHs. Ex. 2: Isasa Dec. ¶ 4; Ex. 3: Indenture § 3.5. It is further beyond serious dispute that the Republic is not going to pay the Plaintiffs. The district court (and

this Court) has repeatedly and emphatically acknowledged as much.⁴ This is unfortunate, but due in absolutely no part to the actions of the innocent EBHs. Given the Republic's position, there are only two realistic responses by the Republic to the Injunction.

The first scenario is that the Republic pays the amount due to the EBHs to the Trustee, but refuses to pay Plaintiffs. Under the Injunction, the EBHs' funds – their *undisputed property*—will be then be frozen at BNYM indefinitely and may trigger a default under the Indenture. Supp. Choi Dec. ¶ 12. This result will occur despite the fact that the EBHs—many of whom have investors that include public employee pension plans (such as police officers and firefighters) and charitable foundations—(i) are indisputably without fault, (ii) owe no obligation of any kind to the Plaintiffs, and (iii) have already taken a massive discount on their original investment to facilitate the type of restructuring that has become critical to the global economy.

The Republic's other plausible response to the Injunction would be to refuse to pay BNYM the amount due to the EBHs. If that occurs, the Injunction will turn a relatively minor default into a *cataclysmic* default that will further unsettle the already fragile global economy, trigger cross-default provisions and credit default swaps, and unquestionably spur an avalanche of follow-on litigation involving the

⁴ See Ex. 6: 11/9/12 Hearing, T10-16; Ex. 7: 2/23/12 Hearing, T3-4, 15, 31, 48-49; Ex. 10: 2d Cir. Hearing, T13-14, 23, 26-27, 78-79.

EBHs, multiple banks, and the Republic (which may be what Plaintiffs intended).⁵ See Ex. 17: Choi Dec. ¶¶ 8-22. Plaintiffs will then have been successful in their efforts to “solve” an alleged \$1.3 billion problem affecting 0.92% of the original FAA Bondholders (Ex. 7: 2/23/12 Hearing, T26:5-8), by creating an over \$50 billion problem affecting 100% of the Republic’s Exchange Bondholders (to say nothing of the collateral effects on skittish international markets).⁶ Ex. 22: Binnie Dec. ¶¶ 5-6; Supp. Choi Dec. ¶ 29 (discussing potential problems for holders of Argentine *private* debt).

B. The Injunction is Unreasonable Because It Attempts to Use the Property of the Innocent Non-Party EBHs to Force Payment of a Judgment Owed to Plaintiffs.

The district court’s initial reaction to Plaintiffs’ injunction request went beyond deep skepticism, to outright rejection:

THE COURT: Is there any legal authority, is there any legal basis for me to use the pari passu clause to interfere with the payment to the exchangers? . . . This would obviously present an impediment, a condition. Is there any legal basis for doing

⁵ As Plaintiffs are reportedly trading credit default swaps betting on an Argentine default (a bet that directly contradicts their representations to the district court that the Injunction would lead to payment by the Republic), they presumably welcome default. See Ex. 17: Choi Dec. ¶ 18; Ex. 12: Ambito Article. Whatever the chaos that would ensue, Plaintiffs are playing both sides of the litigation and stand to profit whatever the outcome.

⁶ In a 2004 amicus brief filed in a related case before the district court, the Federal Reserve Board predicted that the Plaintiffs’ holdout status would allow them to “terrorize” lawful sovereign debt restructurings. Ex. 11: 2004 Fed. Res. Amicus Memorandum, at 13. With the Injunction, that prediction has become the unfortunate reality.

that? Ex. 7: 2/23/12 Hearing, T7:4-6, T8:3-5 (emphasis added).

THE COURT: *I am sticking to my position. I think that I cannot interfere with the rights of the exchange offers by putting conditions on them or impediments on them.* Ex. 7: 2/23/12 Hearing, T15:25-16:2 (emphasis added).

See Ex. 9: EBG Remand Memorandum at 8-10. Nevertheless, at the same hearing, the court reversed field and brushed aside this deep skepticism, instead favoring Plaintiffs' interests in collecting an ordinary contract judgment over the rights of EBHs. Ex. 7: 2/23/12 Hearing, T48:12-49:10.

The district court, understandably frustrated, sought a solution that would encourage the Republic to pay Plaintiffs' judgment. But to achieve that end, it impermissibly imposed an onerous condition on the EBHs' indisputable property rights to achieve payment on the Exchange Bonds.⁷ This Court previously has recognized the EBHs' rights, directing the district court to "take care to craft attachment orders so as to avoid interrupting Argentina's regular payments to [exchange] bondholders." *Capital Ventures Int'l v. Republic of Arg.*, 282 Fed. Appx. 41, 42 (2d Cir. 2008). Yet the Injunction ignores this clear admonition.

At base, Plaintiffs are ordinary civil litigants with an ordinary judgment on an ordinary contract. Ex. 1: 2d Cir. Op., at 16. Their debtor happens to be a sovereign nation (a fact obviously known when Plaintiffs acquired their bonds),

⁷ Even Plaintiffs' counsel has admitted that the Injunction engrafts a "condition" on the EBHs' ability to enjoy their own property that otherwise does not exist. Ex. 7: 2/23/12 Hearing, T5:12-17.

which has frustrated the usual methods of collection. Consequently, like thousands of other civil litigants, Plaintiffs have a judgment that may never be satisfied. That is unfortunate, but it is also the hard reality of our legal system. *See FG Hemisphere Assocs., LLC v. Dem. Rep. Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) (“[A] court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment;” and absent property subject to FSIA immunity exceptions, “a plaintiff must rely on the government’s diplomatic efforts, or a foreign sovereign’s generosity, to satisfy a judgment.”). The proper solution is not to allow the disappointed minority of unimpaired FAA Bondholders to shift the consequences of that reality onto the vast majority of heavily discounted EBHs. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (“In general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulders.”) (Holmes, J.). Rather, the correct approach is vigilantly and aggressively to pursue all remedies available to Plaintiffs *without compromising the property rights of innocent non-parties*.⁸

⁸ Plaintiffs have recourse to Republic assets and need not encumber property of innocent third parties to enforce their judgment. *See, e.g.*, Agustino Fontevicchia, *The Real Story of How a Hedge Fund Detained a Vessel in Ghana and Even Went for Argentina’s “Air Force One”*, Forbes, Oct. 5, 2012, <http://www.forbes.com/sites/afontevicchia/2012/10/05/the-real-story-behind-the-argentine-vessel-in-ghana-and-how-hedge-funds-tried-to-seize-the-presidential-plane/>.

C. The Injunction Denies the EBHs Due Process and Effects An Unlawful Taking In Violation Of The Fifth Amendment.

1. The Injunction Violates the Due Process Clause.

As shown above, the effect of the Injunction is to use the private property of the non-party EBHs for the private benefit of the Plaintiffs. It thus violates the Due Process Clause. “[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.” *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *see 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.”). Indeed, any state action that significantly imposes on the private property of one for the private use of another is a core violation of fundamental due process rights.⁹ *See, e.g., Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 76-80 (1937) (invalidating state administrative order requiring majority of private gas producers to curtail desired production and purchase shortfall from producers with no available market); *Chicago, St. Paul, Minn. & Omaha Railway Co. v. Holmberg*, 282 U.S. 162, 166-67 (1930) (order requiring railroad to build underground pass for private

⁹ The market’s reaction shows that the effect of conditioning the EBHs’ property rights to receive bond payments on the Republic’s payment to Plaintiffs is to impose a significant burden on those rights. Ex. 17: Choi Dec. ¶¶ 15-18; Supp. Choi Dec. ¶¶ 19-21.

benefit of private landowners violated due process); *Missouri Pac. Ry. Co. v. Nebraska Bd. of Trans.*, 164 U.S. 403, 417 (1896) (order requiring railroad to allow private party to construct elevator on its property for private use violated due process).

Further, judicial orders qualify as “state action” under constitutional provisions limiting governmental power. *See, e.g., Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl 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.”); *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948) (“[I]t has never been suggested that state court action is immunized [under the Fourteenth Amendment]. . . simply because the act is that of the judicial branch of the state government [enforcing a private contract].”).

As Justice Kennedy recognized in *Stop the Beach*, a judicial intrusion on a private party’s property violates due process. 130 S. Ct. at 2614-15. The district court recognized the inevitable impact of its order on the EBHs’ property rights, and the lack of legal authority for it (*see* Point II(B), *supra*), but nevertheless entered an Injunction that uses the EBHs’ property as a fulcrum in attempting to collect the private Plaintiffs’ contract judgment. This constitutes an unconstitutional seizure of property for private, not public, purposes.

2. *The Injunction Constitutes an Unlawful Taking.*

In *Stop the Beach*, a plurality of the Supreme Court recognized a cause of action for a “judicial taking.” 130 S. Ct. at 2601-02. The remaining Justices either expressed a preference for a Due Process Clause remedy, or did not reach the issue, but none rejected the concept. *Id.* at 2614-15, 2618-19. As noted in Point II(A), *supra*, although the EBHs’ property is not being seized outright by the government, the practical outcome of the Injunction will inevitably be, at a minimum, a “significant restriction . . . upon [the EBHs’] use of [their] property—” clearly a “taking.” *Maine Educ. Ass’n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012); *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.”).

And the length of time that the EBHs may lose their property rights does not change the fact that the Injunction is an illegal taking. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318 (1987) (even “‘temporary’ takings . . . are not different in kind from permanent takings”); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 14 (1949) (government’s wartime year-to-year use of laundry business constituted compensable temporary taking of, *inter alia*, laundry’s “opportunity to profit from its trade routes,” since “[t]here was nothing [laundry] could do . . . but wait”). As a taking that violates the Fifth Amendment, the Injunction must be vacated.

D. The Injunction is Void Due to Lack of Lack of Notice and Opportunity to Be Heard.

The Injunction also must be vacated under Federal Rule of Civil Procedure 60(b), because it was entered without giving the EBHs proper notice and opportunity to be heard. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 193 (2d Cir. 2006) (judgment is void where court “acted in a manner inconsistent with due process of law”). Non-parties may move pursuant to Rule 60(b) where their interests are adversely affected. *Id.* at 188. Although the Injunction imposes an onerous condition on the EBHs’ right to receive billions of dollars, thereby causing them irreparable harm (*see* Point II(A), *supra*), neither the Court nor the parties gave the EBHs notice or an opportunity to be heard before entry of the Injunction. Rather, the district court simply signed a proposed order drafted by Plaintiffs, unaltered, on the same day as the February 23, 2012 hearing.¹⁰

This Court recognized the need for an opportunity to be heard when it ordered “such further proceedings as are necessary to address the Injunctions’ application to third parties.” Ex. 1: 2d Cir. Op., at 28. While this Court said nothing

¹⁰ Formal service on the EBHs prior to entry of the Injunction was required, regardless of whether the EBHs had actual notice. *See Orix Fin. Servs. v. Phipps*, No. 91-CV-2523, 2009 WL 2486012, at *3 (S.D.N.Y. Aug. 14, 2009) (granting Rule 60(b)(4) motion, in part, because “[t]he Second Circuit has rejected the argument that ‘actual notice’ is sufficient to cure improper service”) (citation omitted); *In re Metzger*, 346 B.R. 806, 818 (N.D. Cal. 2006) (applying Rule 60(b)(4) to void 14-year-old sale order for defective notice even though creditor had actual notice of bankruptcy proceedings; creditor had no duty to investigate and inject himself into the proceedings).

whatever to suggest a need for expedition, the district court gave those EBHs before it only three days to reply to Plaintiffs' papers seeking to modify the injunction to clarify its impact on the EBHs' property rights. As noted below, the court also failed to join the other EBHs as necessary parties pursuant to Rule 19. This was not a reasonable opportunity to be heard. *See In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) (granting Rule 60(b)(4) motion because one day's notice of hearing violated due process). The district court also refused to hold an evidentiary hearing before issuing its decisions modifying the injunction and lifting the stay on the evening of November 21, 2012—less than 48 hours after Plaintiffs filed their reply. *See Fengler v. Numismatic Am., Inc.*, 832 F.2d 745, 747-48 (2d Cir. 1987) (parties bound by injunctions are entitled to evidentiary hearing).¹¹ This rush to judgment deprived the EBG of the right to file a reply in further support of its Rule 60(b) motion, which was not even addressed by the court (and thus denied by implication).

The district court's original injunction also was invalid because it was entered without joining the EBHs as necessary parties. *See Fed R. Civ. P.* 19(a)(1)(B); *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543, 548

¹¹ Among other things, an evidentiary hearing would establish (i) the tens of billions of dollars in third party interests that are put at risk by the Injunction; (ii) the numerous ways in which those interests would be put at risk, *see, e.g.*, Ex: 17: Choi Dec. ¶¶ 8-22; Supp. Choi Dec. ¶¶ 22-30; and (iii) whether (as they effectively conceded in the district court) Plaintiffs have been purchasing credit default swaps effectively betting that their litigation tactics will trigger a default by the Republic.

(S.D.N.Y. 2008) (“Although neither party has moved for joinder, courts frequently do—and indeed should—consider the issue *sua sponte* because a primary purpose of Rule 19 is to protect the rights of an absentee party.”). Although the district court acknowledged the EBG’s submission in entering its revised Injunction (Ex. 14: 11/21/12 Inj. Op., at 2), it performed no meaningful analysis of the EBG’s arguments. And with no hearing and only three days to submit its position, any “hearing” the EBG received was so perfunctory as to be nugatory. Given the multiple due process violations, it is highly likely that the EBG will succeed in vacating the Injunction on appeal.

III. THE EBG WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

Because the EBG has alleged a violation of its constitutional rights, “no separate showing of irreparable harm is necessary.” *Statharos v. New York City Taxi and Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir. 1999). In any event, the Injunction will cause injury that constitutes irreparable harm. The Republic’s Lock Law expressly bars Argentina’s compliance with the Injunction. Moreover, the Republic’s President, Christina Fernandez de Kirchner, and senior treasury officials have stated that the Republic will under no circumstances pay Plaintiffs. (See Ex. 15: 11/21/12 Stay. Op., at 2-3). The bond markets have already signaled their anticipation that the Republic will default, as evidenced by precipitous drops in Exchange Bond prices. See Supp. Choi Dec. ¶¶ 14-21.

If (as is inevitable) the Republic defaults or the Exchange Bond payments are frozen, the EBHs will be left without any effective remedy. In essence, the EBHs rights will be subordinated to the Plaintiffs'¹²—and the EBHs will be forced to litigate and seek to enforce any judgment against a foreign sovereign (the Republic) immune from execution and unwilling to pay. This Court has already held that this constitutes irreparable harm, because “monetary damages are an ineffective remedy when... Argentina will simply refuse to pay any judgments.” Ex. 1: 2d Cir. Op., at 24. Nor would there be any Exchange Bonds left that could be used as leverage for the district court to craft a new remedy like the Injunction. There is simply no basis to favor one group of injured bondholders (Plaintiffs) over the other (the EBHs).

In addition, the EBG consists of investment entities required to “mark-to-market” the value of their Exchange Bonds. Ex. 17: Choi Dec. ¶ 19. Losses to such values would affect these entities’ overall net asset value and potentially lead to the loss of investors, as well as market standing. *Id.*; *see also Grand River Enters. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 67 (2d Cir. 2007) (“It is well-established that a movant’s loss of current or future market share may constitute irreparable harm.”). Moreover, the indefinite nature of any freeze on payments would cause significant problems, even for those EBHs not required to mark-to-

¹² Of course this will have the ironic result of turning the *pari passu* clause – which Plaintiffs have used to obtain this result – on its head.

market, because the future value of the Exchange Bonds (if any) will be uncertain. Some EBHs also may be forced to abandon their Exchange Bond holdings to comply with internal investment guidelines and/or liquidity parameters—effectively locking in large losses by forcing sales in a depressed market. Supp. Choi. Dec. ¶ 24.

IV. CONTINUING THE STAY WILL NOT SUBSTANTIALLY INJURE PLAINTIFFS OR OTHER INTERESTED PARTIES.

Plaintiffs have not received payments on the FAA Bonds since Argentina defaulted in 2001. Ex. 1: 2d Cir. Op., at 5. Accordingly, Plaintiffs cannot credibly contend that a relatively brief stay pending final determination of this appeal will impose any significant incremental harm, given the decade they have been pursuing this litigation. *See Reading & Bates Petroleum Co. v. Musslewhite*, 14 F.3d 271, 272 (5th Cir. 1994) (stay “could not possibly have caused ‘substantial harm’ to [plaintiff], in light of the fact that controversy . . . ha[d] been going on for more than ten years”). Moreover, in the event Plaintiffs prevail on appeal (and assuming the Republic complies with the resultant order), they are protected because (1) the Republic is financially capable of paying them and the EBHs (Ex. 1: 2d Cir. Op., at 26); (2) the Exchange Bonds bear maturity dates extending until September 2038 (Ex. 19: Koenigsberger Dec. ¶ 10); and (3) pre- and post-judgment interest will compensate for any delay in payment. *See NML Capital v. Republic of Arg.*, 435 Fed. Appx. 41, 44 (2d Cir. 2011). Thus, the relatively short

delay caused by this ongoing appeal does not substantially injure Plaintiffs, and there is no urgent reason why bond payments need to be escrowed beginning on December 15 or thereafter.¹³

The district court's contrary conclusion was based on its suspicion that the Republic would "devise means for evasion" of the Injunction. However, as noted in Point I, *supra*, that concern is irrational and illusory. The proper course was not to lift the stay, but to protect the EBHs' rights by maintaining it pending appeal.

V. CONTINUING THE STAY IS IN THE PUBLIC INTEREST.

The following public interest factors militate in favor of maintaining the status quo pending the outcome of this appeal:

- The "significant costs on intermediary banks" imposed by compliance with the Injunction, as well as the risk of "delays in payments unrelated to the targeted Exchange Bond payments." Ex. 1: 2d Cir. Op, at 28.
- The EBG consists of funds that invest on behalf of numerous public employee pensions funds and charitable organizations (Ex. 19: Koenigsberger Dec. ¶ 8), all of which will suffer if bond payments are not received.
- The Injunction violates Fifth Amendment rights, and "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)).

¹³ The standard for evaluating stays differs from that for preliminary injunctions, because while "a preliminary injunction will last until the end of the trial, often a considerable length of time after issuance, . . . a stay pending appeal, at least in the case of an expedited appeal, might last for a very brief interval." *Mohammed v. Reno*, 309 F.3d 95, 101 n.6 (2d Cir. 2002).

- Denial of a stay will create a serious risk the Republic will default on the Exchange Bonds (*see* Ex. 17: Choi Dec. ¶¶ 8-18), which would have “significant negative systemic consequences on countries and investors worldwide,” leading to “large negative consequences for the global economy.” (*Id.* at ¶¶ 21-22).
- The U.S. Government has expressed its view in this case that the Injunction will jeopardize salutary debt restructurings worldwide, at a time when grave sovereign debt rises continue in Europe and elsewhere. Ex. 13: 2012 U.S. Amicus Brief at 17-18. Moreover, the level of rancor towards the Republic exhibited by the district court in its orders now implicates matters of comity and foreign relations.

CONCLUSION

For the foregoing reasons, the Court should stay the district court’s Injunction pending final disposition of this appeal.

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APPENDIX A

The following interested non-parties are members of the Exchange Bondholder Group: Gramercy Funds Management LLC; Gramercy Argentina Opportunity Fund, Ltd.; Gramercy Distressed Debt Master Fund; Gramercy Distressed Opportunity Fund, Ltd.; Gramercy Distressed Opportunity Fund II, L.P.; Gramercy Emerging Markets Fund; Gramercy Local Currency Emerging Market Debt Master Fund; Gramercy Master Fund; Gramercy Opportunity Fund - Special Opportunities II Offshore SP; Gramercy Opportunity Fund - Special Opportunities II SP; Gramercy Opportunity Fund - Special Opportunities SP; Gramercy U.S. Dollar Emerging Market Debt Master Fund; and Gramercy Select Master Fund (collectively, “Gramercy”); Massachusetts Financial Services Company d/b/a MFS Investment Management; MFS Diversified Income Fund; MFS Emerging Markets Debt Fund; MFS High Yield Opportunities Fund; MFS Emerging Markets Debt Local Currency Fund; MFS Global Bond Fund; MFS Multimarket Income Trust; MFS Charter Income Trust; MFS Meridian Funds – Emerging Markets Debt Fund; MFS Meridian Funds – High Yield Fund; MFS Meridian Funds – Global Bond Fund; MFS Meridian Funds – Emerging Markets Debt Local Currency Fund; MFS Investment Management Co. (Lux), S.a.r.l., on behalf of (i) MFS Investment Funds – Emerging Markets Debt Fund, and (ii) MFS Investment Funds – Emerging Markets Debt Local Currency Fund II; MFS Heritage Trust Company Collective Investment Trust – Emerging Markets Debt Fund; and MFS Emerging Markets Debt LLC (collectively, “MFS”); Brevan Howard Asset Management LLP and Brevan Howard Master Fund Limited (collectively, “Brevan Howard”); SW Asset Management, LLC and SWGCO Master Fund, Ltd. (collectively, “SW”); and AllianceBernstein L.P. on behalf of certain accounts managed by AllianceBernstein L.P. and its affiliates (collectively, “AB”).

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