12-105(L)

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

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 AQUERRETA, MARIA ELENA CORRAL, TERESA MUNOZ DE CORRAL, NORMA ELSA LAVORATO, CARMEN IRMA LAVORATO, CESAR RUBEN VAZQUEZ, NORMA HAYDEE GINES, MARTA AZUCENA VAZQUEZ, OLIFANT FUND, LTD.,

Plaintiffs-Appellees,

-v.-

REPUBLIC OF ARGENTINA,

Defendant-Appellant,

(*Caption Continued on Inside Cover*)

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

JOINT RESPONSE BRIEF OF PLAINTIFFS-APPELLEES NML CAPITAL, LTD. AND OLIFANT FUND, LTD.

(*Appearances on Inside Cover*)

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 Federal Rule of Appellate Procedure 26.1, undersigned counsel state that:

NML Capital, Ltd. is not publicly traded and has no corporate parent and no publicly held corporation owns 10% or more of its stock.

Olifant Fund, Ltd. is not publicly traded; its parent corporation is ABIL, Ltd.; and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Table of Contents
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Table of Authorities
(Continued)

Table of Authorities
(Continued)

Table of Authorities (Continued)

Statutes & Rules

Table of Authorities
(Continued)

Other Authorities

Table of Authorities
(Continued)

PRELIMINARY STATEMENT

Just three months ago, this Court "affirmed" the "judgment[ ] of the district court . . . ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders" of the bonds issued pursuant to Argentina's 2005 and 2010 debt exchanges. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 265 (2d Cir. 2012). The Court held that the remedy crafted by the district court did not violate the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 262-63. It affirmed the district court's finding that Argentina has sufficient resources to meet ***all*** of its obligations—a factual finding that informed the district court's determination that its Injunction would not cause any legally cognizable harm to either Argentina or its exchange bondholders. *Id.* at 256, 263. And the Court concluded that the district court's imposition of that remedy on the facts of this case would not disrupt the ability of other sovereigns to restructure their debts. *Id.* at 264.

This Court accordingly found "no abuse of discretion in the injunctive relief fashioned by the district court." *Id.* at 250. It remanded for clarification as to "how the injunction['s] payment formula is intended to function and how the injunction[] appl[ies] to third parties such as intermediary banks." *Id.* at 250.

Seemingly oblivious both to this Court's ruling and to its own comprehensive waiver of sovereign immunity, Argentina thunders against what it calls "ex-

traordinary judicial commands to a foreign state" and seeks to litigate afresh the propriety of the Equal Treatment remedy. Argentina Br. 19. Thus, Argentina re-argues at length that the Injunction violates the FSIA and suggests for the first time that the Court should instead cram down Argentina's 2010 Exchange Offer terms on Appellees. That is a remedy, Argentina says, that "the Argentine Executive could . . . present to Congress." Argentina Br. 19.

This Court's narrow *Jacobson* remand was not an opportunity for plenary reconsideration, much less an invitation to Argentina to begin haggling with the Court. The requirement that Argentina must make a Ratable Payment to Appellees whenever it makes a payment on the Exchange Bonds has been "affirmed." 699 F.3d at 265. Argentina "disagree[s] with this Court's October 26 Decision" (Argentina Br. 6 n.2), but this Court's ruling now is the law of the case. With respect to Argentina, the only question remanded by this Court was "how [the district court] intends this injunction to operate." *Id.* at 255.

On remand, the district court clarified that the Injunction requires Argentina to pay Appellees the full amounts they are owed the next time Argentina pays the full amount of a periodic payment due under the terms of the Exchange Bonds. Argentina made no argument on remand as to how the district court ***intended*** the Injunction's Ratable Payment formula to operate, or, even more generally how the formula ***should*** operate. Instead, it struggled to re-litigate the very existence of the

Equal Treatment remedy, an avenue that this Court had foreclosed. The district court's clarification fully resolves the Court's limited *Jacobson* remand of the Equal Treatment remedy, and that remedy should be affirmed in full.

Even if the clarified remedy were now subject to an additional round of scrutiny—and nothing in the Court's request for clarification suggested that it would—the Injunction remains well within the district court's "considerable latitude in fashioning the relief." 699 F.3d at 261. Indeed, Argentina does not even attempt to explain how the district court's clarification could have altered conclusions with respect to the balance of equities and the public interest in which this Court previously "s[aw] no abuse of discretion." *Id.* at 263. Now, as then, Argentina has sufficient resources to meet its obligations to both Appellees and its exchange bondholders. *See id.* at 264. Likewise, the district court's clarification does not make it any less "unlikely that in the future sovereigns will find themselves in Argentina's predicament." *Id.* at 264. Indeed, Argentina's "predicament" is entirely of its own making. And as the district court explained, the clarified Equal Treatment Injunction is the remedy most supported by the language of the contract, which requires equal treatment not of creditors, but "***payment obligations***."

Various exchange bondholders offer objections to the requirement that Argentina make a Ratable Payment to Appellees if it makes a payment on the Exchange Bonds. Those complaints also come too late, and they lack merit in any

event. Their contention that they will be harmed by the clarified Injunction turns on their insistence that Argentina will choose to comply by ceasing payments on the Exchange Bonds in order to avoid making payments on the FAA Bonds. It is difficult to believe that any debtor with more than $40 billion in accessible reserves, even Argentina, would risk its second default in just 11 years and the acceleration of tens of billions in principal just to avoid payment of approximately $1.44 billion. Yet if Argentina chooses that path, any harm felt by the exchange bondholders would be caused by Argentina's refusal to honor its contractual obligations to them, not the legal obligations imposed by the Injunction. As this Court already has affirmed, Argentina has the means to meet all of its obligations. Its choice not to do so would be entirely its own.

Exchange Bondholder Group's ("EBG") new constitutional claims similarly fall flat. The notion that the Court, by affirming the Equal Treatment remedy, has effected a judicial taking or some other deprivation of the exchange bondholders' property is refuted by the fact that they have today all the same contractual rights and remedies to receive payment under their bonds—or sue Argentina if it does not pay—as they did before the district court first issued the Injunction. The prospectus for the 2005 Exchange warned those considering participation that litigation by creditors owning FAA Bonds could interfere with payments on the Exchange Bonds "by seeking an injunction or pursuing other legal remedies." JA-706. In-

deed, before it became ringleader of EBG, Gramercy itself had predicted that "well-established precedents" such as "Elliott vs. Republic of Peru," which awarded relief similar to the Injunction, would bring "success" in its own "litigation and collection efforts" against Argentina. SPE-1352.

Finally, the district court was right to reject EBG's motion to vacate the Injunction. The sophisticated institutional investors that comprise EBG do not deny they had actual notice of this litigation, which commenced in 2010. Yet, they did not seek to appear in the case until after the Court affirmed the substance of the Injunction. Their actual notice of the litigation, coupled with their tactical decision to observe from the sidelines, forecloses any suggestion that the judgment is "void" under Federal Rule of Civil Procedure 60(b).

COUNTER-STATEMENT OF JURISDICTION

This Court "remanded to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19, 22 (2d Cir. 1994)" for clarification of two issues, and specified that "[o]nce the district court has conducted such proceedings the mandate should automatically return to this Court." 699 F.3d at 265. The district court thus had jurisdiction to enter its order providing the requested clarification, and this Court now has jurisdiction to review that order. *See Jacobson*, 15 F.3d at 22.

COUNTER-STATEMENT OF THE CASE

On October 26, 2012, this Court affirmed the district court's Injunction, and remanded for the district court to clarify two issues relating to the Injunction's operation. 699 F.3d at 265. On November 21, the district court entered the orders at issue in this appeal, clarifying the Ratable Payment formula and specifying the third parties that are likely to be bound by the Injunction under Federal Rule of Civil Procedure 65(d). SPE-1360, 1378. On November 26, the district court denied EBG's motion to vacate the Injunction. SPE-18.

COUNTER-STATEMENT OF THE ISSUES[1]

1. This Court "affirmed" the "judgment[ ] of the district court . . . ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the [Exchange Bonds]" (699 F.3d at 265), and remanded for the district court to "clarify precisely" "how the injunction['s] payment formula is intended to function." *Id.* at 250, 255. The district court did so, and Argentina does not dispute that the clarification accurately reflects how the

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[1] This brief responds to arguments of Argentina and Non-Party Appellants EBG and Fintech Advisory Inc. ("Fintech") with respect to the district court's clarification of the operation of the Injunction's payment formula. The brief filed by Appellees Aurelius Capital Master, Ltd. *et al.* and Varela *et al.*, which NML Capital, Ltd. and Olifant Fund, Ltd. adopt and incorporate by reference, addresses arguments relating to the application of the Injunction to third parties. *See* Fed. R. App. P. 28(i).

court "intended [the Injunction] to function." *Id.* Does the district court's unchallenged clarification of the operation of the Ratable Payment formula nevertheless constitute an abuse of discretion?

2. Federal Rule of Civil Procedure 60(b)(4) permits a district court to "relieve a party . . . from a final judgment" when "the judgment is void." EBG had notice of this litigation for years, yet it waited until after this Court had affirmed the imposition of an Equal Treatment remedy, before it sought to appear in the district court as an interested non-party and to assert the district court's order was void. Did the district court abuse its discretion by denying non-party EBG's motion to vacate the Injunction that this Court had affirmed?

COUNTER-STATEMENT OF THE FACTS

A. The District Court Holds That Argentina Breached The Equal Treatment Provision And Enters Its Injunction

In December 2011, the district court held that Argentina had breached the Equal Treatment Provision in the FAA Bonds. SPA-13-14. Specifically, the court found that Argentina had—for six years—systematically repudiated its obligations to Appellees, while at the same time honoring its obligations under subsequently issued Exchange Bonds.

The district court did not immediately issue any remedy for this breach, however, and instead requested additional briefing on the appropriate remedy. SPA-14; *see also* JA-2162. Appellees submitted a brief seeking an injunction and

proposing an Equal Treatment remedy; they explained that, under this proposal, whenever Argentina paid what was currently due and owing under the Exchange Bonds, it would also be required to pay what was currently due and owing under the FAA Bonds. D.E. 361, at 3-4. Appellees argued that this remedy was appropriate because the Provision "commands equal treatment of 'payment obligations' and the term 'payment obligation' in this context admits of no definition except the duty to pay the amount currently due and owing." *Id.* at 3. The district court urged Argentina to propose an alternative remedy, but Argentina declined to do so—arguing, instead, that the Provision is unenforceable. JA-2321-23. Although the exchange bondholders who have submitted briefs in this appeal do not deny that they had notice of these remedial proceedings, no exchange bondholder sought to participate.

On February 23, 2012, the district court entered its Injunction. Under the Injunction, "[w]henever the Republic pays any amount due under the terms of the [exchange] bonds," it is required also to make a "Ratable Payment" to Appellees. SPA-38-39. Argentina appealed the Injunction to this Court, arguing that the Ratable Payment formula was inequitable, but suggested no alternative. Prior Argentina Op. Br. 7. Argentina also argued that the Injunction "harm[ed]" the exchange bondholders. *Id.* Still, no exchange bondholder sought to participate in the proceedings before this Court.

B. This Court Affirms The Injunction And Remands For Clarification Of Two Narrow Issues

On October 26, 2012, this Court affirmed the substantive portions of the district court's decisions: "(1) granting summary judgment to [Appellees] on their claims for breach of the Equal Treatment Provision and (2) ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to the holders of 2005 and 2010 restructured debt." 699 F.3d at 265.

This Court had "little difficulty" concluding that Argentina had breached the Provision, explaining that "[t]he record amply supports a finding that Argentina effectively has ranked its payment obligations to the plaintiffs below those of the exchange bondholders." *Id.* at 259-60. Indeed, this was true "even under Argentina's interpretation of the Equal Treatment Provision as preventing only 'legal subordination' of the FAA Bonds." *Id.* at 260.

This Court also affirmed the district court's holding that the proper remedy for Argentina's breach was to require Argentina to make a Ratable Payment to Appellees whenever it made a payment due under the Exchange Bonds. *Id.* at 265. The Court explained that monetary damages would be an "ineffective remedy" because "Argentina will simply refuse to pay." *Id.* at 262. And the Court held that the Injunction did not violate the FSIA. That statute, the Court explained, "imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign." *Id.* Argentina's argument that the Injunction effected

an attachment failed because the Injunction "affect[s] Argentina's property only incidentally," leaving Argentina the choice to either "pay all amounts owed," "make [ratable] partial payments" on both the FAA Bonds and the Exchange Bonds, or make no payments at all. *Id*. at 262-63.

Turning to the balance of the equities, the Court found that "Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the Injunction[]," and rejected Argentina's predictions of dire consequences flowing from the Injunction. *Id.* at 263. The Court affirmed the district court's factual finding that Argentina has sufficient funds—"including over $40 billion in foreign currency reserves"—to honor its obligations. *Id.* And the Court explained that the Injunction would not harm future restructuring efforts by other nations and found no risk to multilateral institutions such as the IMF. *Id.* at 260, 264 & n.16. Finally, the Court rejected Argentina's expression of "frustration with plaintiffs for refusing to accept the exchange offers," observing that Appellees were "completely within their rights to reject the 25-cents-on-the-dollar exchange offers." *Id.* at 262 n.15.

Having affirmed the central provisions of the Injunction, this Court remanded for the district court to clarify how the Injunction "is intended to function" in two narrow respects. *Id.* at 250. First, it requested clarification as to "precisely how this formula is intended to operate." *Id.* at 255. Second, the Court expressed

"concerns about the Injunction['s] application to banks acting as pure intermediaries" and "confusion as to how the challenged order will apply to third parties generally," and thus requested that the district court "more precisely determine the third parties to which the Injunction[] will apply." *Id.* at 264.

C. The District Court Enters Its Orders On Remand

On remand, Argentina made no argument as to how the district court intended the Injunction's Ratable Payment formula to operate. It was therefore undisputed that if Argentina pays the full amount currently due under the Exchange Bonds—e.g., the full amount of a scheduled periodic payment—the formula would require that Argentina must pay Appellees the entire amount they are currently owed under the FAA Bonds. D.E. 390, at 12-14. Argentina instead challenged the Equal Treatment remedy that this Court already had affirmed, arguing it should not be required to make ***any*** payments to Appellees when it pays on the Exchange Bonds. D.E. 408, at 14-15. Argentina was joined in this argument by exchange bondholders Fintech and EBG. SPE-14. Although these non-parties had waited until the thirteenth-hour to enter this litigation, the district court gave them the full opportunity to voice their views both at oral argument and in briefing. EBG also filed a motion to vacate—in its entirety—the Injunction that this Court had affirmed (D.E. 410), which the district denied (SPE-18).

The district court entered an order on November 21, 2012, providing the clarification requested by this Court. It observed that "the questions posed to the District Court did not affect the basic ruling of the Court of Appeals that there can be no payments by Argentina to exchange bondholders without an appropriate payment to plaintiffs." SPE-1373. With respect to the Ratable Payment formula, the district court clarified that, if Argentina pays 100% of what it currently owes under the Exchange Bonds—e.g., a periodic payment required by the Bonds—Argentina must likewise pay Appellees 100% of what it currently owes under the FAA Bonds. The district court explained that the debt due to Appellees is the entire amount of the principal and unpaid interest. By contrast, Argentina is currently obligated only to make periodic payments of interest and a portion of the principal on the Exchange Bonds.

The district court found that requiring Argentina instead to make incremental payments of an arbitrary amount to Appellees would constitute a "radical departure" from the bond agreements and the Equal Treatment Provision. SPE-1366. As the court observed, "[t]here is simply no debt owed to plaintiffs on terms providing for payments of 1% of some sum of money, spaced out over 100 installments of 1% each." *Id.* And neither Argentina nor its allies had "suggested any basis in contract or in policy why Argentina deserves to have payment of the amount due to plaintiffs spread over some period of time." *Id.* Such a remedy

"would be a far cry from a proper remedy for the flagrant and intentional contract violations committed by Argentina." SPE-1367.

Turning to the arguments newly advanced by EBG and Fintech, the court also noted that this Court had rejected the assertion that the Equal Treatment remedy would be unfair to the exchange bondholders. SPE-1367. Those bondholders "were able to watch year after year while plaintiffs in the litigation pursued methods of recovery against Argentina which were largely unsuccessful." *Id*. After more than ten years of litigation, it was "hardly an injustice to have legal rulings which, at long last, mean that Argentina must pay the debts which it owes." SPE-1367-68. Pursuant to the terms of the *Jacobson* remand, jurisdiction over the review of the Injunction automatically returned to this Court.

SUMMARY OF ARGUMENT

I. In its October 26 Decision, this Court "affirmed" the "judgments of the district court . . . ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the [Exchange Bonds]." 699 F.3d at 265. Appellants offer no reason to displace that well-reasoned conclusion, which is now the law of the case. Nor do they offer any justification for setting aside the district court's unchallenged clarification of the operation of the Injunction in response to this Court's limited *Jacobson* remand.

A. This Court instructed the district court to "clarify" "how the injunction['s] payment formula is intended to function." 699 F.3d at 250. During the remand proceedings, Argentina did not dispute Appellees' argument about how the district court had intended the formula to function: whenever Argentina honors in full its payment obligations on the Exchange Bonds—by making a periodic payment on those Bonds—it must honor in full its payment obligations on Appellees' FAA Bonds by paying the full amount that is currently due and owing on those Bonds. Because Appellants do not argue that the district court should have clarified its Injunction in a different manner, the clarification should be affirmed.

B. Even if this Court were to consider anew whether the clarified Injunction was an abuse of the district court's broad equitable discretion, that Injunction would easily survive this deferential review.

1. The clarified Injunction is wholly consistent with the equities. The Provision requires the equal treatment of "payment obligations," and the district court acted reasonably in concluding that whenever Argentina honors in full its obligations under the Exchange Bonds, it must honor its obligations under Appellees' bonds. Indeed, given Argentina's undisputed financial ability to honor all of its obligations, a remedy that requires Argentina to pay Appellees what they are owed whenever it pays the exchange bondholders what they are owed cannot possibly be inequitable. If Argentina chooses to abide by all of its legal and contractual duties,

the Injunction will result in Appellees and the exchange bondholders getting what Argentina promised to pay them under their bond contracts, an outcome that is the very definition of equity.

2. Nor is there merit to the argument raised by Non-Party Appellants EBG and Fintech that the clarified Injunction will harm the exchange bondholders. This Court has already affirmed the district court's conclusion that because Argentina has the financial resources to honor its obligations to both the exchange bondholders and Appellees, the Injunction's Ratable Payment requirement will not cause harm to any third parties. In any event, Non-Party Appellants—who accepted the Exchange Bonds after demanding and receiving promises of preferential treatment, despite being aware of Appellees' equal treatment rights—may not now complain that a court will enforce those rights.

3. The clarified Injunction is strongly supported by the public policy interest in the enforcement of contractual promises. Argentina rehashes the same self-interested arguments that this Court rejected in its October 26 Decision: most prominently, that requiring Argentina to live up to its equal treatment promise will somehow harm sovereign restructurings by ***other*** nations. As this Court already observed, the market in sovereign debt obligations has incorporated provisions such as collective action clauses ("CAC") into the vast majority of bond contracts under New York law. The stability of this sophisticated market, and voluntary re-

structurings in general, depends critically upon courts' willingness to enforce ***all*** the terms in such contracts.

C. Argentina leads its brief by repeating its argument that the Injunction violates the FSIA. But as this Court already explained, the Injunction is not a prohibited "attachment" under the FSIA because it merely directs Argentina to abide by its contractual promise of equal treatment, and does not take dominion over any sovereign property.

II. EBG moved in the district court, under Rule 60(d), for an order to vacate the Injunction that this Court had affirmed. EBG's motion asserted a host of untimely arguments—from claiming that the Injunction violated substantive due process and constituted a judicial taking, to asserting that the Injunction was procedurally improper because EBG did not receive actual notice of the proceedings and was not joined as a necessary party. Each of these arguments is an attempt to relitigate an assertion that this Court already rejected: that somehow the Injunction harms exchange bondholders. Because EBG's arguments come too late, and because those arguments merely rehash meritless claims that this Court already rejected, the district court did not abuse its discretion in rejecting them.

III. Argentina's request for certification should be rejected. The certification procedure does not exist to permit parties to obtain an additional opportunity

to re-litigate issues that they lost in federal court, after full briefing and consideration.

ARGUMENT

I. The Clarified Injunction Should Be Affirmed

"[W]here litigants have once battled for the court's decision, they should neither be required nor permitted, to battle for it again." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992) (internal quotation marks omitted). Consistent with this well-established principle, any issue "decided either expressly or by necessary implication" in the Court's October 26 Decision is now the law of the case. *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994) (quotation omitted). Accordingly, both this Court's ruling "affirm[ing]" the "judgments of the district court . . . ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the [Exchange Bonds]" (699 F.3d at 265), and all of this Court's conclusions anterior to that judgment, cannot be revisited except upon a showing of "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (quotation omitted). Appellants' contentions that the Injunction is inequitable, unjustifiably harms third parties, is contrary to the public

interest, and violates the FSIA all are subject to that standard, which Appellants never mention, much less attempt to satisfy.

The only issue relating to the Injunction's application to Argentina that this Court has not already affirmed—the district court's clarifications of the Injunction pursuant to this Court's *Jacobson* remand—is reviewed for abuse of discretion. *See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 40 (2d Cir. 2010). As this Court explained, the district court had "considerable latitude in fashioning" the Injunction, and it must be affirmed "so long as it achieves a 'fair result' under the 'totality of the circumstances.'" 699 F.3d at 261 (quoting *Leasco Corp. v. Taussig*, 473 F.2d 777, 786 (2d Cir. 1972)). The district court's clarification of the operation of the Injunction's formula passes that test. Indeed, under the circumstances of this case—most notably, Argentina's defiance of judgments entered against it in spite of both its promise to submit to the jurisdiction of U.S. courts and its undisputed ability to satisfy all of its obligations—the district court's clarified remedy is the ***most*** fair result.

A. Because No Party Contends That The Clarification Of The Ratable Payment Formula Is Erroneous, That Clarification Should Be Affirmed

In the October 26 Decision, this Court "affirmed" the "judgment[ ] of the district court . . . ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the [Exchange Bonds]."

699 F.3d at 265. It asked the district court merely to clarify ***how much*** Argentina must pay to Appellees when (or if) it makes a payment on the Exchange Bonds. More specifically, this Court offered the district court the "opportunity to clarify precisely" "how the injunction['s] payment formula is intended to function," explaining that it was "unable to discern from the record" which of two potential interpretations was correct. 699 F.3d at 250, 254-55. Under the first interpretation, if Argentina paid on the Exchange Bonds 100% of what it owed on a particular date (e.g., 100% of a scheduled periodic payment), it would be required also to pay Appellees 100% of what it owed to them under the FAA Bonds. *Id.* at 255. Under the second interpretation, if Argentina made a $100,000 payment under the Exchange Bonds, and "if such a $100,000 payment . . . represented 1% of the principal and interest outstanding . . . then Argentina must pay plaintiffs 1% of the amount owed to [Appellees]." *Id.* In hypothesizing those possibilities and giving the district court the "opportunity to clarify precisely how it intends" the formula to function, this Court gave no indication that either interpretation would affect its conclusion that the Injunction was within the district court's broad equitable discretion. *Id.*

On remand, Argentina did not urge the court to adopt the interpretation posed in this Court's second hypothetical, or any alternative interpretation of the Ratable Payment formula. Rather, it was undisputed in the district court, and it is

undisputed here, that this Court's first interpretation of the formula accurately recounted how the district court had "intended [the Injunction] to function." That is, the district court had "intended" to order that whenever Argentina pays what is due and owing under the Exchange Bonds on any particular day, it must pay what is currently due and owing to Appellees. SPE-1363.

Instead, Argentina—joined by EBG and Fintech—attacked ***any*** injunction that required Argentina to make a Ratable Payment to Appellees whenever it makes a payment on the Exchange Bonds. But the district court correctly recognized that those arguments exceeded the limited scope of this Court's *Jacobson* remand, explaining that "the questions posed to the District Court did not affect the basic ruling of the Court of Appeals that there can be no payments by Argentina to exchange bondholders without an appropriate payment to plaintiffs." SPE-1373. As the district court properly understood, this Court did not ask that the court reconsider the requirement that Argentina make a Ratable Payment to Appellees if it makes a payment on the Exchange Bonds. It asked the district court to clarify the operation of that requirement. The district court did so. And neither Argentina nor its new allies are now arguing that the district court should have clarified its Injunction differently. They argue only that the Ratable Payment requirement must be eliminated. They "disagree with this Court's October 26 Decision." Argentina

Br. 6 n.2. Because no one is challenging the district court's clarification, that clarification must be affirmed.

B. The Clarified Injunction Achieves A Fair Result Under The Totality Of The Circumstances

In its October 26 Decision, this Court "s[aw] no abuse of discretion" in the district court's conclusion that "the balance of the equities and the public interest" favored its award of injunctive relief. 699 F.3d at 263. That holding controls the analysis of Argentina's renewed objections to the requirement that it make a Ratable Payment to Appellees whenever it makes a payment on the Exchange Bonds. The district court's clarification was among the two interpretations of the formula that this Court considered (*see id.* at 255), yet this Court did not remotely suggest that adoption of that interpretation would remove the Injunction beyond the wide range of permissible equitable remedies. Quite to the contrary, the most natural reading of the Court's October 26 Decision is that it "s[aw] no abuse of discretion" under ***either*** interpretation of the formula it suggested as plausible alternatives. *Id.* at 263. That is why this Court "affirmed" the district court's judgment "ordering Argentina to make Ratable Payments." *Id.* at 265.

Yet even if this Court intended to subject the district court's clarification of the Ratable Payment formula to an additional round of appellate review, the result could be different only if spelling out ***how much*** Argentina must pay to Appellees when it next makes a periodic payment on the Exchange Bonds so drastically up-

ended the balance of the equities and public interest that it no longer could be said to "achieve[] a fair result under the totality of the circumstances." *Id.* at 261 (internal quotation marks omitted). Neither Argentina nor its allies even attempt to make that showing, choosing, instead, to recycle arguments against ***any*** Equal Treatment remedy. But this Court already held that an Equal Treatment remedy is appropriate under the circumstances. Appellants' tactic reflects not just their refusal to accept the judgments of U.S. courts, but also the bankruptcy of their arguments on the pertinent point: For all the reasons this Court articulated in its October 26 Decision, the clarified Injunction—no less than when it was open to two competing interpretations—is sharply favored by the balance of the equities and the public interest.

1. The Equities Support The Clarified Remedy

The clarified Injunction provides a remedy consistent with the text of the Equal Treatment Provision and "achieves a fair result under the totality of the circumstances." 699 F.3d at 261 (internal quotation marks omitted). Its clarification of the Ratable Payment formula is not remotely an abuse of discretion.

a. The district court properly framed the Injunction in light of the nature of the violation that this Court found. The Provision forbids discrimination between "payment obligations" (JA-157), and this Court accordingly determined that Argentina violated the Provision when it "effectively . . . ranked its payment obli-

gations to the plaintiffs below those of the exchange bondholders" (699 F.3d at 259). Argentina's "payment obligations," in turn, are the amounts that it is obligated to pay at a particular time under the agreements' payment provisions. *See id.* at 259-60. This Court in the October 26 Decision expressed the same understanding of this contractual term. *See, e.g.*, *id.* at 259 n.10.

Consistent with that textual analysis, it was appropriate for the district court to hold that whenever Argentina honors its "payment obligations" on the Exchange Bonds by making a timely periodic payment under those Bonds, it must similarly pay what is due and owing to Appellees on the FAA Bonds. That amount is the full unpaid principal plus accrued interest (including capitalized and prejudgment interest). As the district court explained, there "is simply no debt owed to plaintiffs on terms providing for payments of 1% of some sum of money, spaced out over 100 installments of 1% each." SPE-1366.

That the district court was operating well within the boundaries of its discretion is further demonstrated by the fact that, on remand, Argentina once again declined to suggest any alternative remedy.[2] *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1440 (D.C. Cir. 1988) (defendants' "failure to

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[2] This was consistent with Argentina's persistent refusal, throughout this litigation, to negotiate in good faith with Appellees.

offer an alternative" remedy would make a court of appeals "most reluctant to conclude that" a district court abused its discretion); *see also* SPE-838 (July 23, 2012 oral argument) ("[T]he district court invited you when it framed the injunction to raise these practical concerns. And there was no counter proposal."). Indeed, even as it urged the district court to "reassess" the Injunction (D.E. 408, at 7), Argentina pointedly declined to endorse (even in the alternative) this Court's "1%" interpretation of the formula, instead criticizing that formula for "fail[ing] to take into account the significant haircut taken by the exchange bondholders." D.E. 408, at 11. Argentina should not be heard to argue that the district court's clarification is an abuse of discretion when Argentina itself failed to suggest any alternative remedy that complied with the terms of this Court's *Jacobson* remand.

b. Even setting aside the nature of Argentina's breach and its default on remand, the balance of hardships plainly favors the clarified Injunction. The clarified remedy does not work any unjust hardship on Argentina. This Court already has affirmed the district court's conclusion that Argentina, with "over $40 billion in foreign currency reserves," can "afford to service the defaulted debt" without "defaulting on its other debt." 699 F.3d at 263. This factual determination, having been affirmed on appeal, carries "maximum force" under the law-of-the-case doctrine, and Argentina has not even attempted to dispute it. 18B Charles A. Wright, et al., *Fed. Practice & Proc. Juris.* § 4478.5 (2d ed.).

And that conclusion is no less true now that the operation of the Ratable Payment formula has been clarified. As the district court explained, "[n]o one has suggested any basis . . . why Argentina deserves to have payment of the amount due to plaintiffs spread over some period of time." SPE-1366. Assuming Argentina makes its next periodic payment under the Exchange Bonds in full, then the required Ratable Payment would amount to less than 4% of Argentina's reserves—and less than half of what Argentina paid on the Exchange Bonds in December 2012 alone. This is an amount Argentina easily "can[] afford." 699 F.3d at 263. That Argentina would prefer to avoid its legal obligations, notwithstanding its financial ability to honor them, is not a cognizable harm in a court of equity.[3]

On the other side of the equitable balance, the Injunction will appropriately remedy Appellees' injuries by finally requiring that Argentina honor its contractual commitment to rank its payment obligations to them at least equally with its obligations on its other unsecured debt.

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[3] Argentina's suggestion that the Injunction will "trigger claims by *all* Argentine debt holders, thus threatening to undo Argentina's debt restructuring" (Argentina Br. 29) is baseless hyperbole. The exchange bondholders will continue to get what they are entitled to under their bonds, and would have no basis to complain if Argentina also honored its obligations on Appellees' bonds. Argentina indisputably has the financial resources to honor ***all*** of its obligations under both the Exchange Bonds and the FAA Bonds.

c. Appellants' arguments that, whatever the balance of hardships, the clarified Injunction is inequitable do not withstand scrutiny. They object that it would be somehow unfair for Appellees to "get 100% of all debt" they are owed, "while the exchange bondholders . . . would get only a single installment of interest on a lower amount." Argentina Br. 29; *see* EBG Br. 27-29; Fintech Br. 33-34. But this alleged disparity is not only entirely consistent with the terms of the Equal Treatment Provision, but is the natural result of the exchange bondholders' election to trade their rights under the FAA Bonds for a ***different*** set of rights under the Exchange Bonds. Argentina owes Appellees the entire unpaid principal on the FAA Bonds (plus accrued interest); by contrast, Argentina owes the exchange bondholders their next scheduled payment on their Exchange Bonds, which is exactly what the exchange bondholders bargained for.

There is nothing inequitable about enjoining a debtor to honor "wholly separate debt obligations" to different creditors (Argentina Br. 7), especially where the debtor has promised to do so and has more than sufficient resources to honor all of its debts timely and in full. Rather, as this Court explained, it is equitable for a party to receive "what it is entitled to" under its agreement, even if "other creditors do not receive the same thing" because they are not similarly situated. *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 344 (2d Cir. 2005).

Here, the FAA calls for equal treatment of ***payment obligations***, not equal treatment of ***creditors***; and where one payment obligation calls for payment of one amount to one set of creditors at one time, and another payment obligation calls for payment of a different amount to different creditors at different times, equal treatment of those two obligations necessarily will result in different payments to different creditors. It is not inequitable for Appellees and the exchange bondholders each to receive what they are owed under their respective bonds.

d. Argentina nevertheless now, for the first time, suggests that a more appropriate "remedy" for its now seven-year long breach of the Equal Treatment Provision would be an order that compels Appellees to surrender their rights under the FAA Bonds, including under the Provision, and exchange them for new bonds "on the same terms as participants in the Republic's 2010 Exchange Offer." Argentina Br. 4. In other words, cram down on Appellees exactly those terms that this Court said Appellees "were completely within their rights" to reject and that "Argentina has no right to force them to accept." 699 F.3d at 263 n.15. This is a result, Argentina says, that it "could . . . present" to the vicissitudes of the Argentine legislative process—but only if the Court first rules in Argentina's favor. Argentina Br. 19.

It speaks to the depth of Argentina's commitment not to negotiate with its creditors that it would think it more appropriate at this juncture to attempt to rene-

gotiate the terms of this Court's narrow *Jacobson* remand. If Argentina earnestly wants to "end the litigation" (Argentina Br. 30), it need only sit down with its legacy creditors and negotiate in good faith. But this Court does not haggle with litigants over application of the law, and Argentina's thirteenth-hour "offer" detailing what the "Executive is prepared to" accept therefore is badly misdirected. For that, and several other reasons, this Court should reject it.

Most prominently, Argentina's belated suggestion of a cramdown is foreclosed by this Court's October 26 Decision, which "affirmed" that Argentina must "make 'Ratable Payments' to plaintiffs concurrent with or in advance of" its Exchange Bond payments. 699 F.3d at 265. The suggested cramdown would require that Appellees receive no payments under their FAA Bonds, and instead force them to surrender those Bonds in exchange for different bonds. This would not be a clarification of the operation of the Ratable Payment formula, but a reversal of every aspect of the Injunction that this Court "affirmed." And it would, perversely, install as a new "remedy" for Argentina's breach of the Equal Treatment Provision a surrender of not just all rights under that Provision, but all rights under the FAA Bonds.

Argentina's suggested cramdown amounts to a request that this Court rewrite the FAA in Argentina's distinct favor by effectively importing a CAC into that agreement. Put another way, Argentina argues that because 92% of the FAA

bondholders were ultimately unable to withstand Argentina's unprecedented combination of repudiating its legacy bond obligations, defiance of court judgments, and refusal to negotiate, the rest of those bondholders must now be forced to accept Argentina's historically unfavorable 2010 Exchange. But, as this Court has explained, "because the FAA does not contain a collective action clause, Argentina has no right to force [Appellees] to accept a restructuring, even one approved by a super-majority." 699 F.3d at 263 n.15. Argentina does not identify any case, from any jurisdiction, ordering the inclusion of such a clause into a contract. Quite to the contrary, every court that has considered the meaning of an equal treatment provision in a sovereign debt instrument has ordered an equal treatment remedy. *See Red Mountain Fin., Inc. v. Democratic Republic of Congo*, No. CV 00-0164 R (BQRx) (C.D. Cal. May 29, 2001), JA-1369-72; *Elliott Assocs. L.P. v. Banco de la Nacion*, General Docket No. 2000/QR/92 (Court of Appeals of Brussels 8th Chamber Sept. 26, 2000), JA-1357-60; *LNC Invs. LLC v. Republic of Nicaragua*, Folio 2000 No. 1061, R.K. 240/03 (Commercial Ct. of Brussels Sept. 11, 2003), JA-1334-53.

Argentina's belated cramdown offer is particularly inequitable under the extraordinary facts of this case. Ordering this remedy would mean that Argentina's seven-year-long breach of the Provision—an unprecedented course of misconduct (699 F.3d at 259-60)—would be rewarded by forcing Appellees to give up their

rights and accept the same unilateral offer that Argentina wanted them to take in the first place. It would mean that Argentina never has to honor its obligations under the FAA Bonds, even though it has the indisputable legal duty and financial resources to do so. ***That*** is the "antithesis of equity." Argentina Br. 2.[4]

2. The Clarified Injunction Does Not Harm Exchange Bondholders

EBG and Fintech argue that the Injunction should be vacated because it would undermine their interests allegedly by incentivizing Argentina to cease making payments to them. EBG Br. 17-26, Fintech Br. 35. This objection far exceeds the limited scope of the Court's *Jacobson* remand; it is not tethered in any way to the operation of the Ratable Payment formula. Indeed, it is an attack on ***any*** Ratable Payment formula.

It is not surprising, therefore, that Argentina advanced this argument prior to the remand, both in the district court and this Court. The district court rejected the argument, and this Court affirmed, quoting the district court's conclusion that, "[a]s to the exchange bondholders, the Injunction[] do[es] not 'jeopardiz[e] [their]

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[4] *Amicus* Puente's contention that repeal of the Lock Law would, by itself, remedy Argentina's breach of the Provision is equally absurd. As this Court explained, the Lock Law constituted only one piece of the "course of conduct" in a protracted pattern of payments and official declarations demonstrating an intent to subordinate the payment obligations on the FAA Bonds vis-à-vis the obligations on the Exchange Bonds. 699 F.3d at 264 n.16.

rights' because 'all that the Republic has to do' is 'honor its legal obligations'"—something which it has "sufficient funds" to do. 699 F.3d at 256, 263.

That conclusion, which was a necessary predicate to this Court's decision to affirm the Equal Treatment remedy, is indisputably law of the case. *See Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964) (Friendly, J.) (explaining that the law of the case applies with the same force even where new litigants have entered a proceeding since the case was last considered). Appellants neither acknowledge this Court's prior holding nor suggest that the rigorous standard for its reversal is satisfied here. That is a sufficient basis to dispose of the contention, but it lacks merit in any event, for at least four independently sufficient reasons.

First, the Injunction does not harm the exchange bondholders because it does not prohibit Argentina from making payments on the Exchange Bonds, and because (as the district court found, and this Court affirmed) Argentina has adequate resources to meet all its obligations. *See* 699 F.3d at 256, 263. Any threat of harm to the exchange bondholders thus comes not from the Injunction, but from Argentina. EBG's brief recognizes as much, as it is unabashedly premised on the fact that Argentina "has declared publicly that it has no intention of ever paying holdout bondholders like NML." EBG Br. 2. For good reason, this type of threatened harm—the possibility that a defendant will unnecessarily respond to an injunction by choosing to injure third parties—is not cognizable in equity. *See*

Reynolds v. Int'l Amateur Athletic Fed'n, 505 U.S. 1301, 1302 (1992) (Stevens, J., in chambers) (a party's "threat" to "punish[] innocent third parties cannot be permitted to influence a fair and impartial adjudication of the merits of applicant's claims [for equitable relief]."). Were it otherwise, virtually any defendant could hold equity hostage by threatening harm to third parties within its reach.

EBG, in any event, overstates the likelihood that Argentina would default on the Exchange Bonds in order to punish Appellees for rejecting its exchange offers. *See* EBG Br. 22-25. EBG says that, under the Injunction, there is "no chance" Argentina will continue paying its exchange bondholders (EBG Br. 15), yet Argentina has repeatedly and emphatically declared that it will honor its obligations under the Exchange Bonds timely and in full, at any cost (*see, e.g.*, SPE-566 ("Argentina's capacity and willingness to pay [on the Exchange Bonds] has been demonstrated, again and again. That's not going to change because of rulings."); SPE-391 ("We are going to pay [the exchange bondholders] and with dollars because we have them."); *see also id.* at 394, 553, 599, 609).

Moreover, it is hard to believe that Argentina will needlessly trigger yet another default and cause the acceleration of tens of billions of dollars in principal repayment obligations under the Exchange Bonds—further sullying the international reputation of this wealthy G-20 nation—all in order to avoid paying Appellees $1.44 billion. Far more likely, Argentina first may attempt to evade the In-

junction, and, if it is unable to enlist the aid of the necessary third parties, it eventually will determine that it is in its self-interest to honor its obligations to all of its bondholders and will seek to reach an accommodation with Appellees. EBG's prediction—that Argentina would seek to cure the headache caused by the Injunction by self-inflicting a new and much larger headache of a successive default—is not a rational response. Even if it is a lawless regime, there is no reason to think that Argentina would act in a manner so contrary to its national self-interest.

Second, the exchange bondholders took their bonds subject to the rights of the remaining FAA bondholders—rights of which they plainly were aware because they themselves had been FAA bondholders. The prospectus for the 2005 Exchange Offer explicitly warned them that there could be "no assurance" that litigation under the FAA Bonds would not "interfere with payments" under the Exchange Bonds. JA-466. Indeed, some exchange bondholders pursued such litigation ***themselves*** before accepting the 2010 Exchange. *See, e.g.*, *Gramercy Argentina Opportunity Fund, Ltd. v. Republic of Argentina*, No. 1:07-cv-11492-TPG (S.D.N.Y. 2007). Most strikingly, Gramercy (before accepting the 2010 offer) issued a press release predicting "success" in its "litigation and collective efforts" against Argentina in light of "well established precedents" such as "Elliott vs. Republic of Peru," a case granting equitable relief similar to the Injunction to remedy a violation of an equal treatment provision. SPE-1352.

Third, numerous decisions have endorsed the conditional requirement at the heart of the Equal Treatment Injunction, notwithstanding any incidental burden on third parties. Every court that has confronted an equal treatment provision has ordered equitable relief comparable to the Injunction. *See supra* at 29. And outside the equal treatment context, courts likewise have issued injunctions barring defendants from paying a dividend to one series of shareholders without also setting aside funds for similar payments to another series of shareholders (*Chrysler Corp. v. Fedders Corp.*, 63 A.D.2d 567, 569 (N.Y. App. Div. 1978)), from paying dividends, bonuses, or "extraordinary" salary to officers or directors before paying obligations to plaintiffs in full (*California Serv. Emps. Health & Welfare Tr. Fund v. Advance Bldg. Maint.*, 06-3078, 2007 U.S. Dist. LEXIS 83987, at *23-24 (N.D. Cal. Nov. 1, 2007)), and enforcing performance of pre-existing rights of first refusal even where it will prejudice other parties who have subsequently contracted to purchase (*Yudell Tr. I et al. v. API Westchester Assocs.*, 227 A.D.2d 471 (N.Y. App. Div. 1996)).

Finally, any harm that Argentina might visit on exchange bondholders would counsel against the Equal Treatment remedy only if it outweighed the harm of competing equitable considerations. For instance, in EBG's own cited authority, *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430 (2d Cir. 1993), this Court acknowledged that the injunction would cause harm to third parties, but

found that harm to be outweighed by three considerations all equally applicable here: harm to the plaintiff; the fact that the third parties' contractual rights were not superior to plaintiffs'; and the need to ensure that the defendant did not benefit by "b[inding] itself in conflicting contracts." *Id.* at 436.

The suggestion of harm to the exchange bondholders is the product of the deeply implausible conjecture that Argentina will act in a manner manifestly contrary to its self-interest. That speculative claim is easily outweighed by the irreparable harm to Appellees that certainly would occur if Argentina were permitted to continue its "unprecedented, systematic, scheme" to evade its contractual obligations. JA-2346. And the scale tips over entirely once one considers the fact that many exchange bondholders now challenging the Injunction as inequitable actually were complicit in Argentina's breach of the Provision, urging Argentina to enact the Lock Law. JA-850. Indeed, Fintech admits in its brief that the Lock Law "shaped the expectations of the Republic and the Exchange Bondholders." Fintech Br. 5. The exchange bondholders' efforts to prevent Appellees from receiving what they are due under their contracts and to hold them in an inferior position disentitles them to any equitable solicitude. *See Hermes Int'l v. Lederer de Paris*

Fifth Ave., Inc., 219 F.3d 104, 107 (2d Cir. 2000) ("[H]e who comes into equity must come with clean hands.") (citation omitted).[5]

3. The Public Interest Supports The Clarified Injunction

Like the remedy affirmed by this Court in its prior opinion, the clarified Injunction is strongly supported by the "[t]he public interest of enforcing contracts and upholding the rule of law." SPA-38. Argentina nevertheless urges that it should be permitted to continue to flout its contractual commitments because, in its view, the Injunction will "imperil future sovereign debt restructurings," lead to injunctions against payments to "multilateral and official sector entities [like the IMF]," and undermine "the status of New York as a financial center." Argentina Br. 47-51. Argentina and its *amici* made these same arguments before (*see* Prior Argentina Op. Br. 41-43; Prior U.S. Br. 17-22; Prior Clearing House Br. 27-28), and this Court already rejected each of these arguments in the October 26 Decision. In any event, Argentina's speculative public policy arguments are as meritless now as they were when Argentina raised them the last time around.

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[5] Fintech's brief reveals that its agenda goes beyond securing the payments that are due to it under its Exchange Bonds; it wants this Court to lock in its privileged position vis-à-vis Appellees, in violation of this Court's interpretation of the Equal Treatment Provision. That is why Fintech argues that the Injunction would provide Appellees with a "windfall" and why it laments the "consequences" that it foresees "if the Republic does pay the Original Bondholders in violation of the Lock Law." Fintech Br. 34.

a. Argentina repeats its refrain that the Injunction will "imperil future sovereign debt restructurings." Argentina Br. 47. But as this Court has explained, "it is highly unlikely that in the future sovereigns will find themselves in Argentina's predicament" both because the Injunction was a response to Argentina's unprecedented course of misconduct and because of the prevalence of CACs. 699 F.3d at 264 & n.16.

First, the Injunction is based upon the particular words in the FAA, and is tailored to the particular facts of this case. 699 F.3d at 264 n.16. Argentina's "course of conduct" involved six years of discriminatory payments, public declarations repudiating the defaulted bonds, and codification of that repudiation in the Lock Law and yearly payment moratoriums. *Id.* at 260. Neither Argentina nor its *amici* identify any other sovereign whose activities are even remotely comparable, even as they admit that there have been "more than 600 individual cases of sovereign debt restructuring." Argentina Br. 69 n.14. There accordingly is little reason to believe these decisions would affect incentives outside of the Argentine context. *See generally* Dam *Amicus* Br. 14-15.[6] Indeed, if anything, it is Argentina's un-

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6 While Argentina cites newspaper articles speculating on the impact resulting from this Court's October 26 Decision, a much more measured analysis by Moody's correctly found the Decision would likely have only a "limited impact" beyond the facts of the present case, because of the unique nature of

[Footnote continued on next page]

precedented course of conduct—involving "political threats, dictated 'take it or leave it' terms and selective defaults"—that threatens "to upset a balance that prevailed through decades of orderly and successful restructurings." Harry Tether, *Courts Are Right To Hold Argentina to Equal Debt Treatment*, DealBook (Jan. 18, 2013), *available at* http://dealbook.nytimes.com/2013/01/18/courts-are-right-to-hold-argentina-to-equal-debt-treatment.

Second, CACs—included in 99% of New York-law sovereign debt issued since 2005—"effectively eliminate the possibility of 'holdout' litigation." 699 F.3d at 264.[7] Argentina's observation that some CACs are structured to "bind only

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> Argentina's misconduct, the specific terms of the Provision, and the prevalence of CACs. *See* Moody's, *US Court Ruling On Argentina's Debt Could Have Limited Implication For Sovereign Restructurings* (Dec. 9, 2012), http://www.moodys.com/research/Moodys-US-court-ruling-on-Argentinas-debt-may-have-limited--PR_261525. Indeed, it is generally acknowledged that "Argentina . . . remain[s] a unique example of a sovereign debtor pursuing a unilateral and coercive approach to debt restructuring" (Hung Q. Tran, The Role of Markets in Sovereign Debt Crisis Detection, Prevention and Resolution, Remarks at Bank of International Settlements Seminar: Sovereign Risk: A World Without Risk-Free Assets? (Jan. 8, 2013)), and an "outlier in the history of sovereign restructurings" (Robin Wigglesworth & Jude Webber, *An unforgiven debt*, Financial Times (Nov. 28, 2012)).

7 Argentina disagrees with this as well, now noting that there remains approximately $45.8 billion in New York-law sovereign debt of older vintages that lack CACs. Argentina Br. 50. Argentina fails to mention that this figure is spread over 65 different issuances, including several investment grade cred-

[Footnote continued on next page]

the bondholders of a particular bond issuance" misses the point. Argentina Br. 50. As Greece's 2012 restructuring demonstrated, nations can successfully restructure the vast majority of their debts even when not all bondholders of a particular issuance agree to a settlement offer. *See* Jeromin Zettlemeyer, et al., *The Greek Debt Exchange: An Autopsy* 26 (Sept. 11, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144932. As Professor Dam explains, the isolated failure of a CAC in a small bond issuance would not stop the sovereign's overall restructuring effort. Dam *Amicus* Br. 16. In any event, aggregation clauses included in Argentina's 2005 Exchange Bonds and in recent Greek bonds demonstrate that sovereigns easily can draft bond agreements to permit CAC votes across a sovereign's bond issuances. Zettlemeyer et al., *supra*, at 27.

Argentina suggests the Injunction will make it difficult "to muster the majority needed to invoke CACs" by "incentiviz[ing] creditors not to restructure" and to stand on their original bonds. Argentina Br. 50; *see also* Krueger Br. 13; Euro Bondholder Br. 27-28. But Belize's restructuring, which postdates this Court's

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> its such as China, Israel, Sweden, New Zealand and Japan, or that it comprises less than 12 percent of the approximately $400 billion stock of sovereign debt governed by New York law. Any problem rooted in bonds of older vintage necessarily will dissipate over time, while the principle that New York courts will enforce parties' written agreements will endure.

October 26 Decision, and in which creditors with *pari passu* rights nevertheless agreed to substantial haircuts, refutes this wholly speculative proposition. *See* Adam Williams & Ye Xie, *Belize Rejecting Argentine Default Model Spurs Bond Rally*, Bloomberg (Jan. 14, 2013), *available at* http://www.bloomberg.com/news/2013-01-14/belize-rejecting-argentine-default-model-spurs-region-best-rally.html. In any event, the same, of course, could be said of the enforcement of ***any*** contractual right under a sovereign's bonds, including the right to repayment. Argentina and its allies are quite wrong to believe that a failure of courts to give effect to the legal obligations in sovereign bonds would incentivize restructuring of those bonds. That is because the marketability of restructured bonds, no less than the original bonds, is critically dependent on the predictable enforcement of contracts.

If the Injunction alters incentives at all (*but see supra*), the most natural consequence would be to discourage sovereign debtors from violating equal treatment provisions. It would make little sense for creditors to "hold out" merely hoping that the sovereign will breach enforceable provisions, and "[i]t is up to the sovereign – not any 'single creditor'– whether it will repudiate that creditor's debt in a manner that violates a pari passu clause." 699 F.3d at 264. In fact, the debtor's knowledge that it cannot relegate holdout bonds to a permanent non-paying, end-of-the-line garbage status (SA-296, 320) will promote dialogue and foster a meaningful negotiation between the debtor and its creditors, increasing the possibility

that the debt can be voluntarily restructured by their mutual assent. *See* Tether, *supra* (this Court's October 26 Decision "will motivate responsible sovereign debtors and private creditors to resolve their differences at the negotiating table."). And to the extent the parties want to preclude the possibility of a court enforcing an equal treatment provision, they can reallocate risk among themselves by removing it through a bond modification such as an exit consent, or by including CACs in their restructured bond agreements, all while knowing that New York courts will enforce the agreements they reach. *See* Moody's, *supra*, at 5 ("Exit consents are a formal agreement that allows a majority group of creditors to change the non-financial terms of the bonds in a way that makes them largely worthless for the minority holdouts.").

On the other hand, adoption of Argentina's approach would foreclose the possibility of truly voluntary restructurings. Under Argentina's model, a sovereign wishing to reduce its debt obligations merely would need to put forward a unilateral pennies-on-the-dollar exchange offer, and then repudiate its obligations to any creditors that rejected that "offer." Dam *Amicus* Br. 6. The sovereign could then treat the exchange offer as a *fait accompli*, claiming the proper remedy for its breach of its equal treatment promise is to force non-consenting creditors to accept the exchange based upon the free-floating, extra-contractual "principle[]" that "holdout creditors" "not be treated better than participants who accepted a steep

discount when exchanging their defaulted debt." Argentina Br. 29. Under this approach, equal treatment provisions, CACs, indeed, the entirety of the sovereign bonds—and the restructured bonds—all are irrelevant. All that matters is the sovereign's willingness to pay (or not). Every sovereign can be *Casablanca*'s Captain Renault: "It is a little game we play. They put it on the bill, I tear up the bill. It is very convenient." But capital will not follow such capriciousness indefinitely, and the emerging market countries most in need of external funding ultimately will be the ones who suffer if creditors lose faith that their contracts will be enforced.

b. The clarified Injunction does not in any way hinder a sovereign's ability to service debt to multilateral organizations such as the IMF. Argentina Br. 47. As this Court already determined, quoting the concession in Appellees' brief, "commercial creditors never were nor could be on equal footing with the" IMF, and thus "a sovereign's *de jure* or *de facto* policy [of subordinating] obligations to commercial unsecured creditors beneath obligations to" the IMF "would ***not*** violate the Equal Treatment Provision." 699 F.3d at 260 (emphasis added). Argentina suggests no reason—beyond its disagreement—why this Court was incorrect.

c. Citing an *amicus* brief filed during the prior round of litigation, Argentina rehashes the claim that "the status of New York as a financial center" will suffer if courts enforce the Equal Treatment Provision. Argentina Br. 51. But this

Court recognized—in the context of litigation involving another default by Argentina—that the interest "in maintaining New York's status as one of the foremost commercial centers" is advanced by "encouraging foreign debtors to pay their debts that are due in New York." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992). "If individuals or corporate entities become wary of their ability to protect their rights in business transactions conducted in New York," this Court explained, "they will look elsewhere." *Id.*; *see also* James K. Glassman, *As Argentina Balks Over Debts, Bond Markets Hold Their Breath*, Wall St. J. (Dec. 28, 2012), at A15 ("Argentina has been getting off the hook for years, but markets have always assumed that the country would eventually be held to account. If U.S. courts and European governments back off, then the market effects could be dire.").

Even Argentina's oft-cited professor Mitu Gulati predicted that creditors could "embrace the fact that there is one jurisdiction [New York] that is willing to try to protect its rights" and would pay a premium for that protection. Tracey Alloway, Joseph Cotterill & Nicole Bullock, *BNY Mellon joins Argentina spat*, Financial Times (Dec. 4, 2012). Indeed, sovereigns issue bonds in New York precisely because creditors seek the protection of a jurisdiction where they know con-

tracts will be enforced. This Court's enforcement of creditors' rights would thus only enhance the reputation and importance of New York law.[8]

C. The Clarified Injunction Does Not Violate The FSIA

Argentina begins its brief with a strikingly familiar argument under the FSIA. *Compare* Argentina Br. 20-26, *with* Prior Argentina Op. Br. 50. This Court, however, previously rejected all of Argentina's FSIA arguments, holding that an Injunction requiring Argentina to make a Ratable Payment to Appellees whenever it makes a payment on the Exchange Bonds does "not operate as [an] attachment[] of foreign property prohibited by the FSIA." 699 F.3d at 262. Argentina presents no argument that could warrant displacing that well-considered law of the case.

Argentina's recycled FSIA argument boils down to an assertion that the Injunction "grant[s] relief not contemplated by the FSIA" because it "compel[s] the Republic to bring immune assets into the country." Argentina Br. 21. But as this Court explained, the only limit on the district court's equitable authority—section

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[8] Notably, since this Court's October 26 Decision, emerging market countries (even those advised by the same law firm that advises Argentina) have continued to issue debt under New York law that includes equal treatment provisions. Thus, in November 2012, Uruguay issued a prospectus prepared by Cleary Gottlieb that offered New York-law bonds with the promise that they would "rank equal in right of payment with all of Uruguay's payment obligations relating to unsecured and unsubordinated external indebtedness." Those bonds, of course, also include a CAC.

1609 of the FSIA, 28 U.S.C. § 1609—applies to orders of "attachment arrest and execution," and is not implicated here because the Injunction "do[es] not attach, arrest, or execute upon any property." 699 F.3d at 262. "[In] restraining [a defendant's] conduct (i.e., commanding it to take certain actions and prohibiting it from taking others)," the Injunction is the "classic modus operandi of injunctive relief," and thus not an attachment, arrest or execution. *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 157 (1st Cir. 2004). Indeed, the Injunction is not even arguably an attachment because Argentina can comply with its directives by paying the exchange bondholders and Appellees in full, in part, or not at all, at Argentina's own option. 699 F.3d at 263.

Argentina attempts to revive its FSIA argument by dressing it up as a challenge to the district court's decision—in its order lifting the stay—to allow Argentina to deposit funds into escrow. *See* Argentina Br. 21. The court included the escrow option ***to protect Argentina*** pending final resolution of the litigation. But this aspect of the district court's order is now moot in any event because this Court re-imposed the stay pending appeal. When the stay is lifted, any payment Argenti-

na chooses to make will be paid to Appellees directly, exactly as contemplated by the original Injunction that this Court found unproblematic under the FSIA.[9]

Argentina also suggests the district court's clarification of the Injunction's application to third parties somehow offends the FSIA. *See* Argentina Br. 22. But none of the relevant third parties—all of whom are private commercial institutions—have any claim to sovereign status, and therefore none can possibly claim immunity under the FSIA. *See EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 210 (2d Cir. 2012) (discovery order did not implicate FSIA in part because it was "directed at . . . commercial banks that have no claim to sovereign immunity"). In any event, the clarified Injunction—just like the Injunction this Court already affirmed—does not purport to attach any funds held by third parties to satisfy Appellees' claims, meaning the Injunction could not possibly violate the FSIA.

Grasping at straws, Argentina newly invokes the anti-commandeering principle of the Tenth Amendment, but that is similarly meritless. *See* Argentina Br. 23 (citing *New York v. United States*, 505 U.S. 144 (1992)). The Tenth Amendment applies only to U.S. States, not to foreign countries; and sovereign nations

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[9] The mooted escrow option did not violate the FSIA, as it did not eliminate Argentina's choice as to how to comply with the Injunction, including by making no payments under the Exchange Bonds and depositing no money into escrow.

that waive their immunity in U.S. courts and consent to their jurisdiction are unquestionably subject to injunctive relief ordered by those courts.

Argentina's further assertion that "the United States" has made the decision that creditors are limited to "execution on non-immune property"—and may never obtain orders of specific performance enforcing their contractual rights against sovereigns—is belied by Congress' choice to the contrary. *See* H.R. Rep. No. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604, at 22 (1976) ("[A] court could, when circumstances were clearly appropriate, order an injunction or specific performance" against a foreign sovereign). As this Court recognized, the FSIA "imposes no limits on the equitable powers of a district court that has obtained jurisdiction over a foreign sovereign." 699 F.3d at 262-63.

Finally, Argentina reverts to defiance, claiming that the Injunction should be vacated because it "would be *impossible* to secure compliance" in light of the Lock Law. Argentina Br. 45. This contention is as ironic as it is meritless. Argentina has asserted for years that it could breach the Equal Treatment Provision only by passing a law subordinating its payment obligations (JA-253), but now it relies upon precisely such a law to urge that the breach cannot be remedied (Argentina Br. 23). In any event, Argentina lifted the Lock Law in 2009 to complete its 2010 Exchange, and Argentine legislators have said that they could do so again in an hour if asked. Appellees' Mot. to Amend Stay, Ex. B. Argentina even proposed in its

most recent brief that it lift the Lock Law if this Court orders a cramdown remedy. Argentina Br. 4, 30. This "impossibility" defense is just a thinly veiled threat that Argentina will attempt to violate the Injunction unless it gets what it wants, a threat that only undermines Argentina's position in the equitable balance. *See Hermes*, 219 F.3d at 107.

II. The District Court Properly Denied EBG's Motion To Vacate The Judgment

In the course of the narrow *Jacobson* remand, EBG entered this litigation for the first time. EBG did not limit itself to the issues identified by this Court for the district court to clarify; instead, EBG filed a motion asking the court to vacate—in its entirety—the judgment this Court had just affirmed. *See* D.E. 401. The district court did not abuse its discretion when it denied that motion.

As a threshold matter, the Court need not reach the merits of EBG's motion. EBG may not bring a substantive due process or takings challenge to the operation of a judicial decision under Rule 60(b)(4). *See* WLF Br. 17-18 (explaining that to bring a takings claim, a party must file an action for compensation under the Tucker Act); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 130 S. Ct. 2592, 2609-10 (2010) (plurality op.) (non-parties must bring a separate action to challenge a judicial taking). Indeed, as a non-party, EBG does not have standing to bring a Rule 60(b) motion at all. *See Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1052 (2d Cir. 1982) (Rule 60(b) relief is "not

ordinarily . . . available to non-parties"); 60 James Wm. Moore, et al., Moore's Federal Practice § 60.63 (3d ed. 2007).[10]

EBG's belated challenges to the Injunction are, in any event, an obvious attempt to re-litigate an argument this Court has already rejected: that the Injunction inequitably burdens the exchange bondholders' interests. *See supra* at 30-36. Perhaps because it knows it is too late to litigate that underlying issue, EBG presents a series of strained constitutional and procedural arguments. These arguments provide no basis to disturb the Injunction, which is precisely why nobody raised them ***prior*** to entry of judgment. They certainly do not satisfy the requirements necessary to award relief under Rule 60(b).

A. The Injunction Does Not Violate Exchange Bondholders' Substantive Due Process Rights

EBG claims the Injunction interferes with its contractual rights under the Exchange Bonds, in violation of its substantive due process rights. *See* EBG Br. 30. But the days when courts invoked substantive due process to invalidate gov-

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[10] This Court has recognized a limited exception to that rule in "extraordinary circumstances" where the non-party's interests were "not . . . adequately represented during the litigation, because of the peculiar structure of [the] case." *Federman v. Artzt*, 339 F. App'x 31, 33-34 (2d Cir. 2009). But no such "extraordinary circumstances" are present here, as EBG's interests were adequately represented by Argentina, which energetically resisted the Injunction, including on the ground that it would burden the rights of the exchange bondholders. *See, e.g.*, JA-2150, 2324.

ernment action that "interferes with the right of contract" (*Lochner v. New York*, 198 U.S. 45, 53 (1905)) are long past. A substantive due process claim requires a right so fundamental that, in its absence, "neither liberty nor justice would exist," such as "procreation, marriage and family life." *Local 342 v. Huntington*, 31 F.3d 1191, 1196 (2d Cir. 1994). "Simple, state-law contractual rights" do not meet that threshold. *Id.*; *accord Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990). EBG's citation to Justice Kennedy's concurrence in *Stop the Beach*, is therefore beside the point. Justice Kennedy argued that, "[i]f a judicial decision . . . ***eliminates an established property right***, the judgment could be set aside as a deprivation of property without due process of law." *Id.* at 2614 (emphasis added). But that merely raises the question of what constitutes a "property right" under substantive due process, and contractual rights are excluded from that category under this Court's precedents.

Even if EBG's rights to receive payment were a form of property that was eligible for protection under the substantive due process doctrine, the Injunction does not "eliminate[]" those rights, as Justice Kennedy's articulation would require. EBG speculates that Argentina will be less likely to honor its payment obligations on the Exchange Bonds if the Injunction stands, but that is just implausible conjecture. *See supra* at 33. And even supposing events prove EBG correct and

Argentina defaults on the Exchange Bonds in order to punish Appellees, EBG will retain the right to sue Argentina for the breach.

Finally, under the standard articulated in Justice Kennedy's *Stop the Beach* concurrence, "incremental modification under state common law . . . does not violate due process," so long as courts do not completely "abandon settled principles." 130 S. Ct. at 2615. EBG itself claims that "there is no decision from any New York court, let alone the Court of Appeals, that sheds any light—beyond the most general precepts of contract construction—on how this Court should interpret a *pari passu* clause." EBG Certification Mot. 9. EBG's assertion that this Court's October 26 Decision is nonetheless so outrageously contrary to precedent that it constitutes a violation of due process is frivolous.[11]

B. The Injunction Does Not Violate The Takings Clause

The Injunction likewise does not violate the Takings Clause. When the issue of whether a judicial takings claim can ever lie came before the Supreme Court in *Stop the Beach*, only three Justices joined Justice Scalia's opinion arguing in favor

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[11] EBG's *Lochner*-era authorities—*Thompson v. Consolidated Gas Utilities. Corp.*, 300 U.S. 55 (1937), *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. Holmberg*, 282 U.S. 162 (1930), *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896)—involved administrative orders depriving parties of their property rights. Those precedents from a bygone era area far cry from a judicial decision, like the present case, which merely enforces pre-existing contractual rights that non-parties to subsequent contracts speculatively claim may burden their interests.

of the adoption of the theory. 130 S. Ct. at 2592. The four other non-recused Justices expressed grave reservations. *See id.* at 2614-17 (Kennedy, J., concurring); *id.* at 2618-19 (Breyer, J., concurring). Those reservations accord with a long line of authority rejecting judicial takings claims as a categorical matter. *See, e.g.*, *Brinkerhoff-Faris Tr. & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930); *Brace v. United States*, 72 Fed. Cl. 337, 358-59 & n.35 (2006).

Even proponents of the judicial takings theory, moreover, recognize that this doctrine would apply only where a decision eliminates a pre-existing property right. *See Stop the Beach*, 130 S. Ct. at 2610-12 (plurality op.). Here, EBG cannot point to any property right that has been eliminated: The only relevant right enjoyed by EBG is a contract right to payment, and nothing in the Injunction undermines, and most certainly does not eliminate, that right in any way. At worst, the Injunction makes it somewhat more likely that Argentina will breach its promise under the Exchange Bonds, although it bears emphasis once again how deeply implausible it is to suggest that Argentina would adopt such an irrational course. *See supra* at 33. Courts have uniformly held that the government does not effectuate a taking simply because it makes it less likely that a party will honor its agreements. *See, e.g.*, *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-14 (1923) (contractual rights not "taken" when government regulation of third party frustrat-

ed performance); *Huntleigh USA Corp. v. United States*, 75 Fed. Cl. 642 (2007) (similar), *aff'd*, 525 F.3d 1370 (Fed. Cir. 2008).

C. The District Court Did Not Violate EBG's Procedural Due Process Rights

EBG's procedural due process arguments are similarly baseless. Non-parties do not acquire due process rights to notice and an opportunity to be heard merely because they might be affected by a decision. *See Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 41-43 (1st Cir. 2009); *United States v. Buck*, 281 F.3d 1336, 1345 (10th Cir. 2002). To the contrary, due process "obviously does not mean . . . that a court may never issue a judgment that, in practice, affects a nonparty." *Provident Tradesman Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 110 (1968).

Moreover, even if EBG's procedural due process rights were implicated, EBG did receive notice of the proceedings and therefore did have an adequate opportunity to be heard. There can be no dispute that EBG—a group consisting of sophisticated commercial entities—was aware of the high-profile proceedings in the district court. Indeed, the very documents of the exchange offers warned the exchange bondholders about this litigation. *See* 2005 Prospectus, JA-466; 2010 Prospectus, JA-857. And Argentina's 2011 18-K specifically discussed the then-ongoing remedial proceedings in the district court, in which EBG declined to participate. JA-2790. When a party such as EBG had ***actual notice*** of a proceeding

but did not attempt to take part, that party may not thereafter upset a judgment under Rule 60(b)(4) for lack of notice and an opportunity to be heard. *See Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 429 (2d Cir. 2011) ("[A]lthough due process does not require actual notice, actual notice satisfies due process"); *accord United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1378 (2010). EBG does not explain why it waited so long to voice its due process concerns, why that long delay should be excused, or what prejudice it suffered from not receiving formal notice of proceedings it was already closely monitoring.[12]

EBG asserts that the district court was required to hold an evidentiary hearing before issuing the Injunction, but due process imposes no such requirement. Even where a party asserts its purported right to a hearing on a timely basis, which EBG did not do here, the party is entitled to such a hearing only when it can identify a ***material*** factual dispute that a hearing would help resolve. *Beck v. Levering*,

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12 Cases relied upon by EBG (EBG Br. 39), are not to the contrary. *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 258 (2d Cir. 1991), *Orix Fin. Serv. v. Phipps*, 2009 WL 2486012, at *3 (S.D.N.Y. Aug. 14, 2009), and *Triad Energy Corp. v. McNell*, 110 F.R.D. 382, 386 (S.D.N.Y. 1986), all involved allegations that improper service deprived the district court of personal jurisdiction over parties bound by a court order; they have no relevance to the argument that due process is offended by failure to formally serve a non-party that in any event had actual notice.

947 F.2d 639, 642 (2d Cir. 1991). EBG has identified none. EBG asserts that a hearing "would have established [that] the tens of billions of dollars in third party interests . . . are put at risk by the Injunction," as well as the "numerous" but unidentified "ways in which those interests are put at risk." EBG Br. 38 n.21. But in reality the relevant factual questions are simple: This Court has already affirmed the district court's factual finding that Argentina has sufficient resources to honor all of its obligations to both Appellees and EBG. 699 F.3d at 263. Whether Argentina will do so is not a fact capable of being ascertained in an evidentiary hearing. EBG thus fails to explain how an evidentiary hearing even arguably could have changed the equitable analysis in this case.[13]

D. EBG's Rule 19(a) Argument Is Meritless

EBG's argument that it must have been joined as a necessary party under Rule 19(a) is similarly untimely and baseless. That EBG has waited until this "be-

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[13] EBG, in any event, had an opportunity to be heard after the October 26 Decision—an opportunity that it availed itself of both by filing a brief and by participating at the district court's November 9 hearing. *See* SPE-472-478; D.E. 410. EBG complains that it had only three days to respond to Appellees' briefs, but due process does not guarantee a non-party the briefing schedule of its choice. Moreover, EBG had significantly more time to draft its brief, which addressed issues teed up weeks earlier by this Court's decision—a fact that is well-illustrated by the polished work product EBG was able to submit to the district court, a product that does not much differ from its submission to this Court. *See* D.E. 410.

lated juncture" to raise its Rule 19(a) claim means that the argument is forfeited. *See Manning v. Energy Conversion Devices*, 13 F.3d 606, 609 (2d Cir. 1994).

In any event, the exchange bondholders are not necessary parties under Second Circuit law, since "[a] non-party to a contract is ordinarily not a necessary party to a lawsuit asserting a breach of contract." *Carlone v. Lion & The Bull Films, Inc.*, 861 F. Supp. 2d 312, 324 (S.D.N.Y. 2012). EBG argues that the resolution of Appellees' contractual dispute with Argentina will adversely impact its interest in its own separate contracts with Argentina. But that is the same argument that this Court rejected in *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385-89 (2d Cir. 2006). In that case, Visa claimed that the resolution of MasterCard's suit to enforce its right of first refusal to sponsor certain events would impact Visa's own subsequent contractual rights to sponsor the same events. *Id.* at 386-88. This Court rejected that argument, holding that Visa was not a necessary party in MasterCard's suit against FIFA because even if MasterCard prevailed, Visa could then bring a separate suit against FIFA for breach of contract.

Indeed, EBG's Rule 19(a) argument is ***substantially weaker*** than the argument this Court rejected in *MasterCard*. Just like Visa, EBG will have the right to sue Argentina if Argentina breaches its contractual rights to EBG while complying

with the Injunction.[14] But whereas MasterCard's win in its suit would have necessarily been Visa's loss vis-à-vis the event sponsorship, Argentina has sufficient financial resources to pay both EBG and Appellees timely and in full, and thus any suggestion that the Injunction will cause Argentina to breach its obligations to EBG is purely conjectural. *See supra* at 33; *see also Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1472 (1st Cir. 1992); *Fleet Nat'l Bank v. Trans World Airlines, Inc.*, 767 F. Supp. 510, 515 (S.D.N.Y. 1991).[15]

III. Argentina's Request For Certification Is Meritless

Argentina's request that this Court certify to the New York Court of Appeals the question whether a "violation of a pari passu clause support[s] the remedy" ordered by the district court (Argentina Br. 55), should be rejected for much the same reasons that this Court rejected a similar request by EBG. The propriety of the In-

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[14] EBG's reliance on *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 700-01 (2d Cir. 1980), is wholly misplaced because "[i]n *Crouse-Hinds*, the actual contract involving the absent third party was the basis of the claim. The counterclaim specifically challenged the validity of the merger agreement . . . . In contrast, in this case, while the [EBG's contract] may be affected by this litigation, it is not the contract at issue in [Appellees'] lawsuit." *MasterCard*, 471 F.3d at 386.

[15] To the extent that EBG intended to argue that it is an "indispensable" party under Rule 19(b)—a provision EBG does not invoke—EBG has never attempted to make that even more stringent showing. *See MasterCard*, 471 F.3d at 389. And because it is clear that EBG is not a "necessary" party under Rule 19(a), it follows *a fortiori* that it is not an indispensable party. *Id.*

junction is ultimately an issue of federal, not state, law. *Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 806 (2d Cir. 1981). And, to the extent that Argentina seeks certification of the "proper interpretation of the pari passu clause" (Argentina Br. 55), it seeks to certify the very issue already decided by this Court's October 26 Decision (*see* Opp. to Mot. to Certify 7-13). Argentina's request is ***even more improper*** than EBG's request, as Argentina is seeking certification only after it has already litigated and lost these issues before this Court—a fact highlighted by Argentina's decision to support certification only "[i]f the Court does not vacate the Amended Injunction[]" on the basis of its other arguments. Argentina Br. 54. The certification device does not exist to afford litigants like Argentina a second bite at the apple after their arguments have already been rejected by the federal courts.

CONCLUSION

For the foregoing reasons, the district court's orders denying the motion to vacate and entering the clarified Injunction should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,971 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 25, 2013

/s/ Matthew D. McGill
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January 2013, a true and correct copy of the foregoing Response Brief was served on the following counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2):

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