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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,*

—against—

THE 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

## BRIEF FOR *AMICUS CURIAE* THE CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF REVERSAL

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## INTRODUCTION

The Clearing House Association L.L.C. ("The Clearing House") submits this brief as *amicus curiae* in the appeal by defendant the Republic of Argentina ("Argentina") from orders entered on remand by the United States District Court for the Southern District of New York (Griesa, J.) on November 21, 2012 amending and expanding an injunction that the lower court had entered on February 23, 2012 (the "Amended Injunction" (SPE-1378–85)[1]). The Clearing House supports Appellants' position that the Court should reverse the district court and vacate the Amended Injunction.

This brief addresses an issue of considerable importance to the United States and international credit markets and payment systems: Whether a court may attempt to give force to an order directed at a foreign sovereign judgment debtor (here, Argentina) by entering an otherwise unenforceable injunction whose entire purpose and intended effect is achieved by commandeering third parties involved

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[1] Citations to "A-" refer to the Joint Appendix; citations to "SPE-" refer to the supplemental joint appendix filed on December 28, 2012.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), The Clearing House states that this brief was authored by The Clearing House and its counsel; was neither authored nor funded by any party to this action; and no person other than the *amicus curiae*, its members, or counsel contributed money that was intended to fund preparing or submitting this brief.

in performing ordinary and ministerial tasks such as clearing and settling electronic funds transfers ("EFTs").

Although the lower court recognized that it could not enjoin "intermediary banks" within the meaning of Uniform Commercial Code Article 4A from processing EFTs, it failed to recognize that the issue, impact and dangers posed by its injunction go well beyond such banks. We wish to focus on four of the Amended Injunction's deficiencies that are of particular concern to The Clearing House: (i) in expressly directing the Amended Injunction to non-party banks, financial institutions and clearing and payment systems involved in the distribution of payments to bondholders who participated in Argentina's 2005 and 2010 voluntary debt exchange offer (the "Exchange Bondholders"), the court extended the reach of the injunction beyond the scope permitted under federal law; (ii) likewise, that application of the Amended Injunction interferes with the property rights of the Exchange Bondholders, who are entitled to receive payments of principal and interest on those bonds from those banks, financial institutions and clearing and payment systems; (iii) despite the carve-out for intermediary banks as defined by U.C.C. Article 4A, the Amended Injunction nevertheless contravenes federal and New York State law governing payment systems and would impose risk and unwarranted burden on remote banks that are not "intermediary banks"

under the U.C.C., as well as on funds-transfer networks, clearing organizations and other financial institutions involved in the payment process; and (iv) the Amended Injunction exposes such entities that are located outside of New York to the risk of double liability without due process.

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1853, The Clearing House is the United States' oldest banking association and payments company. It is owned by the world's largest commercial banks, which collectively employ 1.4 million people in the United States and hold more than half of all U.S. deposits.[2] The Clearing House is a nonpartisan advocacy organization representing, through regulatory comment letters, *amicus* briefs and white papers, the interests of its member banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C. ("PaymentsCo"), provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated clearing-

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[2] The members of The Clearing House are: Banco Santander, S.A.; Bank of America, N.A.; The Bank of New York Mellon; The Bank of Tokyo-Mitsubishi UFJ Ltd.; Branch Banking and Trust Company; Capital One, N.A.; Citibank, N.A.; Comerica Bank; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; KeyBank, N.A.; PNC Bank, N.A.; RBS Citizens, N.A.; The Toronto-Dominion Bank; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

house, funds-transfer, and check-image payments made in the United States.[3]

PaymentsCo operates the Clearing House Interbank Payments System ("CHIPS"), a real time, final payment funds-transfer system that serves 52 U.S. and foreign banks and that processes an average of 385,000 payment orders per day, with an average aggregate daily value of $1.452 trillion.[4] CHIPS and Fedwire, which is operated by the Federal Reserve Banks, are the principal payment systems for funds transfers in the United States.[5]

The Clearing House has a substantial interest in the outcome of this action because the application of the lower court's sweeping Amended Injunction to financial institutions involved in the distribution of payments on the Exchange Bonds violates long-established principles of equity jurisdiction, as well as federal and state statutes, and imposes undue burdens and risks on those institutions. As such, the Amended Injunction would, if upheld, undermine the efficiency and reliability of the payment system and New York's preeminence as a commercial center.

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[3] *See* http://www.theclearinghouse.org.

[4] *See* http://www.chips.org/docs/000652.pdf.

[5] During the third quarter of 2012, funds transfers through Fedwire amounted to an average of $2.388 trillion per day. *See* http://federalreserve.gov/paymentsystems/fedfunds_qtr.htm.

**BACKGROUND**

On February 23, 2012, the district court entered an injunction (the "2/23/12 Injunction") that purported to bind "all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment" due under the bonds or other obligations issued pursuant to Argentina's 2005 or 2010 exchange offers (the "Exchange Bonds"). A-3388 (2/23/12 Injunction ¶ 2.e). That injunction prohibited such "Participants" from processing payments made pursuant to the Exchange Bonds unless Argentina had certified to the district court that Argentina had made or concurrently was making a Ratable Payment to plaintiffs. A-3388 (2/23/12 Injunction ¶ 2.e–f).

On appeal to this Court, The Clearing House filed an *amicus* brief that argued, *inter alia*, that the vague language in the 2/23/12 Injunction was unreasonable and improper because it would impose undue burdens on banks and threaten delay of unrelated payments.[6] In its opinion on appeal, this Court shared The Clearing House's concern and remanded for consideration of the potential effect of the 2/23/12 Injunction on intermediary banks and other third parties. *NML Capital, Ltd.* v. *Republic of Argentina*, 699 F.3d 246, 264–65 (2d Cir. 2012).

[6] Br. for *Amicus Curiae* The Clearing House Association L.L.C. In Support of Reversal, *NML Capital, Ltd.* v. *Republic of Argentina*, No. 12-105(L), at 17–24 (2d Cir. Apr. 4, 2012) (Dkt No. 237).

The Court declined to accept plaintiffs' assurances that the injunctions were not intended to encompass intermediary banks, because that claim was inconsistent with the language of the 2/23/12 Injunction. *Id*. at 264. "Consequently," the Court directed, "we believe the district court should more precisely determine the third parties to which the Injunctions will apply before we can decide whether the Injunctions' application to them is reasonable." *Id*.

Providing almost no time for third parties to provide fully considered views,[7] the district court amended the 2/23/12 Injunction to specify various financial institutions that the Amended Injunction provides would be deemed to have acted "in active concert and participation" with Argentina if they processed a payment to Exchange Bondholders that was made in violation of the Amended Injunction. (SPE-1382 (Amended Injunction ¶ 2.f).) Among the named institutions was one of the trustees for the Exchange Bondholders—Clearing House member The Bank of New York Mellon ("BNY Mellon"), which under a New York law-governed trust indenture receives (in Argentina) payment of

[7] On Friday, November 9, 2012, the district court announced a schedule for consideration of the effect of the Amended Injunction on third parties that provided three days the following week to respond to plaintiffs' brief in support of its proposed injunction. (SPE-449.) Such a schedule was unreasonable for third parties to evaluate a filing, engage counsel as necessary and make a fully considered submission.

interest and principal from Argentina—and The Depositary Trust Company ("DTC"), a securities clearing organization, which receives the proceeds of EFTs originated by BNY Mellon and distributes such proceeds to its participant financial institutions, which in turn (often through various other financial institutions or funds-transfer systems) pay the beneficial Exchange Bondholders. The court also exempted "intermediary banks" as defined in Article 4A of the U.C.C. (N.Y. U.C.C. § 4A–104) from the reach of the Amended Injunction. (SPE-1383 (Amended Injunction ¶ 2.g).)

The Amended Injunction contains almost the same defects as the original injunction that this Court remanded. The carve out for "intermediary banks" within the meaning of U.C.C. Article 4A did not cure the problems for financial and clearing institutions that U.C.C. Article 4A was crafted to address. Because the district court has not fashioned an injunction that is consistent with applicable law, the Court should vacate the Amended Injunction.

## ARGUMENT

As the Supreme Court has emphasized, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982). The analysis includes the impact on nonparties. *E.g.*, *Girl Scouts of Manitou*

*Council, Inc.* v. *Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) ("Where appropriate, this balancing process should also encompass any effects that granting or denying the preliminary injunction would have on nonparties (something courts have termed the 'public interest')."); *Sammartano* v. *First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002); *Oburn* v. *Shapp*, 521 F.2d 142, 147 (3d Cir. 1975).

The district court here has ignored this mandate and been careless as to the rights and obligations of nonparties. First, the court included in the Amended Injunction a catalogue of entities involved in the processing of payments to third-party Exchange Bondholders, entities that have no particular interest in denying plaintiffs their recovery. This impermissibly extended the Amended Injunction beyond the ordinary reach of injunctions under federal law. Second, in requiring those entities to enforce the injunction, the Amended Injunction improperly interferes with the property rights of the Exchange Bondholders in payments of interest and principal received by the trustee for those Bondholders. Third, the Amended Injunction, notwithstanding the carve-out for "intermediary banks," continues to impose burdens on clearing organizations and non-party financial institutions that are contrary to federal and state law. Finally, the

Amended Injunction exposes such entities located outside of New York to the risk of double liability.

## I. THE AMENDED INJUNCTION IMPROPERLY EXPANDS THE SCOPE OF NONPARTIES BOUND BY ITS TERMS BEYOND AIDERS AND ABETTORS.

The Amended Injunction expressly purports to bind five categories of persons that are involved in the processing of payments to Exchange Bondholders, including (i) the indenture trustees for the Exchange Bondholders, which receive payments of principal and interest from Argentina; (ii) the registered owners of the Exchange Bonds, to which the trustees separately transmit such payments; and (iii) the "clearing corporations and systems, depositaries, operators of clearing systems and settlement agents" for the Exchange Bonds, which are to distribute the payments to beneficial owners of the Exchange Bonds. (SPE-1382–83 (Amended Injunction ¶ 2.f).)[8] In extending the Amended Injunction to these financial institutions the district court rested on a finding, made without joining those entities to the suit, that their participation in distributing payments of principal and interest to Exchange Bondholders would amount to acting "in active concert and participation with the Republic" in any violation of the command that the Republic

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[8] The other categories are (iv) paying agents for the trustee and transfer agents and (v) "attorneys and other agents engaged by any of the foregoing or the Republic in connection with their obligations under the Exchange Bonds."

pay plaintiffs whenever it pays Exchange Bondholders. (*Id.*) This finding was contrary to controlling law on the reach of Fed. R. Civ. P. 65(d).[9]

Pursuant to Fed. R. Civ. P. 65(d), an injunction binds "persons who are in active concert or participation" with a party or its agents. This is a codification of the common law standard that one who aids and abets a violation of a court order can be held in contempt. *Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc.* v. *Nat'l Spiritual Assembly of Baha'is of U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010). The rationale for that test is that an aider and abettor is so closely identified with the defendant that the person can be treated as if it were the defendant itself and therefore can be bound:

> It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies.[10]

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[9] The Clearing House also joins in the position set forth in the Brief for Non-Party Appellant The Bank of New York Mellon, as Indenture Trustee, at 15–23 (Dec. 28, 2012), that in making this finding without joining the nonparties to the suit, the district court also violated the due process rights of those entities. We focus here on the merits of that finding.

[10] "Privy" here does not refer to any contractual relationship (as exists between a bank and its customer), but to the legal conclusion that the non-party is bound

(*footnote continued*)

*Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 436–37 (1934) (footnote added); *accord Regal Knitwear Co.* v. *NLRB*, 324 U.S. 9, 14 (1945) (Fed. R. Civ. P. 65(d) "is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.").

Consistent with its origins as a test for identifying those who are "identified with [the defendant] in interest," the concept of "active concert and participation" does not reach persons who are not "associates" or "confederates," that is, persons who do not share with the defendant an interest in achieving the prohibited result. *Chase Nat'l Bank*, 291 U.S. at 437 ("[E]stablished principles of equity jurisdiction and procedure . . . require that the clause [subjecting nonparties to liability under an injunction] be limited to confederates or associates of the

(*footnote continued*)
by the defendant's conduct. *Nat'l Spiritual Assembly of Baha'is*, 628 F.3d at 849 ("When privity is invoked as a basis for binding a nonparty to an injunction, it is 'restricted to persons so identified in interest with those named in the decree that it would be reasonable to conclude that their rights and interests have been represented and adjudicated in the original injunction proceeding.'" (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2956 (2d ed. 1995))).

defendant.”). In both civil and criminal contexts, courts have relied upon the Supreme Court’s test in *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949): “In order to aid and abet another to commit a crime it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.’” *Id.* at 619 (quoting *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, L., J.)); *accord*, *e.g.*, *United States* v. *Kaminski*, 692 F.2d 505, 517 (8th Cir. 1982); *SEC* v. *Apuzzo*, 689 F.3d 204, 212 (2d Cir. 2012) (adopting Judge Hand’s formulation for aider and abettor liability in civil securities fraud cases); *E. Trading Co.* v. *Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000) (“[I]t is apparent that one who aids and abets a fraud, in the sense of assisting the fraud and wanting it to succeed, is himself guilty of fraud[.]”); *Landy* v. *FDIC*, 486 F.2d 139, 163–64 (3d Cir. 1973) (noting that this standard “harmonizes with the . . . ‘state of mind’” applicable to civil aiding and abetting liability).

Thus, courts have found that a non-party’s activities that may incidentally aid the defendant in accomplishing the prohibited result do not amount to aiding and abetting where the non-party was simply carrying out its ordinary

business activities,[11] or acting pursuant to a pre-existing duty,[12] or otherwise had an "independent interest" in doing the prohibited act.[13]

Here, the district court specifically found that the nonparties involved in transmission and distribution of payments of principal and interest to Exchange Bondholders would be acting in active concert and participation with Argentina if they participated in that transmission and distribution without receiving a certification that Argentina had complied with the Amended Injunction. (SPE-1382 (Amended Injunction ¶ 2.f).) But the trustee and the other nonparties would

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[11] *E.g.*, *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 392–93 (S.D.N.Y. 2009) (clearing broker that cleared transactions and extended credit, even with knowledge of market manipulation scheme, "cannot be held liable as an aider and abettor simply because it performed its contracted-for services") (citations and internal quotation marks omitted); *Rosner* v. *Bank of China*, 528 F. Supp. 2d 419, 426–27 (S.D.N.Y. 2007) (no aiding and abetting where "no evidence that [bank] was doing anything more than providing its usual banking services," even if bank had actual knowledge of fraud).

[12] *Chase Nat'l Bank*, 291 U.S. at 437 (injunction could not reach non-party state officials who might seek to enforce state court judgment "acting solely in the performance of their official duty," even if such action was to benefit defendant city).

[13] *Heyman* v. *Kline*, 444 F.2d 65, 66 (2d Cir. 1971) (where husband gave wife half interest in option prior to suit, wife had "independent interest" in option and could not be held to have participated in husband's barred maintenance of claim against property). *See also Regal Knitwear*, 324 U.S. at 13 ("The courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.").

not be participating in the payment to the Exchange Bondholders "as in something that he wishes to bring about" or as an "associate or confederate." Rather, those nonparties would be acting in accordance with independent obligations to third parties under the terms of an indenture (under which the trustee assumed specified duties to the Exchange Bondholders) or in accordance with their pre-existing obligations under the Uniform Commercial Code and banking law. Indeed, in no meaningful sense are the financial institutions even incidentally aiding Argentina, which unilaterally decides whether to make a payment to the trustee for the benefit of Exchange Bondholders, after which the trustee and the other nonparties fulfill their own respective obligations to distribute funds.

That some of these nonparties, such as the indenture trustee, are acting pursuant to a pre-existing contract with the Republic is irrelevant where, as here, the nonparties' purpose in entering into those indentures in 2005 or 2010 was not to deprive plaintiffs of payments under completely separate bonds. Clearing brokers and banks routinely are acting pursuant to contractual undertakings with the defendants in cases that reject aiding and abetting claims.[14] That contractual

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[14] *E.g.*, *Rosner*, 528 F. Supp. 2d at 422, 427 (bank provided banking services to defendants); *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 544 (S.D.N.Y. 2008) (non-party broker was alleged market manipulator's primary clearing broker throughout relevant period).

connection does not transform the ordinary-course services into aiding and abetting. To apply the Amended Injunction to these nonparties violates "established principles of equity jurisdiction and procedure." *Chase Nat'l Bank*, 291 U.S. at 437.

Beyond this violation of fundamental legal principles, this expansive application of the prohibitions of the Amended Injunction to nonparties involved in distributing payments to bondholders presents a serious threat to the integrity of the securities clearing and payment systems. If, for example, an indenture trustee's duties to its beneficiaries under an instrument that preexisted the district court's injunction can be commandeered to the service of another creditor of the bond issuer in order to enforce a contractual obligation under a different contract, commercial parties will avoid trustees subject to the jurisdiction of the New York courts and trust indentures governed by New York law. Further, directing the trustees and others to impound or refuse funds to which Exchange Bondholders otherwise are entitled will inevitably generate claims and eventually litigation. The incremental burdens and risks of competing claims upon the securities clearing and payment systems will raise costs and reduce the efficiency of those systems.

## II. THE AMENDED INJUNCTION IS CONTRARY TO LAW BECAUSE IT INTERFERES WITH PROPERTY RIGHTS OF NONPARTIES.

The application of the Amended Injunction to the non-party participants in the distribution of payments of principal and interest is also unlawful because by the time any of those persons act, the funds involved are no longer the property of the Republic. (SPE-650 (Trust Indenture, dated June 2, 2005, § 3.5(a) ("the Republic shall have no interest whatsoever" in payments received by trustee)).) It is clear that a creditor of a bond issuer could not attach funds in the hands of a trustee for bondholders because the funds belong to the bondholders. *Brown* v. *J.P. Morgan & Co.*, 40 N.Y.S. 2d 229, 233 (1st Dep't 1943) (bondholder cannot attach money in the hands of trustee for other bondholders because the money "belongs to the [other] bondholders"), *aff'd*, 295 N.Y. 867 (1946). Likewise, once a financial institution receives such funds, no court may enjoin performance of its contractual obligations to transfer the funds to the persons who have property rights in the funds.

For example, in *Chase Nat'l Bank* v. *City of Norwalk*, the City of Norwalk, Ohio, obtained an injunction in state court against the electric power company directing the company to remove its power lines and poles from city streets because its concession had expired. But the power company had mortgaged the power lines and poles to bondholders and the trustee sued in federal court to

prevent enforcement of the injunction. The United States Supreme Court upheld an injunction barring enforcement of the Ohio state court order, finding that federal law restricting anti-suit injunctions "could not preclude the federal court from protecting the trustee's alleged property from wanton destruction." 291 U.S. at 438.

Likewise in *Herrlein* v. *Kanakis*, 526 F.2d 252 (7th Cir. 1975), the district court had enjoined the defendant's use of plaintiff's trade secrets to manufacture or sell certain pet foods. But prior to the lawsuit, the defendant had sold the business to a third party, Mogul. The district court held Mogul in contempt for violating the injunction. The Seventh Circuit overturned the finding of contempt, holding:

> In effect, this injunction adjudicated the merits of Mogul's property rights in the animal formulas, the subject matter of the underlying suit to which Mogul was not a party. . . . The injunction was an attempt to obtain satisfaction of [the] judgment [against the defendant] by binding a person not a party to the suit. This is antithetical to the primary axiom of our jurisprudence that no man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim against him.

*Id.* at 255.

Here, the Amended Injunction, by requiring the various nonparties involved in the distribution of payments to Exchange Bondholders to decline to

transmit those payments, likewise interferes with the property rights of the Exchange Bondholders. Not only were the Exchange Bondholders not joined to the lawsuit before their rights were so abrogated, but as noted above the Trust Indenture makes those rights indisputable. Again, that the Exchange Bondholders' rights were established in a contract (the Exchange Bonds) with Argentina, or that the duties of the trustee and other nonparties were established in a contract with Argentina (*e.g.*, the Trust Indenture), is irrelevant. The affected nonparties in both *Chase Nat'l Bank* and *Herrlein* acquired their rights in contracts with the defendants in those cases. The direction to trustees and others to interfere with property rights of the Exchange Bondholders was thus improper, and undermines the integrity of trust indentures under New York law.[15]

## III. THE AMENDED INJUNCTION VIOLATES FEDERAL AND NEW YORK STATE LAW BECAUSE IT IMPROPERLY INTERFERES WITH THE ORDERLY FUNCTIONING OF PAYMENT SYSTEMS.

The lower court's carve-out in the Amended Injunction for "intermediary banks" as defined in U.C.C. Article 4A does not extend far enough to protect non-party clearing organizations and financial institutions involved in

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[15] As discussed in the next section, the U.C.C. commands the same result as the general equitable principles discussed in this section: a creditor of the originator of a payment cannot, by either attachment or injunction, interfere with payment flows destined for third parties after the payment or payment order has left the originator's bank.

the processing or settling of EFTs. Consequently, the Amended Injunction contravenes New York State and federal law, and imposes unwarranted risk and burden on such entities.

First, the term "intermediary banks" is defined in the U.C.C. to exclude the beneficiary's bank, the bank at the end of an EFT. N.Y. U.C.C. § 4A–104(2) ("'Intermediary bank' means a receiving bank other than the originator's bank or the beneficiary's bank."). But beneficiary's banks are equally exempt from attachment and restraint by creditors of the originator, *id.* § 4A–502 & cmt. 4, and the application of the Amended Injunction to beneficiary's banks would interfere with the ordinary processing of payments just as much as applying it to intermediary banks would have done.[16]

[16] Plaintiffs argued in the court below that U.C.C. Article 4A does not bar their efforts to reach assets in the hands of beneficiary's banks by means of an injunction, as opposed to an attachment. That is wrong. It is undisputed (as plaintiffs conceded below) that U.C.C. Article 4A prohibits creditors of the originator of a funds transfer from reaching the proceeds of such a funds transfer by serving creditor process (*e.g.*, an attachment order) on the beneficiary's bank. N.Y. U.C.C. § 4A–502(d) & cmt 4. Pursuant to U.C.C. § 4A–503, a court may enter an injunction concerning EFTs, but only "[f]or proper cause and in compliance with applicable law," and subject to the same limitations as those to which attachments and other creditor process are subject under U.C.C. § 4A–502. *See* N.Y. U.C.C. § 4A–503 cmt. ("This section [4A–503] is related to Section 4A-502(d) and to Comment 4 to Section 4A-502. It is designed to prevent interruption of a funds transfer after it has been set in motion.").

In fact, the application of the Amended Injunction to beneficiary's banks in this case would be peculiarly burdensome. The Exchange Bonds in this case are likely to be very widely held.[17] The banks and institutions that receive payment from DTC or its participants, and that are to process transfers on those bonds for the Exchange Bondholders, could be located anywhere in the United States or virtually anywhere abroad. Major money-center banks in New York and other financial centers that handle immense volumes of payments have developed sophisticated and expensive systems to monitor and interdict international payments in connection with the enforcement of federal sanctions against Iran, Cuba and other sanctioned governments, entities, and persons. But at regional and smaller banks around the world, which may engage in a significantly lower volume of international transactions, such screening systems are less robust. This is because such institutions are required only to maintain compliance systems commensurate with the risk posed by their location, size and nature of their business. The lower volume of international business means a lower risk of

[17] For example, some 60,000 Italian plaintiffs who refused to accept the exchange offer have brought a collective claim against Argentina in arbitration. *Abaclat* v. *The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 216 (Aug. 4, 2011).

processing transfers linked to sanctioned governments or the financing of terrorist activities.

Those banks would not be subjected to these burdens under the ordinary attachment regime, because they hold no property interest of the judgment debtor. Demanding that they monitor EFTs they receive to ascertain whether the transfer relates to an Argentine Exchange Bond would impose unwarranted cost and burden on them. Further, requiring those banks then to inquire up the funds-transfer chain to determine whether Argentina had issued and served a certificate of compliance would only increase their burden. Payment systems are designed to work automatically and quickly, but as a result of the Amended Injunction banks might be forced to hold many potentially unrelated transfers until the issue could be sorted out, delaying the payment process and undermining participants' and customers' expectations of real-time payment processing.

In addition, the potential inclusion of payment systems and clearing organizations, such as Fedwire, CHIPS and DTC, in the Amended Injunction would also disrupt payment systems and contravene federal law.[18] As an initial

[18] It is not clear how the district court intended the term "clearing corporations and systems" in the Amended Injunction to be defined. All the examples given in the Amended Injunction (DTC, Clearstream Banking S.A., Euroclear Bank S.A./N.V. and the Euroclear system) are securities clearing organizations rather (*footnote continued*)

matter, the Amended Injunction as applied to CHIPS is a clear violation of federal law. CHIPS is a "clearing organization" that operates pursuant to netting contracts.[19] CHIPS holds no money for any party (and so cannot be reached by ordinary attachment orders or other creditor process), but merely manages a settlement account at the Federal Reserve Bank of New York the balance of which is a debt owed by the Reserve Bank to the participating banks. Consequently, CHIPS is covered by the provision of federal law that provides: "No stay, injunction, avoidance, moratorium, or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise, shall limit or delay application of otherwise enforceable netting contracts . . . ."[20] Thus any order that would require the operator of a clearing and payments system such as CHIPS to isolate individual payment orders and pay the amount to anyone other than the participating beneficiary's (or intermediary) banks would violate this provision. 12 U.S.C. § 4405; *id.* § 4401 (finding that netting obligations among financial

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(*footnote continued*)
than funds-transfer systems. Nevertheless, both DTC and CHIPS are "clearing organizations" as defined in 12 U.S.C. § 4402(2).

[19] CHIPS settles debts throughout the day pursuant to the terms of bilateral and multilateral netting contracts among CHIPS participants. *See* Benjamin Geva, The Law of Electronic Funds Transfers § 3.03 (2012).

[20] 12 U.S.C. § 4405.

institutions "reduce the systemic risk within the banking system and financial markets"). The sending and receiving banks would be left with unbalanced accounts (CHIPS accounts that could not be finally settled before the relevant time under the netting agreement). Moreover, this would result in the problems that this statute was designed to prevent: increased credit and liquidity risk among banks and other financial institutions. *See id.*

Further, the federal exemption from injunctions exists for good reason: it is practically impossible for CHIPS and other funds-transfer systems to identify particular payments for a particular purpose, and the Amended Injunction would therefore result in disruption of payment systems and delays in processing legitimate payments. In the case of CHIPS and other Clearing House payment systems, for example, the payment system operator has no ability to screen payment orders to block individual transactions. Once a payment order is cleared by the CHIPS release algorithm, which merely assesses whether the conditions for release as determined by the CHIPS rules have been met, it is automatically released to the receiving participant. There is no practical way for CHIPS and other payment systems like it to identify payments in violation of the Amended Injunction without delaying unrelated payments.

*    *    *    *

In its November 21, 2012 opinion accompanying the Amended Injunction, the district court appears to have recognized some of these concerns when it noted in its opinion that the plaintiffs were "also not requesting that the financial institutions receiving funds from the DTC be bound by the Injunctions." (SPE-1370 (Slip Op. at 11).)[21] But this language is vague—it apparently requires returning to the underlying submissions by the plaintiffs to understand precisely who is excluded[22]—and the court did not incorporate even this vague language into the terms of the Amended Injunction itself. Aside from the other flaws in the Amended Injunction, this was independently improper. Under Fed. R. Civ. P. 65(d)(1)(C), an injunction must "describe in reasonable detail—*and not by*

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[21] This suggests an intent not to reach beneficiary's banks and funds-transfer networks, because one or both will become involved in any payment of interest to the Exchange Bondholders after the payment has been made to DTC or its nominee (Cede & Co.), or one of the other registered holders of Exchange Bonds. The payment is then distributed to DTC participants (DTC credits the accounts of its participants), which make payment to the beneficial Exchange Bondholders either by crediting the beneficiary's account on the institution's books or sending an EFT for payment to the ultimate beneficiaries through beneficiary's banks.

[22] Among other problems with interpreting the district court's language, DTC is only one of several registered holders under the various Exchange Bonds: Euro-denominated bonds, Argentine peso-denominated bonds and U.S. dollar-denominated bonds governed by Argentine law have different registered holders and payment flows, so the court's statement does not even on its face include all the affected beneficiary's banks, funds-transfer networks or securities intermediaries. Plaintiffs' briefs below do not clarify this point.

*referring to the complaint or other document*—the act or acts restrained or required." (Emphasis added.) If an injunction that expressly incorporated a term from another document is improper, then the *sub silentio* cross-reference in the Amended Injunction to the district court's opinion, which in turn incorporates limitations set forth in plaintiffs' brief, is an even clearer violation.

## IV. EXTRATERRITORIAL APPLICATION OF THE AMENDED INJUNCTION WOULD VIOLATE DUE PROCESS BY POTENTIALLY IMPOSING DOUBLE LIABILITY ON FINANCIAL INSTITUTIONS OUTSIDE NEW YORK

Unlike the application of a traditional attachment order (or similar creditor process), the application of the Amended Injunction to restrain assets in the hands of third-party financial institutions located outside New York would often impose double liability on any such institution. This is because the Amended Injunction would affect the rights of those institutions by requiring them to hold and, presumably, turn over to the district court, the property at issue without the consent of the account holder or others with an interest in the assets and accounts (*e.g.*, an Exchange Bondholder). Where the bank account or property to which a turnover order is directed is located in New York, the garnishee bank or other entity is protected from this risk because it is discharged by operation of law from

its obligations to the judgment debtor.[23] But in the instant action, the Amended Injunction would separate the jurisdiction of the injunction (New York) from the jurisdiction where the assets are held or the debt is payable and under whose law the obligation to the account holder was incurred. This divergence could expose the bank or other entity to double liability because the discharge available under New York law will not apply or control in the foreign jurisdiction, and the bank might be claimed to retain liability to account holders.

As the Supreme Court held more than 50 years ago, even where a court may have in rem jurisdiction over property, exposure to multiple liability contravenes due process if "the holder of such property . . . is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *W. Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961) (citing *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 242–43 (1944); *Sec. Sav. Bank* v. *California*, 263 U.S. 282, 286–90 (1923)); *see also Reebok Int'l Ltd.* v. *McLaughlin*, 49 F.3d 1387, 1394–95 (9th Cir. 1995) (district court lacked

[23] N.Y. C.P.L.R. 6204 ("A person who, pursuant to an order of attachment, pays or delivers to the sheriff money or other personal property in which a defendant has or will have an interest, or so pays a debt he owes the defendant, is discharged from his obligation to the defendant to the extent of the payment or delivery."), *id*. 5209 (same as to writ of execution).

jurisdiction to hold Luxembourg bank in contempt of injunction barring transfer of debtor's assets where Luxembourg law required the payment). Here, the district court failed to provide—and could not provide—any assurance that a remote financial institution "will not be held liable again in another jurisdiction." As a result, the Amended Injunction violates those institutions' rights to due process of law under the Constitution of the United States.

## CONCLUSION

The Clearing House respectfully urges the Court to vacate the Amended Injunction. In the district court's haste to secure an injunction that might apply to payments to be made in the near term, the lower court extended the Amended Injunction to numerous third-party financial institutions and clearing organizations in violation of well-established principles of equity and of federal and state law, imposing on those financial institutions burdens that those laws were designed to prevent. At least on the present record, none of the financial institutions specifically referred to in the Amended Injunction can properly be bound by it, and the Amended Injunction should have explicitly excluded, rather than included, them, and should likewise have excluded other such entities in the securities and payment processing system acting in the ordinary course of their functions. If upheld in its present form, the Amended Injunction would undermine

the integrity of the payment systems and the reliability of New York law governing trust indentures and payment systems.

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I certify that the length of this brief, as measured by the "Word Count" function of Microsoft Word software, is 6,341 words, exclusive of this certificate and other permissible exclusions contained in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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