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)

In the United States Court of Appeals for the Second Circuit

NML CAPITAL, LTD., *ET AL.*,

Plaintiffs-Appellees,

-v.-

REPUBLIC OF ARGENTINA,

Defendant-Appellant.

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

EMERGENCY MOTION OF APPELLEES TO AMEND OR MODIFY THE STAY TO REQUIRE THE REPUBLIC OF ARGENTINA TO POST SECURITY IN ORDER TO MAINTAIN THE STAY

ROBERT A. COHEN
ERIC C. KIRSCH
DECHERT LLP
1095 Avenue of the Americas
New York, N.Y. 10036
(212) 698-3500

THEODORE B. OLSON
MATTHEW D. MCGILL
JASON J. MENDRO
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Attorneys for Plaintiff-Appellee NML Capital, Ltd.

[Additional counsel on inside cover]

EDWARD A. FRIEDMAN
DANIEL B. RAPPORT
FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
7 Times Square
New York, N.Y. 10036
(212) 833-1100

JEFFREY A. LAMKEN
MOLOLAMKEN LLP
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000

Attorneys for Plaintiffs Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC

STEPHEN D. POSS
ROBERT D. CARROLL
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Attorneys for Plaintiff-Appellee Olifant Fund, Ltd.

MICHAEL C. SPENCER
MILBERG LLP
One Pennsylvania Plaza
New York, N.Y. 10119
(212) 594-5300

Attorney for Plaintiffs-Appellees Pablo Alberto Varela, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pursuant to Rules 8 and 27(b) of the Federal Rules of Appellate Procedure, Appellees respectfully move to modify the Court's November 28, 2012 Order Granting A Stay Of The District Court's November 21, 2012 Orders to condition the Court's stay as to Defendant-Appellant the Republic of Argentina ("Argentina") on Argentina posting appropriate security on or prior to December 10, 2012, before Argentina makes a $3 billion payment scheduled for December 15, 2012.

STATEMENT OF EMERGENCY

This Court's decision of October 26, 2012 affirmed the district court's Injunction "ordering Argentina to make 'Ratable Payments' to plaintiffs." Op. 28, Ex. CC.[1] In the wake of that ruling, Argentina's President pronounced that Argentina will not comply with any injunction under which Argentina would pay Appellees. Argentina's Minister of Economy agreed, adding that "***[w]e are never going to pay the 'vulture funds.'*** . . . ***That's not going to change because of rulings***." Ex. AA (emphasis added). Consistent with these threats of defiance, Argentina is now actively planning to evade the Injunction that this Court affirmed. According to numerous reports in both the U.S. and Argentine media—reports Argentina conspicuously never has denied—Argentina is exploring alternate structures for payments under the Exchange Bonds beyond the district court's jurisdiction and supervisory powers. The emergency giving rise to this motion is that if Argentina is

[1] All exhibits cited are contained in the Declaration of Matthew D. McGill.

not required to post security as a condition for maintaining the stay when its December 2012 payments on the Exchange Bonds come due, Argentina will have at least an additional three months to continue developing its scheme to attempt to evade the Injunction.

The context within which Argentina is making its plans to evade is critical. Argentina has sought and obtained from this Court a stay that permits it to make payments exceeding $3 billion to its Exchange Bondholders in December 2012, while paying Appellees nothing, notwithstanding the findings and decisions of this Court and the district court that:

(1) Argentina agreed to the application of New York law, submitted to the jurisdiction of the courts of New York, and agreed to be bound by those courts' decisions (Op. 16, 25);

(2) Argentina is nonetheless actively planning to evade the Injunction by attempting to move offshore its payment structure under the Exchange Bonds and ***will use the time permitted by the stay to implement such plans*** (Stay Opinion at 3-4, Ex. H);

(3) The December payments, if not accompanied by ratable payments to Appellees, would amount to ***another*** of Argentina's repeated and continuing violations of its contractual obligations to Appellees to rank its "***payment obligations***"

to Appellees equally with its payment obligations to the Exchange Bondholders (Op. 19-20);

(4) Argentina has "sufficient funds, including over $40 billion in foreign currency reserves, to pay Appellees the judgments they are due." *Id.* at 26. In fact, "Argentina makes no real argument that . . . it cannot afford to service the defaulted debt" (*id.*);

(5) Meeting its obligations to Appellees will not in any way jeopardize the rights of any third parties, including the Exchange Bondholders (*id.*);

(6) Foreign indebtedness restructuring by other countries will ***not*** be adversely affected by Argentina's payments to Appellees (*id.* at 27); and

(7) Compliance with its equal payment obligations to Appellees "[will] not deprive Argentina of control over any of its property, [nor constitute an attachment] of foreign property prohibited by the FSIA" (*id.* at 24).

In short, while Appellees are threatened with serious irreparable harm if the Injunction is stayed without security to ensure compliance, no damage will be done to Argentina, the Exchange Bondholders, or the financial community if appropriate security is posted or if Appellees receive the payments to which they are entitled by contract and by the decisions of the courts. Under these circumstances, Argentina should be required to post security as a condition of continuing the stay.

Requiring Argentina to post security for the stay is particularly appropriate given Argentina's routinized defiance of judgments and its pronouncements to defy the Injunction in this case. Far more reliable judgment debtors, including sovereign nations, are regularly required to post security as a condition of a stay. At the very least, Argentina should be called upon to post security of $250 million, which is a small fraction of full security and just 8% of the sums Argentina will be paying to Exchange Bondholders in the coming month alone. If Argentina refuses to post even that minimal security even as it prepares to pay more than $3 billion to Exchange Bondholders, that will amply demonstrate its intention not to comply with this Court's mandates and that the stay should be lifted at as to Argentina itself.

BACKGROUND

A. This Court Holds That Argentina Breached The Equal Treatment Provision And That Argentina Is Required To Specifically Perform Its Obligations Under That Provision

Appellees moved in the district court for an injunction requiring Argentina to live up to its promise to "rank" its "payment obligations" under the FAA Bonds "at least equally" with its payment obligations under "future unsecured and unsubordinated External Indebtedness." On February 23, 2012, the district court granted the Injunction, ordering Argentina to specifically perform its obligations under the Equal Treatment Provision, providing that "[w]henever the Republic pays any amount due under the terms of the [exchange] bonds," it shall make a "Ratable

Payment" to Appellees. Feb. 23 Orders ¶ 2(a), Ex. FF. Argentina appealed, and the district court issued a stay pending appeal together with a preliminary injunction, mandating that Argentina not "take any action to evade the directives of the [Injunction]," including "altering or amending the processes or specific transfer mechanisms by which it makes payments on the Exchange Bonds, without prior approval of the Court." Ex. EE ¶ 1 ("March 5 Stay Order").

On October 26, 2012, this Court affirmed 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." Op. 28. This Court had "little difficulty" concluding that Argentina had breached the Equal Treatment Provision, "even under Argentina's interpretation" of that Provision. *Id.* at 20. This Court also held that the equitable relief that the district court ordered in the Injunction was permitted by law and amply justified by the equities. The Court explained that Argentina's "disregard of its legal obligations exceeds any affront to its sovereign powers resulting from the" Injunction and upheld the district court's conclusion that "the Republic had sufficient funds, including over $40 billion in foreign currency reserves, to pay plaintiffs the judgments they are due." *Id.* at 26.

Having affirmed the substantive provisions of the Injunction, this Court remanded for the district court to clarify "how the injunctions are to function" in two respects. *Id.* at 1. First, it requested clarification only as to "precisely how [the Ratable Payment] formula is intended to operate." *Id.* at 11. Second, it 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 Injunctions will apply." *Id.* at 27-28.

B. Argentina's Highest Officials Declare That Argentina Will Defy The Injunction And This Court's October 26 Opinion

Immediately following this Court's October 26 Opinion, Argentina's highest officials repeatedly declared—in direct defiance of this Court's Opinion—that Argentina will pay the Exchange Bondholders, but will never pay Appellees. For example, Economy Minister Hernan Lorenzino proclaimed that "Argentina's capacity and willingness to pay has been demonstrated, again and again," but that "***[w]e are never going to pay the vulture funds. . . . That's not going to change because of rulings***." Ex. AA (emphasis added). Minister Lorenzino reiterated that Argentina will continue its discriminatory payments "despite any ruling that could come out of any jurisdiction, in this case New York." Ex. X. As recently as this weekend, Economy Ministry personnel "roundly dismissed that [Argentina's] appeal would include any class of offer for the [Appellees]." Ex. F.

Argentine President Cristina Kirchner took the same position following this Court's decision, openly vowing that "we are going to pay [the Exchange Bonds], in dollars, because we have them," but "not one dollar to the 'vulture funds.'" Ex. W at 1; Ex. V at 1-2. Minister Lorenzino reiterated on November 14 that the "***President [will] not accept the reopening of the exchange nor pay as ruled by the judge***." Ex. K (emphasis added); *see also* Ex. O; Ex. P. Key members of President Kirchner's government, including the Foreign Minister and its Ambassador to the United States, made similar statements. Ex. M; Ex. N.

Argentina's November 16, 2012 brief to the district court on remand presented a similarly hard line. Rather than proposing an alternative to the payment formula advocated by Appellees, Argentina argued that it should not be required to pay Appellees at all—implicitly proposing a payment percentage of ***zero***. *See* Ex. L at 14.[2]

Consistent with that message, news sources report that Argentina is seeking to alter how it pays the Exchange Bondholders to eliminate U.S.-based institutions

[2] In seeking a stay in this Court, Argentina implied—for the first time in the two years of this litigation—that Argentina ***might*** permit the Appellees to extinguish their equal treatment rights entirely in exchange for discounted bonds like the ones it issued in 2010. This wholly inadequate and untimely suggestion is nothing more than a delaying tactic. The day after this Court entered the stay, the Argentine press reported that "[Economy] Minister Lorenzino had put in doubt that the government was going to present a new swap proposal." Ex. A.

and thereby evade the district court's supervisory jurisdiction. As early as July 13, 2012, an Argentine newspaper reported that Argentine officials were looking to "pay out the bonds at the Caja de Valores in Buenos Aires" to avoid compliance with U.S. court orders. Ex. DD at 2. Reports of Argentina's planned evasion multiplied following this Court's ruling. On October 29, 2012, Argentine news sources reported that Argentina's "technical staff" spent "all weekend" after the decision was issued "on the various scenarios that will be opening up from here on out to confront the vulture funds," and that Argentina is "now preparing alternative payment schemes . . . so that they can make [the Exchange Bond payments] abroad." Ex. Y at 3; Ex. Z at 1.

One article published on November 13, 2012 by a prominent Argentine newspaper reported that Argentina is considering, as one of two alternatives, ignoring the Orders and paying ***only*** on the Exchange Bonds outside of New York. Ex. R. Another analyst known for his contacts with Argentine officials advised his clients on November 9 that, "once the appeals process is over, our view is that Argentina would seek to reroute payments away from the US, rather than pay holders of defaulted debt." Ex. S at 1. *Bloomberg News* also reported that, according to Argentine news sources, certain Exchange Bondholders are "considering collecting interest payments in France or Switzerland, beyond the reach of U.S. District Judge Thomas Griesa." Ex. Q. And in the past several days, there have been reports that

an "anti-vulture" team in the Argentine Economy Ministry has worked through different proposals (Ex. D), including offering Exchange Bondholders the opportunity to exchange their "NY Law bonds into local law bonds" (Ex. C).

In December 2012, Argentina is scheduled to make three payments to the Exchange Bondholders—on the 2nd, 15th, and 31st—totaling approximately $3.3 billion. The most significant payment, scheduled for December 15, 2012, is expected to be nearly $3 billion. Once these December 2012 payments have passed, Argentine officials could continue their planned evasions with more deliberation, as Argentina's next scheduled Exchange Bond payment is not due until March 2013, when it must pay approximately $180 million.

C. The District Court Enters Its Orders On Remand And Lifts The Stay

On November 21, 2012, the district court entered its orders on remand. In an opinion ("Remand Opinion," Ex. G), the district court clarified the Ratable Payment formula to require Argentina to pay Appellees the full amount of the accelerated principal and interest if Argentina pays the full amount it is obligated to pay on the Exchange Bonds on any given date. The district court also explicitly set out the third parties bound by the Injunction under Rule 65(d).

That same day, the district court also lifted the stay of the Injunction. Under Fed. R. Civ. P. 65(c), the district court had authority to "suspend, modify, restore, or grant" further injunctive relief even during the pendency of the appeal. Citing

"extraordinary circumstance[s]," the court determined that it was appropriate to modify that relief here. It explained that, "[f]rom the moment of the October 26, 2012 Court of Appeals' decision, the highest officials in Argentina have declared that Argentina would pay the exchange bondholders but would not pay one dollar to holders of the original FAA Bonds." Stay Opinion at 2, Ex. H. Emphasizing that the March 5 Stay Order prohibited Argentina "from taking any action to evade the February 23, 2012 Order in the event that it is affirmed" (*id.* at 3), the district court explained that "action is called for" to confront the possibility "that Argentina will not honor or carry out the current rulings of the District Court and Court of Appeals" (*id.* at 4). It found that, the more time Argentina had beyond December 15 during which to "devise means for evasion," the more likely it became that Argentina could and would effectuate that evasion. *Id.* "The less time Argentina is given to devise means for evasion, the more assurance there is against such evasion." *Id.*

Accordingly, the district court lifted the stay and ordered Argentina to comply with the Injunction, as amended, as of Argentina's December 15, 2012 payment. *Id.* at 4-5. Because the Ratable Payment formula had not yet been reviewed by this Court, the district court declined to order that Argentina make any Ratable Payment to Appellees. Instead, it allowed Argentina to make any Ratable Payment

into an escrow account so funds could be returned to Argentina depending on the result of this Court's review of the formula. *Id.* at 5.

Argentina and several non-parties then filed emergency motions to stay the Injunction pending appeal. This Court granted a stay and set a schedule concluding with oral argument on February 27, 2013.

ARGUMENT

I. This Court Should Condition The Stay On Argentina's Posting Of Security

To decide whether a party is entitled to a stay, a court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In addition, a court must consider whether equity requires the stay applicant to post security during the stay to protect the rights of the prevailing party. *See* Fed. R. App. P. 8(a)(2)(E); *accord* 16A Charles Alan Wright, Arthur Miller, & Edward H. Cooper, Federal Practice and Procedure § 3954.1 (4th ed. 2012). Security is required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case" (*Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154-55 (2d Cir. 1986)), such as when the applicant "has no assets in

the United States" (*Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998)). That requirement reflects the practical policy that "a plaintiff who has won in the trial court should not be put to the expense of defending his judgment on appeal unless the defendant takes reasonable steps to assure that the judgment will be paid if it is affirmed." *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986).

These factors weigh strongly in favor of requiring Argentina to post security as a condition of a stay of the Injunction as applied to itself.

A. Appellees Will Be Irreparably Harmed Absent Argentina's Posting Of Security

The extraordinary developments since this Court issued its October 26 Opinion show precisely why security is necessary. As discussed above, from the moment this Court issued its decision, Argentina's President and high ministers have declared their intent to evade the Injunction. *See supra* 6-9. They have declared that they "are going to pay [the Exchange Bondholders], in dollars, because we have them," but are "never" going to pay Appellees—not even a "cent" or "one dollar" or "a single peso"—and "[t]hat's not going to change because of rulings." Ex. AA; Ex. J; Ex. M; Ex. W at 1; Ex. V at 1-2. When presented with these statements, the district court recognized them for what they were: "they are simply saying we will not comply." Nov. 9 Tr. 12:5-6, Ex. T.

Consistent with those threats of noncompliance, Argentina is developing plans to move its Exchange Bond payment structure offshore. *See supra* 8-9.

When confronted with the daily press reports of Argentina's plans—in sources ranging from *The Wall Street Journal* to *Bloomberg News* to Argentina's leading newspapers—Argentina criticized the reports as "newspaper hearsay" but refused to dispute their accuracy. Ex. U at 3. This classic non-denial denial confirms that Argentina is actively and aggressively attempting to create a plan to evade the Injunction. And while Argentina has proffered a declaration merely asserting that it is complying with the stay pending appeal, ***it has never denied that it is actively engaged in developing a plan to evade the Injunction when the stay is lifted***.[3] As the district court explained, if Argentina moved its payment mechanisms offshore, then this Court's October 26 Opinion affirming the Injunction might "be entirely for naught." Remand Opinion at 9.

Although Argentina had been investigating ways to evade the district court's orders, executing such plans would take time—more time than permitted by the December 15 payment deadline. For example, Argentina would need to consider the non-U.S. institutions it uses to re-route payments. One analyst noted that even the Caja de Valores, the Argentine institution frequently cited as an alternate payment center (Ex. DD), "is not bulletproof because Caja de Valores has foreign as-

[3] The declaration—offered by a less senior official within Minister Lorenzino's Ministry of Economy—merely states that Argentina "has complied, is complying, and will comply with the terms of the March 5 Stay Order." Ex. GG.

sets that could be affected." Ex. E. And another exchange offer that effectively converts the Exchange Bonds from New York law securities into Argentine law securities likely could not be consummated before December 15. *Id.* Argentina's strategy has thus been "to engineer a stay that would give the government more time to solve the payment issue." *Id.*

With the stay now in place for the December 2012 payments, Argentina will be able to make its $3.3 billion payments on the Exchange Bonds while paying Appellees nothing and then enjoy ***at least*** an additional ***three months*** to attempt to devise its evasion scheme. The risk grows exponentially to the extent the stay is extended beyond March and potentially during Argentina's efforts to obtain further review. The more time "Argentina is given to devise means for evasion," the more likely it is that such evasion will occur. Stay Opinion at 4.

In sum, there is far more than "some reasonable likelihood of [Argentina's] unwillingness to" comply with the Injunction "upon ultimate disposition of the case." *Texaco*, 784 F.2d at 1154-55. Far more reliable judgment debtors, without Argentina's history of serial defaults and non-compliance, are routinely required to post bonds pending appeal. Regardless of whether Argentina actually succeeds in rerouting its payments during the pendency of this appeal, Appellees should not have to bear the risk that it will do so. *See Texaco*, 784 F.2d at 1154-55; *Adsani*, 139 F.3d at 79.

B. Conditioning Maintenance Of The Stay On The Posting Of Security Will Not Harm Argentina

Argentina will suffer no harm if it elects to post security to maintain the stay. Argentina does not lack for funds. As this Court explained, "the Republic ha[s] sufficient funds, including over $40 billion in foreign currency reserves, to pay [Appellees] the judgments they are due" and also to pay the Exchange Bondholders. Op. 26. Any security would be returned to Argentina in the unlikely event that it should prevail before this Court or the Supreme Court. Similarly, if Argentina or the Exchange Bondholders convince this Court to order a different Ratable Payment formula than the one the district court provided, or if Argentina pays less than 100% of what it owes on the Exchange Bonds, Appellees would only be entitled to the portion of the security provided for by the payment formula.

Nor will posting security infringe on Argentina's sovereignty. There is ample precedent for conditioning a stay on a sovereign posting security. *See, e.g.*, *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1478 (9th Cir. 1992) (China not entitled to stay because it "refused to post a supersedeas bond or letter of credit to stay execution"); *Sales v. U.S. Underwriters Ins. Co.*, No. 93-Civ.-7580-CSH, 1995 WL 144783, at *6 (S.D.N.Y. Apr. 3, 1995) (Uganda not entitled to a stay because it "refused to post a bond"); *Morgan Guar. Trust Co. v. Republic of Palau*, 702 F. Supp. 60, 65-66 (S.D.N.Y. 1988) (imposing bond of less than total defaulted debt where defaulted debt was 145% of Palau's governmental

revenue). To the extent Argentina would argue that its Lock Law prohibits compliance with a conditional security, that notion would be belied by indications that the Argentine Congress is so dominated by President Kirchner's allies that it could and would repeal the Lock Law ***in an hour*** if asked. Ex. B. In any event, this Court held that "Argentina's disregard for its legal obligations exceeds any affront to its sovereign powers resulting from the" district court's orders. Op. 26. That is as true now as it will be at the conclusion of these proceedings. *Id.*

C. Requiring Security Would Serve The Public Interest By Eliminating Any Potential Harm To Third Parties And Promoting The Rule Of Law

Requiring Argentina to post security in the amount Appellees are owed would resolve any concerns about the impact of the Injunction on third parties, including the Exchange Bondholders. Once Argentina posts such security, that would settle any uncertainly in the market, as it would provide all interested parties with assurance that Argentina will honor ***all*** of its obligations—to both Appellees and to the Exchange Bondholders—once this Court finally determines what those obligations are and lifts the stay. And even if Argentina only posted security of $250 million, a mere fraction of what it owes to Appellees, this would at least provide an indication of Argentina's good faith that would calm the concerns of the markets, Exchange Bondholders, Appellees, and the courts.

Only if Argentina refused to post any security at all, thereby evincing an intention not to comply with this Court's orders, could countervailing concerns arise. But a threat not to comply cannot possibly justify—much less dictate—continuing an unconditional stay.[4]

Argentina's vows not to comply, and its ongoing plans to evade the Injunctions, present a serious challenge to the rule of law. The obligation to protect that value supports denying equitable relief to litigants that threaten to undermine it. *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 127-29 (2d Cir. 2009). Requiring Argentina to post security will ensure its compliance with this Court's ruling and therefore protect the rule of law.

D. Argentina Has No Likelihood Of Success On The Merits

Argentina's bid for an unbonded stay of the Injunction as to itself is also inappropriate because there is no appreciable probability—much less a likelihood—that Argentina will, at this phase of the proceedings, prevail on its contention that it should not be required to specifically perform its obligations under the Equal Treatment Provision. This Court already has affirmed "the judgments of the district court (1) granting summary judgment to plaintiffs on their claims for breach of

[4] Nor would the third parties that act with Argentina in making the Exchange Bond payments be adversely affected by the proposed relief. Even if Argentina fails to post security and the stay is lifted ***as to Argentina***, this Court's stay could remain in place as to any institutions that might be bound under Federal Rule of Civil Procedure 65(d).

the Equal Treatment Provision and (2) ordering Argentina to make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt." Op. 28. This Court remanded to the district court to clarify only two narrow issues: the Ratable Payment formula and the extent of the Injunction's binding effect on third parties such as intermediary banks.

Although Appellees expect the district court's careful decision on these issues to be affirmed, no modification to the payment formula or the reach of the Injunction to third parties could make Argentina the prevailing party in this appeal. This Court has already held that Argentina must "make 'Ratable Payments' to plaintiffs concurrent with or in advance of its payments to holders of the 2005 and 2010 restructured debt." Op. 28. If this Court ultimately determines that Appellees are owed a lesser amount under the Ratable Payment formula than what the district court ordered, then Argentina will have still lost on the merits and, in the event of non-compliance, Appellees would merely draw less from Argentina's security. And whatever this Court determines as to the Injunction's reach to third parties, that would not affect whether Argentina is bound by the Injunction. This Court has already held that it will be bound once the Injunction comes into effect.

II. Conditioning A Stay On The Posting Of A Reasonable Security Is Consistent With The FSIA

In affirming the district court's orders, this Court held that requiring Argentina to make a Ratable Payment to Appellees if Argentina paid the Exchange

Bondholders did not violate section 1609 of the FSIA (28 U.S.C. § 1609), which prohibits "attachment arrest and execution" of a sovereign's property in the United States. That section does not apply, this Court explained, because Argentina retained the right to choose whether and how much to pay Appellees—it could "pay all amounts owed," "[o]r it can decide to make partial payments," so long as Argentina made similar proportionate payments to the Exchange Bondholders. Op. 25.

A condition of security would permit Argentina the same choice. Argentina may choose to post security to continue its stay. It may choose not to post security and to comply with the Injunction by paying Appellees when it pays the Exchange Bondholders. Or Argentina may choose not to post security and not to pay anyone. *Id.* Conditioning Argentina's stay on its posting of security thus is not prohibited by the FSIA. Rather, it is common practice when a sovereign's ability or willingness to satisfy a judgment is in doubt. *See Richmark*, 959 F.2d at 1478; *Sales*, 1995 WL 144783, at *6; *Morgan Guar.*, 702 F. Supp. at 65-66.

III. Alternatively, This Court Should Expedite The Briefing Schedule

If this Court determines that requiring Argentina to post security is unwarranted, Appellees respectfully request that this Court expedite the briefing and consideration of the present appeal. The parties fully briefed the two remaining issues in this case in 10 days before the district court and can do so just as quickly before

this Court. Expediting the briefing schedule will allow this Court to resolve this case fully before the nearly $3 billion payment due on December 15 or, at minimum, before the $500 million payment due on December 31. This would not prejudice the parties or the Court, but would ensure that Argentina does not have until March 2013 to attempt to devise a means to evade the U.S. courts.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the Court modify its order granting a stay of the November 21, 2012 orders to provide that the stay will dissolve unless Argentina elects to post security of $1.45 billion, or at least $250 million, on or prior to December 10, 2012. Alternatively, Appellees respectfully request that the remaining proceedings be further expedited to permit this Court to decide the remaining issues in this case before Argentina's December 2012 payments.

DATED: November 30, 2012

Respectfully submitted,

By: /s/ Theodore B. Olson

Robert A. Cohen
(robert.cohen@dechert.com)
Eric. C. Kirsch
(eric.kirsch@dechert.com)
DECHERT LLP
1095 Avenue of the Americas
New York, N.Y. 10036-6796
(212) 698-3500

Theodore B. Olson
(tolson@gibsondunn.com)
Matthew D. McGill
(mmcgill@gibsondunn.com)
Jason J. Mendro
(jmendro@gibsondunn.com)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500

Attorneys for Plaintiff NML Capital, Ltd.

Stephen D. Poss
(sposs@goodwinprocter.com)
Robert D. Carroll
(rcarroll@goodwinprocter.com)
GOODWIN PROCTER LLP
53 State Street
Boston, MA 02109
(617) 570-1000

Attorneys for Plaintiff-Appellee Olifant Fund, Ltd.

Edward A. Friedman
(efriedman@fklaw.com)
Daniel B. Rapport
(drapport@fklaw.com)
FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
7 Times Square
New York, N.Y. 10036
(212) 833-1100

Jeffrey A. Lamken
(jlamken@mololamken.com)
MOLOLAMKEN LLP
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000

Attorneys for Plaintiffs Aurelius Capital Master, Ltd., Aurelius Opportunities Fund II, LLC, ACP Master, Ltd., Blue Angel Capital I LLC

Michael C. Spencer
MILBERG LLP
(MSpencer@milberg.com)
One Pennsylvania Plaza
New York, N.Y. 10119
(212) 594-5300

Attorney for Plaintiffs Pablo Alberto Varela, et al.