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

against

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

(Caption Continued on the Reverse)

*On Appeal from the United States District Court
for the Southern District of New York (New York City)*

BRIEF FOR ALFONSO PRAT-GAY AS *AMICUS CURIAE* IN SUPPORT OF THE REPUBLIC OF ARGENTINA'S PETITION FOR PANEL REHEARING

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THE BANK OF NEW YORK MELLON, AS INDENTURE TRUSTEE,
EXCHANGE BONDHOLDER GROUP, ICE CANYON LLC, FINTECH ADVISORY INC.,
Non-Party Appellants,

and

EURO BONDHOLDERS,
Intervenor.

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Alfonso Prat-Gay is a National Congressman in the Republic of Argentina, who represents the City of Buenos Aires and presides over the block of deputies of CoaliciónCívica-ARI, one of the many opposition parties in the Argentine Congress. Because his fellow citizens and constituents interests are affected by the outcome of the Court's ruling on the issues addressed herein, and because certain relevant facts have yet to be presented to the Court by any other party or *amicus curiae*, Prat-Gay respectfully submits this brief as an interested, non-party, *amicus curiae* in support of The Republic of Argentina's petition for panel rehearing, rehearing *en banc*, and appeal of the November 21, 2012 Orders of the District Court.¹

INTEREST OF ALFONSO PRAT-GAY

Prat-Gay was governor of the Central Bank of the Republic of Argentina (the "BCRA"), an independent institution, when the late Argentine President Néstor Kirchner took office in May 2003. Prat-Gay left the BCRA in September 2004, once his institutional mandate expired. Prior to his tenure at the BCRA, Prat-Gay worked for more than seven years at JPMorgan and JPMorgan Chase, as an Emerging Markets Economist, an Emerging Markets Proprietary Strategist, and as Head of Global Foreign Exchange Strategy, based respectively in New York,

¹ Pursuant to Fed R. App. P 29(c)(5) and L.R. 29.1, this brief was authored by the office of Alfonso Prat-Gay, and edited by counsel. Neither Prat-Gay nor his counsel contributed money that was intended to fund preparing or submitting the brief.

Buenos Aires, and London. In these various capacities, he was a first-hand witness to many of the emerging markets currency and debt crises, most notably the Mexican Tequila Crisis of 1995, the South East Asian crises of 1997, the Russian crisis of 1998, and the Brazilian currency crisis of 1999.

In 2004, Euromoney Magazine awarded Prat-Gay with the Central Banker of the Year Award (“*Prat-Gay wins some respect for Argentina*” was the title of the featured article). And shortly after leaving the BCRA, Prat-Gay was approached by the Bank for International Settlements (the “BIS”) the Central Bank’s financial institution, to take over in a top, executive position. Prat-Gay, however, declined the offer to stay on for another six years at the head of the Central Bank, for a number of reasons, including, *inter alia*, his disagreement with the President and the Minister of Economy regarding the debt renegotiation process, eventually launched after the end of his tenure in early 2005.

ARGUMENT

Political considerations have formed the basis for several of the District Court Orders in this case. *See, e.g.* Nov. 9 H’g Tr. at 10, ln. 4. It appears, however, that not all of the facts have been provided to the Court.

For example, the Kirchner Administration reported a resounding success in its debt deal: “*with the 2005 restructuring and this one [the 2010 restructuring], we achieved a 92% participation rate. And it is the first time in 200 years of*

*history that we could reduce the debt by 75% in the last 7 years” (i.e., Since the Kirchners took office), “Cristina [Fernández de Kirchner] celebrates the results of the [2010] debt restructuring: ‘Today is the day of argentine unindebttness” (June 23, 2010) [http://www.ambito.com/noticia.asp?id=528896] , and “we won the arm-wrestling match with the most hostile bondholders.” “We won the armwrestling match with the most hostile of the bondholders.” (June 24, 2010)[http://www.lanacion.com.ar/1278159-les-ganamos-la-pulseada-a-los-bonistas-mas-hostiles]. Such commentary is a known (and emotional) political slogan in Argentina and, judging by the widespread international sentiment about Argentina, appears to be convincing to a world-wide audience. Indeed, such sentiment appears to have shaped some of the decisions in this matter. See, e.g., *NML Capital, Ltd., et al. v. Republic of Argentina*, Docket No. 12-105(L), at 6, lns, 7-9)(2d cir. Oct. 26, 2012) (“In 2005, Argentina initiated an exchange offer in which it allowed FAA bondholders to exchange their defaulted bonds for new unsecured and unsubordinated external debt at a rate of 25 to 29 cents on the dollar.”).*

However, Argentina’s latest debt restructuring, when compared with other Emerging Market debt restructurings, is modest, at best. In its first round in 2005, Argentina swapped defaulted bonds worth \$78 billion (including principal and past-due interest) for \$700 million in cash and \$35.3 billion in new, long-dated

bonds. At first hand, this comes to a haircut of 54%, similar to other average Emerging Market distressed debt restructuring. Indeed, this is exactly the same reduction that Greece recently achieved in its (futile) debt negotiation.

But unlike any other experience in the world (the only exception is Bulgaria in the 1990s), Argentina also offered a “sweetener bonus” to those bondholders entering the exchange: an annual dividend linked to its GDP performance—what became known as the “GDP Warrant”. The critical role of the GDP Warrant should not be ignored when judging the fairness of the exchange. This instrument made the exchange very expensive for Argentina from the time it closed, resulting in a long-run financial burden as the GDP Warrant payments continue to increase. This consequently reduced the losses for the bondholders that accepted the exchange.

Last month, Argentina paid out its seventh such dividend (out of eight years since the first exchange), worth \$3.5 billion this time. Out of a total \$42 billion of new bonds issued in both rounds of the debt exchange, these \$3.5 billion represent an 8.3% bonus on annual performance, a dividend even few companies pay out these days. Although there will be years like 2013 in which the dividend will not be paid, when it does get paid, by construction the percentage can only go up. In fact, the structure was so generous for bondholders participating in the deal, that Argentina even put a cap on the accumulated payments that it will make on the GDP warrant during its 30 years lifetime:

The total amount to be paid during the life of the GDP-linked Securities, per unit of GDP-linked Security, will not exceed 0.48, measured per unit of currency. We refer to this amount as the “payment cap for GDP-linked Securities.” For example, if you receive GDP-linked Securities in a notional amount equal to U.S. \$1 million, the payment cap for your GDP-linked Securities would equal U.S. \$480,000.

If the payment cap for a GDP-linked Security is reached in a payment year prior to the scheduled expiration of the GDP-linked Securities, the GDP-linked Securities will be deemed to have expired in such year.

If, for any given year the aggregate payment due under a GDP-linked Security is greater than the amount remaining under the payment cap for that Security, then the remaining amount available under the payment cap for that GDP-linked Security will be distributed to the holder of that security.

United States 2005 prospectus supplement, page 35.

Such cap amounted to \$29.9 billion at the time of the first exchange.

The sheer and manifest amount of unused economic resources by the year 2004, with high unemployment and low capacity utilization, meant that actual GDP was significantly below its potential. But Argentina offered GDP dividends right away, unlike its Bulgarian precedent where such payments started only when the pre-crisis GDP level was met. The “base case GDP” indicated by the U.S. prospectus was always going to be badly underestimated as the economy returned to its long-run potential, as they usually do once the crisis is over. The coupon pays out 5% of such GDP gap every year during 30 years. Therefore, the expected, natural recovery from the slump (per-capita GDP had fallen nearly 20% between

1998 and 2002) and the inevitable recovery in the real exchange rate plus subsequent trend growth alone—an almost certainty, judging by the vast world experience on financial crises—guaranteed that such cap would eventually be hit. By construction, the coupon was a concealed capital payment, and a significant one. Therefore, Argentina’s 2005 offer implied a reduction of just 15.6%, a far cry from the purported and widely cited 75% number, and an incredibly modest pain for bondholders given the depth of the country’s financial, political, social, and economic crisis.

In its reasonable search for fairness, the Court recognized that it was understandable for Argentina to take such a drastic reduction when it was insolvent, but now, since its economy has stabilized, Argentina should pay the full debt amount, [as mentioned by the Court]. This reasoning appears to be the basis for the order leading to the cash, accelerated payments to the Appellees. (*See* November 21, 2012, District Court Opinion at 7, lns. 17-21 (“But the fact is that the amount owed to plaintiffs by Argentina is the accelerated principal plus accrued interest. Argentina owes this and owes it now. No one has 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.”)).

On the contrary, Argentina’s offer was extremely generous since the beginning, as Argentina committed to significant payments in the future, even if it

was probably not clear for all creditors at that time. Take, for example, an average 2005 exchange bondholders who have not sold the new bonds they received in the exchange. The market value of the mix of Par and Discount bonds received is currently at 36 cents to the original dollar tendered, a few cents above the average market value of the defaulted bonds at the time of the first deal (32 cents on the dollar). Immediately after the 2005 swap, the holders also received an average of 2 cents per dollar in cash. But this is where the GDP warrant makes the whole difference. Its market value is currently at 7 cents per original dollar tendered. And its cash payments so far amount to 18 cents on the original dollar. Hence, the average bondholder participating in the Exchange has made a profit of 19 cents, or 58%.

Argentina's per capita real GDP has risen 46% since April 2005. This means that the average Argentine citizen is worse off than the average participating bondholder. And the GDP warrant clock continues to click relatively more in the latter's favor. How fair is that? Furthermore, how fair would it be for holdouts to get a better deal, even one cent more than what has already been given out?

Argentina did not secure a massive "haircut" when it appeared to be in a dire economic crisis. Rather, it made an extremely generous offer, even if in such a complex way that neither the bondholders nor Argentine citizens could disentangle how beneficial it would turn out to be for creditors. Enough time has gone by and

enough evidence has accumulated to ignore it, however. When imparting justice, the Courts should be fully informed.

Nor does Argentina now have plentiful resources, as the Appellees aver. Indeed, the Appellees frequently point out that Argentina's Central Bank has sufficient reserves to make any payment. This too is inaccurate. While the Kirchner Administration may have tapped the Central Bank's reserves to pay down the sovereign debt, by as much as \$58.5 billion, these Central Bank reserves are not inexhaustible. Argentine inflation has exceeded the 25% per annum mark. The extremely tight capital controls speak to the fact that, if anything, Argentine reserves are scarce, not abundant.

Dated: January 4, 2013
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certificate that:

1. This brief complies with Fed. R. App. P. 32(a)(7)(B)(i), because it contains 1,799 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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