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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

AMICUS CURIAE BRIEF OF DUANE MORRIS INDIVIDUAL PLAINTIFFS IN SUPPORT OF PLAINTIFFS-APPELLEES NML CAPITAL, LTD., ET AL.

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FRAP 29(C)(5) STATEMENT

Pursuant to Federal Rules of Appellate Procedure Rule 29(c)(5), I hereby state that:

A. This *amicus curiae* brief was not authored, in whole or in part, by any party's counsel;

B. No party or party's counsel contributed any money that was intended to fund preparing or submitting the brief; and

C. No person – other than the *amicus curiae* or its counsel – contributed money that was intended to fund preparing or submitting the brief.

/s/Anthony J. Costantini
Anthony J. Costantini

The law firm of Duane Morris LLP represents various individual plaintiffs (the "Duane Morris Individual Plaintiffs")[1] who hold bonds issued by the Republic of Argentina ("Argentina"), pursuant to the 1994 Fiscal Agency Agreement, that are in default and the subject of much litigation. We submit this memorandum, as *amicus curiae,* in support of Plaintiffs-Appellees NML Capital, Ltd. et al.

PRELIMINARY STATEMENT

The Exchange Bondholders characterize themselves as "innocent creditors" and "innocent non-parties." (EBG Brief, pp. 1, 5, 10).[2] They characterize themselves as holders including employee pension plans and charitable foundations that are "indisputably without fault." (EBG Brief, pp. 17, 19).

While the characterizations offered by the Exchange Bondholders may be accurate, the Duane Morris Individual Plaintiffs point out that the same characterizations are equally applicable to the "holdout" bondholders. Specifically, the Duane Morris Individual Plaintiffs are individual investors

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1 The list of Duane Morris Individual Plaintiffs is attached to the Motion For Leave To File An Amicus Curiae Brief as Schedule A.

2 The Emergency Motion of the Bondholder Group For Stay Pending Appeal is referred to herein as "EBG Brief." NML Capital Ltd. v. Republic of Argentina, Docket No. 12-105(L), Dkt. # 483 (2d. Cir. November 28, 2012).

who purchased the Argentine bonds at par, and not at any deep discount in the aftermarket. They, like the Exchange Bondholders, are innocent creditors, innocent non-parties, and "indisputably without fault."

Notwithstanding the apparent emotional appeal of the foregoing characterizations offered by the Exchange Bondholders, there is no meaningful legal distinction between bondholders who purchased the Argentine bonds for par or those who purchased the Argentine bonds in the aftermarket: all of the purchases were made by individuals or entities relying on Argentina's promise to pay its legal debts.[3] Argentina's failure to do so has affected many, whether they are individual retirees (like the Duane Morris Individual Plaintiffs), pension plans, or monetary funds. In that regard, *all* of the bondholders, whether they accepted or rejected the exchange offer, are "innocent." The only "guilty" party here is Argentina, and this basic fact should be addressed by this Court in any balancing of equities.

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[3] In fact, to further induce potential bond purchasers to buy its bonds, Argentina explicitly promised to honor any final, non-appealable judgment establishing its liability to pay its bond obligations. Needless to say, the promise has not been honored.

ARGUMENT

I.

The Interest Of The "Holdouts" Must Be Protected

The basic issue here is the extent to which the federal courts are willing to use their equitable powers to enforce their judgments and orders. This Court has held that the *pari passu*, or equal treatment, clause was violated by the exchange offers and the adoption of the Lock Law. One group of bondholders -- the Exchange Bondholders -- has gained through Argentina's contractual violation, while another group of bondholders -- the "holdouts" (*i.e.,* bondholders of defaulted Argentina bonds who opted not to participate in the exchange offers) -- has suffered greatly. The thrust of the judicial orders should be that this violation be set right by requiring Argentina to act in an equitable manner. While the Duane Morris Individual Plaintiffs certainly do not hope that this means that the Exchange Bondholders will suffer, it must be borne in mind that that the Exchange Bondholders' "rights" were established through Argentina's violation of its agreements.

II.

The Duane Morris Individual Plaintiffs Are Not Vulture Funds

The holdouts, including the Duane Morris Individual Plaintiffs, exercised their right not to accept Argentina's "low-ball" exchange offers.

Thereafter, Argentina made it a point to punish this group of bondholders. To that end, Argentina has steadfastly and repeatedly repudiated its obligations to all holdouts and disregarded the judgments and orders of our federal courts with which it disagrees.

In the past several months, Argentine officials have been quoted in various media outlets regarding Argentina's intent to disobey orders of the courts of the United States of America. Almost immediately after this Court issued its Order of October 26, 2012, which upheld the District Court order enjoining Argentina from servicing its restructured bonds as long as it refused to pay holders of defaulted debt, the Argentine Minister of Economy, Hernán Lorenzino, boldly proclaimed that "Argentina isn't going to change its position of not paying vulture funds . . . , ***despite any ruling that could come out of any jurisdiction, in this case New York***." (Declaration Of Matthew D. McGill ("McGill Decl."), Ex. X).[4] Argentina's President, Cristina Fernández de Kirchner, has said that Argentina "will not give in" to the "***vulture funds***" (McGill Decl. Ex. O) and "***will not pay one dollar to the 'vulture funds***'"

[4] Declaration of Matthew D. McGill dated November 30, 2012, submitted in support of the 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. See NML Capital Ltd. v. Republic of Argentina, Docket No. 12-105(L), Dkt. # 506 (2d. Cir. November 30, 2012).

(McGill Decl. Ex. V), even though Argentina has "***sufficient funds, including over $40 billion in foreign currency reserves,*** to pay plaintiffs the judgment they are due." NML Capital Ltd. v. Republic of Argentina, 699 F.3d 246, 263 (2d. Cir. 2012). In a speech given on November 14, 2012, Argentina's then-Ambassador to the United States, Jorge Argüello, said:

> [the vulture funds] didn't want to participate [in the 2005 and 2010 exchange offers], clearly because it is not the nature of their business, since ***they do not buy at 12 in order to settle for 30, but rather they buy at 12 in order to collect 100 plus late interest***, clearly a vulture interest[.]...[Argentina is] religiously paying every installment on all the paper that came out of the 2005 and 2010 swaps. That gives Argentina prestige and the predictability it needs to grow strong and ***fight this usurious extortion by the vulture fund speculators***[.]"

(McGill Decl. Ex. M)

Argentina's recent and repeated comments suggest that Argentina has been resisting payment of its ongoing obligations because the holders of the defaulted bonds are all "vulture fund speculators" who bought "at 12 in order to collect 100 plus late interest." (McGill Decl. Ex. M). While it is not for Argentina to pick and choose which bond obligations to honor, we bring to the Court's attention that a group of holdouts – who purchased the Argentine

bonds at the time of issue – purchased the bonds *not* as bets or hedges, but as secure investments to fund their retirements.

The Duane Morris Individual Plaintiffs are a group of individuals who purchased the bonds at par value, *i.e.,* at "100," hoping only to reap the benefit of their investment through interest payments and, upon maturity, full repayment of principal. Indeed, most of these individual bondholders are retirees who had hoped to fund their retirements through investment in Argentine bonds. Some of them have passed away while waiting for the payments.

In 2001, Argentina unilaterally repudiated its obligation to pay. Since that default, the Duane Morris Individual Plaintiffs have not received any interest payments, and their investments have become illiquid. As they had the right to do, the Duane Morris Individual Plaintiffs refused to accept the exchange offers, which would have yielded only a small percentage of their actual investments. Despite its proclaimed ability to pay, Argentina has steadfastly refused to make the payments that are due under the defaulted bonds -- even to the individuals who are not "vultures." Argentina's refusal to pay these individual investors, who purchased the bonds at par, makes clear that Argentina's refusal to pay, despite its ability to do so, is not predicated

upon any principled reason relating to the identity of the bondholders, but is a boldfaced and blatant repudiation of its obligations and disobedience to the courts of the United States.[5]

III.
The Exchange Bondholders Have Benefitted From The Republic's Unlawful Activities

The only real issue is the "innocence" of the Exchange Bondholders. They are "innocent" but no more "innocent" than the holdout bondholders who were duped by Argentina in making the "secure" investment in the first place. And the Exchange Bondholders have received a benefit -- the exchange payments made to-date -- as a result of what this Court has found to be a contractual violation. The Exchange Bondholders are not being asked to disgorge the unlawful gains they have received. They may lose those future rights, but only if Argentina chooses to dishonor its prior commitments. But this Court should not tolerate a regime whereby Argentina may pick and choose which commitments to honor, and which not, despite the unambiguous rulings of our courts.

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[5] In a shameless display of bravado, Argentina has sought from the courts – and obtained, in many instances – rulings that protect it from judgment creditors' attempts to execute against Argentine assets. At the same time, Argentina continues to openly proclaim that it will not obey orders of the courts with which it disagrees. This comportment makes a mockery of our judicial process and should not be countenanced.

IV.

Any Relief This Court Fashions Should Be Retroactive

The Duane Morris Individual Plaintiffs have suffered a devastating loss of liquidity and their investments in the Argentine bonds have been frozen for over ten years. As this Court has already declared, any payments made to exchange bondholders without a "ratable payment" being made to the defaulted bondholders violates the *pari passu* clause. NML Capital Ltd. v. Republic of Argentina, Docket No. 12-105(L), 699 F.3d 246, 259-260 (2d. Cir. 2012).

One major issue on this appeal is the definition of the "ratable payment" that should be paid to the appellees. This Court's resolution of that issue will impact a number of existing bondholders who chose not to participate in the exchanges offered by Argentina. In addressing this issue, we respectfully urge this Court to bear in mind that there has been a significant past harm that needs to be taken into account.

The District Court found, and this Court has confirmed, that Argentina violated the *pari passu* clause in making the 2005 and 2010 Exchange Offers and instituting the Lock Law. *A fortiori*, the holdout bondholders have suffered significant economic loss over the last seven years as they should have received "ratable payments" when the Exchange Bondholders received

their payments. Thus, any relief fashioned by this Court should have a retroactive effect -- Argentina should be required to catch up on the payments it has wrongfully chosen not to make to the holdout bondholders. Whether this is accomplished by a payment in full, as NML suggests, or some scaled payment, this Court should not lose sight of the retroactivity component, especially given Argentina's continued defiance of the orders and judgments of the courts of these United States.

In their appellate briefs, both the Republic and the United States argue, yet again, that the courts of the United States lack the authority, in the exercise of their equitable powers,[6] to order a defaulting sovereign over which the courts have personal jurisdiction to either make payments or refrain from making payments in this country. They cite to the FSIA as the authority which allows for this overriding of traditional equitable remedies. But, as this Court has found, the FSIA only forbids attachments, execution and arrests - - traditional in rem actions concerning property. 28 U.S.C. § 1609. Nothing in the FSIA prohibits a court from exercising its equitable remedies with respect

[6] CPLR 5225(a) authorizes turnover proceedings against a judgment debtor and 5225(b) authorizes garnishment proceedings against a third party. In both cases, the debtor/garnishee can be ordered to bring assets into New York. See, e.g., Miller v. Doniger, 28 A.D.3d 405, 814 N.Y.S.2d 141 (1st Dep't 2006); Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533 (2009).

to a sovereign which has waived its immunity. The courts may do so without exercising dominion over the sovereign's property, and they may punish a sovereign with contempt if the sovereign fails to obey its orders even if the courts lack power to actually compel the payment. NML Capital Ltd, 699 F.3d at 262-263. The final choice of whether to make a payment is left in the hands of the sovereign. Thus, the sovereign never loses dominion over its property.

V.

The Reach Of This Court's Order Should Extend To Anyone Aiding Argentina In Circumventing Its Payment Obligations

Should Argentina choose not to comply with the retroactivity or any other component of the eventual Order, or any other Court Order, it goes without saying that Argentina should be held in contempt. Argentina's contempt citation should bear heavily on the second question raised by this Court – the scope of the Order directing future compliance. If, as we suspect, Argentina decides to flout the orders of the Court and put itself in contempt on the retroactivity element, Argentina will certainly not honor the future element.[7] The question then becomes one of the extent of this Court's reach

[7] Of course, the assumption is that an injunctive order will be obeyed. GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386-87 (1980). The Republic's

vis-à-vis those who, knowing of this Courts' rulings, would help Argentina honor its commitment to the exchange bondholders while Argentina continues to dishonor its prior commitments to the holdout bondholders. To raise the question is to answer it. If a sovereign chooses to ignore the orders of our courts, the eventual order should encompass the acts of anyone who intentionally aids the sovereign in circumventing the obligation to pay the holdout bondholders by paying only the Exchange Bondholders.

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behavior over the last decade casts some doubt on the application of this assumption.

CONCLUSION

The Duane Morris Individual Plaintiffs urge this Court to take the considerations set forth herein in its determination of the issues on appeal.

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Dated: January 4, 2013

CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, I certify that:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure because this brief contains 2,180 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B).

2. This brief complies with the requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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