Dechert LLP

1095 Avenue of the Americas
New York, NY 10036-6797
+1 212 698 3500 Main
+1 212 698 3599 Fax
www.dechert.com

ROBERT A. COHEN

robert.cohen@dechert.com
+1 212 698 3501 Direct
+1 212 314 0001 Fax

June 24, 2014

VIA E-MAIL

The Honorable Thomas P. Griesa
U.S. District Court for the Southern District of New York
United States Courthouse
500 Pearl St., Room 1630
New York, NY 10007-1312

Re: *NML Capital, Ltd. v. The Republic of Argentina,* 08 Civ. 6978 (TPG), 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG);
Aurelius Capital Master Fund, et al v. Republic of Argentina, 09 Civ. 8757 (TPG) 09 Civ. 10620 (TPG);
Aurelius Opportunities Fund II, et al v. Republic of Argentina, 10 Civ. 1602 (TPG), 10 Civ. 3507 (TPG), 10 Civ. 3970 (TPG), 10 Civ. 8339 (TPG);
Blue Angel Capital I LLC, 10 Civ. 4101 (TPG), 10 Civ. 4782 (TPG);
Olifant Fund, Ltd. v. Republic of Argentina, 10 Civ. 9587 (TPG);
Varela, et al v. The Republic of Argentina, 10 CV 5338 (TPG)

Dear Judge Griesa,

I write on behalf of the Plaintiffs in the above-captioned cases in response to the June 23, 2014 letter of counsel for the Republic of Argentina that requests a stay of this Court's Amended February 23 Orders (the "Equal Treatment Injunctions"). The Court should deny Argentina's request to suspend an injunction that has already been affirmed on appeal and to leave the Plaintiffs unprotected against further Equal Treatment violations.

As a legal matter, the law is clear – there is absolutely no basis for granting a stay at this stage in the proceedings. Because Argentina's appellate rights have been exhausted, Argentina's request for a stay is actually a request that this Court modify the Injunctions to permit Argentina to make the June 30, 2014 payments on the Exchange Bonds without making a Ratable Payment to Plaintiffs. As explained below, Argentina cannot even come close to meeting the legal standard for such relief.

As a practical matter, although Argentina claims that a stay would facilitate negotiations, just the opposite is true. If Argentina is serious about negotiating a resolution there is no reason why negotiations could not be concluded prior to July 30, 2014 which, by virtue of a 30-day grace period, is the effective due date for the payment on the Exchange Bonds that is scheduled for

June 30, 2014.[1] While granting a stay is not necessary for negotiation, it would serve to create more time for Argentina to develop evasion plans which it has repeatedly demonstrated its willingness to do – and, would remove all pressure from Argentina to either comply with the Orders or negotiate a reasonable resolution. If as July 30 approaches the parties have made good progress but more time is needed, and Argentina has not taken action to evade the Amended February 23 Orders, Argentina and the Plaintiffs will both have a strong motivation to work out a consensual accommodation, on mutually agreeable terms, that would (i) allow the settlement process to continue, (ii) allow Argentina to make the Exchange Bond payment due June 30 within the 30-day grace period, and (iii) provide the Plaintiffs with suitable protections and compensation for the risk that the settlement effort will fail after Argentina has paid another $900 million to the Exchange Bondholders on account of the June 30 interest installment.

Yesterday's letter from Argentina's counsel incorrectly states that "the Second Circuit's decision requires Argentina, when it makes an interest payment on restructured debt, to pay full principal and interest to all holders of defaulted debt." This is not true. While the Equal Treatment Clause protects creditors beyond those in these actions, the Second Circuit decision requires that when Argentina pays the restructured debt (i.e., the Exchange Bonds), it must make a Ratable Payment to the Plaintiffs in these actions – not the full principal and interest to all holders of defaulted debt. The maximum Ratable Payment that Argentina would be required to make to Plaintiffs is approximately $1.65 billion.

Argentina offers no legal basis for a further stay of the Equal Treatment Injunctions, and there is none. Argentina enjoyed a stay of nearly two-and-a-half years, during which it paid billions of dollars to the Exchange Bondholders (but not a penny to Plaintiffs) and exhausted two appeals to the Second Circuit and two petitions for certiorari to the Supreme Court of the United States. The Second Circuit's August 23, 2013 decision provided that the stay of the Injunctions would dissolve upon disposition of Argentina's second petition for a writ of certiorari, and two days after the Supreme Court denied Argentina's petition, the Second Circuit ordered that the stay be lifted.

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[1] During the telephone conference this morning with Your Honor, counsel for Argentina represented that Argentina would be in default if it failed to make the interest payments due on certain Exchange Bonds on June 30, 2014. That is not so. The relevant Indentures provide that an Event of Default would only occur if Argentina "fails to pay any interest on the [Exchange Bonds] when due and payable **and such failure continues for a period of 30 days.**" (emphasis added) Trust Indenture Between the Republic of Argentina, as Issuer, and The Bank of New York, as Trustee, dated June 2, 2005, at Section 4.1(i).

The only procedural avenue for this Court to grant Argentina the relief it requests is Federal Rule of Civil Procedure 60, which provides that, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding" when "applying it prospectively is no longer equitable . . . ." Fed. R. Civ. P. 60(b)(5). This provision permits the Court to modify an injunction when "the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961); *see also* 11A Wright & Miller, *Federal Practice and Procedure* § 2961 (3d ed.). But in considering a request to modify final judgment of an injunction, a court must weigh its right "to apply modified measures to changed circumstances" against "the policies of res judicata." *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO*, 364 U.S. at 647-48. Accordingly, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation." *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932). To justify relief, continued enforcement of the decree must be "detrimental to the public interest," and "[t]he party seeking relief bears the burden of establishing that changed circumstances warrant relief." *Horne v. Flores*, 553 U.S. 443, 447 (2009).

Here, the only change in circumstance Argentina invokes is its newly-stated conditional willingness to negotiate with holders of its defaulted debt. *See* Letter at 2 ("Argentina is therefore committed to engaging in a dialogue with Plaintiffs that can lead to a resolution of this litigation, ***if the right circumstances for negotiation contemplating the interests of 100% of its creditors are established, as the Republic requests here***") (emphasis added). While this is a welcome development, it is not even remotely the type of "new and unforeseen condition[]" that could warrant granting it relief from the injunction. This is because the "condition" of willingness to negotiate ***always*** has been available to Argentina. Argentina just chose a different and more defiant path. Argentina's representation that it now "committed to a dialogue" thus cannot be viewed as "new" or "unforeseen" and therefore does not constitute a legally adequate basis to modify or suspend a final judgment entered against it. And that is especially so here given that Argentina's supposed "commitment" to negotiations is expressly contingent on the "establishment" of "the right circumstances for negotiation," which is to say, entry of another stay. The fact that a defendant offers to attempt to settle a case if it is granted a stay cannot itself be the new and unforeseen condition that warrants a stay.

Moreover, Argentina cannot possibly show (and this Court would have no basis for finding) that enforcement of the injunction would be "detrimental to the public interest" as the Supreme Court decision in *Horne* requires, 553 U.S. at 447—particularly in the face of the Second Circuit's ruling that Argentina's allegations that enforcement of the injunction would injure the public interest were "speculative, hyperbolic, and almost entirely of the Republic's own making." *NML Capital Ltd. v. Republic of Argentina*, 727 F.3d 230, 246 (2d Cir. 2013). Indeed, Argentina's

implicit assertion that, in the absence of a stay, it will default on the Exchange Bonds, is precisely the same "threat to punish third parties" that the Second Circuit held could not "dictate the terms or availability of relief." *Id.* at 242. These rulings of the Second Circuit are now law of the case and the conclusion that Argentina invites this Court to reach—that enforcement of the Equal Treatment Injunctions now is against the public interest—is directly to the contrary and accordingly is not open to this Court.

Even if Argentina's conditional willingness to negotiate were a permissible basis for staying the Equal Treatment Injunctions entered against it—and it is not—for several reasons, equity counsels strongly against granting Argentina that relief.

First, just last week the parties were before the Court addressing a speech by Argentina's Economy Minister publicly announcing a blatant attempt to violate this Court's longstanding anti-evasion orders by replacing the Exchange Bonds with bonds payable outside the reach of U.S. Courts. What is more, after Your Honor announced in open court that the "proposed mechanism . . . violates the orders of this Court," (June 18 Tr. 29) the Republic submitted a proposed order that would have prohibited merely *payment* on restructured Exchange Bonds, not the swap of Exchange Bonds to make them payable in Argentina. (Of course, if Argentina had had its way and the swap had been completed, it might not have mattered whether *payment* was prohibited because Argentina presumably would have relied on local entities that were unlikely to respect this Court's orders.) It would hardly be equitable to afford Argentina further time in which to devise and implement another evasion plan. As the rhetoric accompanying the Republic's (intermittent) settlement overtures makes clear, Argentina would seize any possible opportunity to flout this Court's orders yet again.

Second, while Argentina now expresses a willingness to negotiate a resolution of its defaulted debts—and, to be clear, Plaintiffs welcome the opportunity that may present—Argentina has not yet commenced such a negotiation. Argentina's officials have yet to engage in any way with the principals of its creditors, or even take steps to schedule such a meeting. In fact, Argentina's counsel informed Plaintiffs yesterday that the Republic is unsure if it will engage with Plaintiffs this week. Unlike the representation of Mr. Boccuzzi on June 18, as noted above, Argentina's "commit[ment]" to negotiations now is expressly conditional, perhaps to be withdrawn if it determines that the "circumstances for negotiation" are not "right." Indeed, a stay could well be counterproductive: It is no accident that Argentina's first (tentative) settlement overture in more than a decade comes only when it faces a realistic—but firm—timeframe. Even when the Second Circuit directly invited Argentina to make a settlement offer following oral argument in the remand appeal, Argentina—feeling no immediacy—offered to pay Plaintiffs *less* than what was offered in the 2005 and 2010 exchanges that Plaintiffs had rejected. *See* 2d Cir. Dkt. 935. As it

has throughout the course of this litigation, further delay will afford Argentina the opportunity to postpone serious discussions.

Third, as noted above, Argentina will avoid default on its Exchange Bonds so long as it makes its scheduled payment by July 30. Five weeks is more than enough time to negotiate a resolution of the remaining claims on Argentina's defaulted debt. Indeed, Plaintiffs believe that if Argentina began negotiating in good faith today—something it evidently is not prepared to do—such a resolution could be achieved by June 30. A stay of Plaintiffs' relief should not be imposed when Argentina has failed to demonstrate that it is necessary to achieve a negotiated resolution.

Finally, a stay of the injunctions is not necessary because Argentina has ample resources to pay both the amounts due on the defaulted bonds in these cases (approximately $1.65 billion as of June 30) and the amounts due on the Exchange Bonds on June 30 (approximately $900 million). If Argentina complies with the injunctions in these cases by paying Plaintiffs what they are owed, Argentina will then be free to make the scheduled payment on its Exchange Bonds on or before July 30, and will have ample time to negotiate a resolution of its remaining defaulted debt before its next scheduled payment on the Exchange Bonds on September 30. As noted above, Argentina is incorrect that, under this Court's Equal Treatment Injunctions, when it makes a payment on the Exchange Bonds it must also "pay full principal and interest to all holders of defaulted debt." The Equal Treatment Injunctions require only that Argentina pay ***$1.65 billion***. Equally meritless is Argentina's invocation of the Rights Upon Future Offers (RUFO) clause in its Exchange Bonds, which by its terms applies only when Argentina "voluntarily makes an offer to purchase or exchange" defaulted bonds. If Argentina complied with the Injunctions by paying Plaintiffs the $1.65 billion they are owed on the bonds in these cases, that would not even arguably implicate the Exchange Bonds' RUFO Clause. In any event, the RUFO clause does not prohibit various mechanisms for Argentina to reach a near-term accord with its creditors. A stay of Plaintiffs' relief should not be imposed when Argentina has the ability to pay Plaintiffs and the Exchange Bondholders on June 30 and to complete negotiations on the remaining claims on defaulted debt thereafter.

In short, there is no legal or equitable basis for the further stay Argentina now asks this Court to grant. Plaintiffs welcome the opportunity to negotiate with Argentina, but Plaintiffs respectfully submit that the further stay Argentina now requests will only delay the ultimate resolution of the litigation over Argentina's 2001 default. It is, after all, only the effectiveness of the Equal Treatment Injunctions that finally has brought Argentina to state a (conditional) willingness to come to the negotiating table. If Argentina wishes to negotiate in good faith there is ample time for it to do so. Argentina's request for a further stay should be denied.

Respectfully submitted,

Robert A. Cohen

cc: (via email)
Carmine D. Boccuzzi, Esq.
Jonathan I. Blackman, Esq.