IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NML CAPITAL, LTD., et al., Plaintiffs-Appellees, -and- ROSAS DE COHEN, et al., Plaintiffs, v. THE REPUBLIC OF ARGENTINA, Defendant-Appellant.	Nos. 15-3675(L), 15-3609, 15-3612, 15-3614, 15-3616, 15-3617, 15-3618, 15-3621, 15-3622, 15-3623, 15-3624, 15-3625, 15-3626, 15-3628, 15-3629, 15-3630, 15-3632, 15-3633, 15-3634, 15-3638, 15-3640, 15-3641, 15-3642, 15-3643, 15-3645, 15-3646, 15-3647, 15-3648, 15-3649, 15-3651, 15-3652, 15-3653, 15-3656, 15-3657, 15-3659, 15-3660, 15-3661, 15-3663, 15-3664, 15-3666, 15-3668, 15-3670, 15-3672, 15-3678, 15-3679, 15-3682, 15-3713, 15-3715

RESPONSE IN OPPOSITION TO EMERGENCY MOTION FOR LIMITED REMAND PURSUANT TO FED. R. APP. P. 12.1

Appellees NML Capital, Ltd., Aurelius Capital Partners, LP, Aurelius Capital Master, Ltd., Blue Angel Capital I LLC, FFI Fund, Ltd., and FYI Ltd. respectfully oppose the Republic of Argentina's emergency motion for a limited remand (Dkt. 69) ("Mot.").

This Court and other courts have spent more than a decade grappling with Argentina's billions of dollars of defaulted debt. Those painstaking efforts, involving numerous cases, yielded a set of injunctions that this Court has twice affirmed. Argentina now moves—just eleven days after it sought this relief in the

district court—for a remand of this case that would (upon satisfaction of conditions wholly within Argentina's control) immediately and automatically cause the injunctions to be vacated. Still more brazenly, it asks this Court to rule with life-or-death haste, disregarding this Court's requirements for an emergency motion.

Argentina's effort to tear down in a matter of days something that took the courts years to build and years more to defend against Argentina's attempts to evade it is nothing more than a tactic to manufacture settlement leverage. There is no real emergency here. Argentina wants only to engage the courts in an effort to crank up pressure on the plaintiffs to accept Argentina's settlement offer by Argentina's wholly arbitrary and needlessly short deadline of February 29.

In addition to the dearth of reasons to consider the motion on an emergency basis, there are sound reasons at this juncture to deny it. The indicative-ruling procedure that the district court has used here is intended to promote judicial efficiency. Granting Argentina's motion, however, would disserve that objective. It would not moot these appeals, as Argentina suggests, but rather would spawn a whole new round of appeals—in which a real emergency *would* exist.

Were the Court inclined to remand these cases at all, there would be a simple way to at least ameliorate these problems. The Court should exercise its discretion to decline to remand these cases unless and until the conditions stated in the district court's indicative order have been satisfied (or nearly so). This approach would

cause Argentina no harm whatsoever and would spare the Court and the litigants from piles of work that could prove to be pointless. It also would require Argentina to deliver on the most basic promises—repealing legislation blocking settlements and actually authorizing the payments that it claims (after nearly fifteen years of defiance) to be willing to make. Declining to remand until the district court actually is prepared to vacate the injunctions will ensure that there is one appeal concerning these injunctions rather than two.

BACKGROUND

A. After Years Of Litigation At Three Levels Of The Judiciary, Argentina Is Enjoined

These appeals concern substantially identical permanent injunctions entered against the Republic of Argentina. The injunctions require that, if Argentina makes payments on certain of its bonds, then it must also make ratable payments to the plaintiffs in this litigation. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 254-56 (2d Cir. 2012) ("*NML I*").

The injunctions stem from Argentina's default on its public debt in 2001. *Id.* at 251. After that default, it invited holders of defaulted bonds to exchange their bonds for new bonds that were much less valuable. *Id.* at 252. It did not, however, seek to negotiate with its bondholders. Holders of bonds governed by New York law filed suit in the district court but were unable to collect on money judgments.

In February 2012, after years of litigation, the district court entered permanent injunctions against Argentina. *Id.* at 254. It held that Argentina had breached promises of equal treatment contained in its bond contracts by paying on so-called "Exchange Bonds" while refusing to pay Appellees' bonds. The district court therefore enjoined Argentina from paying on the Exchange Bonds unless it simultaneously made a ratable payment on Appellees' bonds. *Id.* at 254, 255-56.

It took nearly two and a half years of further litigation before those injunctions took effect. Argentina appealed to this Court, then this Court ordered a limited remand, after which this Court issued another opinion. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 237-39 (2d Cir. 2013) ("*NML II*"). Finally, the Supreme Court denied Argentina's petition for certiorari. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014).

After those injunctions took effect, the plaintiffs in these appeals—the so-called "me-too" plaintiffs—moved the district court for substantially identical relief. The district court granted that relief in October 2015, issuing additional injunctions in favor of the plaintiffs in these cases. That order is the subject of these appeals.

B. Argentina Appeals The Injunctions, Yielding Two Sets Of Appeals Pending In This Court

These appeals, No. 15-3675(L), concern the "me-too" injunctions that the district court entered in October 2015. In these appeals, Argentina seeks to vacate those injunctions in their entirety. Briefs have not been filed in these appeals.

There is a second set of appeals, No. 15-1060(L), in the cases that originally gave rise to the injunctions. The injunctions in those cases are indisputably final, as Argentina exhausted its appellate rights in 2014. Argentina, however, sought to modify the injunctions to carve out certain bonds governed by Argentine law, and appealed the district court's rejection of that effort. These appeals are set for oral argument on February 24 before judges Raggi, Hall, and Walker. This morning, just hours after Appellees suggested that the Court refer Argentina's remand motion to the 15-1060 panel, Argentina abruptly moved to dismiss the 15-1060 appeal.

C. Argentina Commences—Then Pulls The Plug On—Settlement Negotiations

In November 2015, Argentina elected a new president, Mauricio Macri. To his credit, President Macri promptly announced his intention to resolve this long-running litigation.

Argentine officials met with representatives of certain plaintiffs on January 13. Mot. Ex. B at 7. Settlement negotiations began on February 1, when Argentina

presented its initial proposal. *Id.* By February 3, Argentina announced that it had reached agreements in principle with two groups of plaintiffs who, together, held about 14% of the outstanding claims in this litigation. *Id.* Argentina, however, declined to invite the vast majority of plaintiffs into negotiations. *See* Letter from Michael C. Spencer, *Aurelius Opportunities Fund II v. Republic of Argentina*, No. 15-1060, Dkt. 208 (Feb. 22, 2016). Notably, a substantial majority of the 14% of creditors who settled did so in exchange for 100% payment on their claims; other creditors permitted to negotiate with Argentina were urged to accept hefty discounts off their claims.

On February 5, Argentina unilaterally announced a tender offer for the bonds in litigation, offering most plaintiffs up to 72.5% of their claims—but others (not including Appellees) substantially more (even up to 100%). *Id.* It thereupon left the bargaining table, and its representatives decamped for Buenos Aires.

D. Argentina Moves To Vacate The Injunctions, And The District Court Issues Its Indicative Ruling

Cutting short the nascent settlement talks was just the beginning of Argentina's strategy to force plaintiffs to accept its February 5 offer.

On February 11—less than a week after issuing its tender offer—Argentina moved the district court by *ex parte* order to show cause to vacate the injunctions in these cases. It contended that, due to President Macri's professed willingness to settle this litigation (albeit on Argentina's own terms), the injunction was no longer

warranted. The district court initially ordered the plaintiffs to respond at noon on the next business day for the court, February 16, before extending plaintiffs' deadline to noon on February 18. Plaintiffs obliged, and Argentina filed its reply brief the following day.

On February 19, just hours after Argentina had filed its reply brief and barely 24 hours after plaintiffs had filed their opposition, the district court produced a 23-page indicative ruling pursuant to Federal Rule of Civil Procedure 62.1. Mot. Ex. B. It entered its ruling only in the "me-too" cases, currently on appeal as No. 15-3675(L). Because these appeals were pending, the district court recognized, it lacked jurisdiction to vacate the injunction in these cases. The district court has yet to rule on Argentina's motion to vacate the injunction in the other cases, currently on appeal as No. 15-1060(L). In its ruling, however, the district court stated that if it "lifts the injunctions, it will do so in all cases." *Id.* at 19.

In its indicative ruling, the district court held (for the reasons Argentina had given) that it would vacate the injunctions if this Court remanded these cases, subject to two conditions precedent: first, Argentina must repeal certain legislation blocking payment on the bonds (the so-called "Lock Law" and "Sovereign Payment Law"); and second, Argentina must actually make payment to those plaintiffs with which it has reached agreements in principle by February 29,

however few in number they might be. *Id.* at 23. If these conditions are satisfied, then the injunctions "in all cases" (*id.* at 19) automatically will be vacated, without further order of any court.

Ironically, on February 18, Argentina had finally resumed negotiations with the undersigned Appellees and resolved or narrowed many key differences. But, as one might expect of a multi-billion-dollar agreement to settle more than a decade of litigation, there are many issues still to be ironed out.

The unmistakable upshot of the district court's indicative ruling is this: Plaintiffs must reach settlements by February 29, or they are on their own; equitable relief—which this Court held was the only adequate remedy for Argentina's persistent violation of the plaintiffs' contractual rights—no longer will be available. And, not surprisingly, the threat implicit in the district court's indicative ruling and its arbitrary deadline has destabilized the undersigned Appellees' efforts to negotiate their remaining differences with Argentina and to bring their long-running litigation against Argentina finally to an end.

STANDARD

"If a district court issues an indicative ruling, remand remains at the discretion of the court of appeals." *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1297 (11th Cir. 2014). "Discretion is not whim, and limiting discretion to legal standards helps promote the basic principle of justice that like cases should

be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005) (citing Henry Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982)).

ARGUMENT

I. Argentina's Cries Of "Emergency" Are Nothing More Than A Hardball Negotiating Tactic

The Motion Information Statement for Argentina's motion is bizarre. This Court's rules require movants seeking emergency treatment (as Argentina does) to give their opponents "as much advance notice as possible." Local Rule 27.1(d)(1). Eschewing procedural regularity, however, Argentina gave Appellees no notice at all. Why? Because, says the Information Statement, of "the limited time available." But what is so pressing as to prevent a phone call? According to the Information Statement, the rush is that Argentina's "opening brief is due tomorrow"—though Argentina has sought an extension—and that "the Argentine Congress will be in session beginning next Tuesday." For those reasons, and those reasons alone, Argentina demanded that Appellees prepare and file opposition papers in less than fourteen hours.

The two asserted bases of the "emergency" come nowhere close to constituting a real emergency. First, Argentina claims that its brief is due tomorrow. But that has been true for months; indeed, Argentina itself requested that due date long ago. Dkt. 25. Even so, Argentina has since sought a thirty-day

extension (also by emergency motion). Dkt. 72. In any event, Argentina never explains how filing a brief—which Argentina's able counsel can assuredly handle between two of the best-resourced law firms on the planet (Cravath, Swaine & Moore and Cleary, Gottlieb, Steen & Hamilton) that it employs—gives rise to an emergency.

Second, Argentina states that its Congress convenes on March 1. But that is a week away; it hardly justifies a fourteen-hour briefing timetable, especially when Argentina fails to provide even the assurance that the Argentine Congress will do something on that day. But more fundamentally, the Argentine Congress does not require that a springing vacatur of the injunctions in these cases be in place in order to enact whatever legislation it wishes to enact, and nothing in the injunctions prevents it from legislating as it wishes. So any emergency attributed to the convocation of the Argentine Congress is entirely pretextual.

Argentina's asserted "emergency" is not real but tactical: A credible threat that the injunctions will be vacated would pressure plaintiffs to settle now on terms favorable to Argentina. Argentina fears that the longer the injunctions remain in effect, the longer the plaintiffs will have to negotiate a fair resolution of these cases. Argentina's effort to vacate the injunctions post haste is nothing but a hardball settlement tactic, different only in amount—but not in kind—from the ultimatums issued by past Argentine administrations.

Allowing the district court to vacate the injunctions now would be fundamentally inconsistent with the long and deliberate process by which these injunctions were obtained and defended. It took many years of litigation before the injunctions took effect. There have been numerous hearings in the district court, multiple oral arguments before this Court, and hundreds upon hundreds of pages of briefing at every level of the federal judiciary. The district court's indicative ruling threatens to discard all of that in the span of less than two weeks, and without affording the plaintiffs even a hearing on the matter. Indeed, as noted above, the district court issued its 23-page indicative ruling just one day after the plaintiffs filed their opposition, and the court failed to act on multiple requests for oral argument in these cases involving billions of dollars of claims and dozens of plaintiffs.

II. Judicial Economy Counsels Against An Immediate Remand

Remanding these cases immediately would also undermine the sensible administration of these cases. Argentina claims that granting its motion "would moot this appeal." Mot. at 2. As explained below, that is wrong. What is more, remanding these cases for entry of the district court's order would give rise to yet another set of appeals. Thus, far from promoting judicial economy, as the

indicative-ruling procedure should, an immediate remand would foster judicial disorder.[1]

First and foremost, it is not true that entry of the district court's order will moot this appeal. The most that can be said is that the district court's order *might* moot these appeals *if* Argentina decides to satisfy the conditions precedent by repealing the Lock Law and the Sovereign Payment Law and actually authorizing and making payment on the settlements it has obtained. Indeed, as Argentine representatives have repeatedly stressed, all settlements are subject to approval by the Argentine Congress. Thus, all of the proceedings that an immediate remand and entry of the district court's order would yield—including, no doubt, emergency stay applications and expedited appeals—would be conditional on events that may never come to pass.

Moreover, granting Argentina's motion would add fresh layers of procedural mess to these cases. If this Court remands these cases, then plaintiffs will appeal the district court's forthcoming order vacating the injunction. And, as long as Argentina faces the prospect that plaintiffs will succeed, the currently pending appeals would proceed as well. *See* Fed. R. App. P. 12.1(b) ("[T]he court of appeals may remand . . . but retains jurisdiction unless it expressly dismisses the

[1] Granting Argentina's motion would also complicate the relationship between these appeals and the appeals pending under No. 15-1060(L). We have therefore moved separately for the panel already constituted in those appeals to consider this motion.

appeal.”). These appeals would not become moot. Instead, they would now run alongside a new parallel and overlapping appeal of non-settling plaintiffs from the order conditionally vacating the injunctions in their cases. And the parallel litigation would not necessarily be brief. In its public tender offer, Argentina has given itself up to 150 days to make payment to the plaintiffs who accept its offer. Republic of Argentina, Master Settlement Agreement at 6, http://bit.ly/1mU2rDv. An immediate remand thus would significantly complicate, rather than simplify, the administration of these appeals and would be contrary to the policy of judicial economy the indicative ruling procedure of Civil Rule 62.1 and Appellate Rule 12.1 is intended to foster.

There is a simple solution to these problems—wait. If the Court remands these cases at all, it should exercise its discretion to decline to remand them unless and until it is first established that the district court’s conditions precedent have been satisfied (or at least nearly so). More particularly, Argentina should at least be required to repeal the Lock Law and the Sovereign Payment Law, formally authorize the settlements, and remove any other legal impediments to payment. That would ensure that there is only one appeal concerning these injunctions, rather than two.

Indeed, waiting to remand would also have the important consequence of requiring Argentina to actually deliver on its promises before it receives any

indulgence from the federal courts that it has openly defied for more than a decade. Thus far, all that the settlement negotiations have accomplished is that Argentina's representatives—who say they lack authority to bind the Republic—have agreed to try to get authorization to pay a small portion of the claims it owes. If Argentina is serious about reaching settlements, it should be required to eliminate all barriers to making payment before it receives even the conditional relief contemplated in the indicative ruling.

III. An Immediate Remand Would Create A Real Emergency In This Court

Although there is no emergency now, there would be were the Court to grant Argentina's motion. Vacatur of the injunctions, even on a conditional basis, would upend a status quo that has been settled and stable for almost two years. And there may be no going back to the status quo—with the injunctions out of the way, Argentina could make billions of dollars' worth of payments to other bondholders in violation of the plaintiffs' contractual rights. It could also put in place mechanisms to circumvent this Court's jurisdiction, as it has sought for years to do. To avert these consequences, the plaintiffs would need to seek immediate relief from this Court. Attempting to fix a fake emergency is particularly unwarranted where doing so would create a real emergency.

CONCLUSION

The Court should deny Argentina's motion for an immediate remand of these cases.

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Respectfully submitted,

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