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United States Court of Appeals

for the

Second Circuit

AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD.,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR PLAINTIFF-APPELLANT ANDRAREX, LTD.

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Plaintiffs-Appellants,

GIOVANNI BOTTI, CLAUDIO MORI, SILVIA REGOLI,

Plaintiffs,

– v. –

REPUBLIC OF ARGENTINA,

Defendant-Appellee,

BANK OF AMERICA, N.A.,

Respondent,

BANCO BILBAO VIZCAYA ARGENTARIA, S.A., BBVA COMPASS BANCSHARES, INC., BBVA SECURITIES INC.,

Third-Party-Defendants,

ADMINISTRACION NACIONAL DE SEGURIDAD SOCIAL, UNION DE ADMINISTRADORAS DE FONDOS DE JUBILACIONS Y PENSIONES, CONSOLIDAR AFJP S.A., ARAUCA BIT AFJP S.A., FUTURA AFJP S.A., MAXIMA AFJP S.A., MET AFJP S.A., ORIGENES AFJP S.A., PROFESION+AUGE AFJP S.A., UNIDOS S.A. AFJP,

Defendants.

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PRELIMINARY STATEMENT

Andrarex Ltd. (hereinafter "Andrarex" or "Appellant") is an individual holder of defaulted Argentine bonds.[1] The value of Andrarex's claim, including principal and interest, as of October 1, 2018, was $5,276,390. Post-judgment interests must be added since then.

Andrarex joins the arguments of the NML, Aurelius, and Olifant funds (the "NML Group") as well as of the Individual Bondholders in opposing Argentina's effort to take away the injunctive relief that has been these bondholders' only potentially effective remedy against Argentina's decade of unequal treatment of their bonds.

This separate brief is filed in order to emphasize facts that uniquely affect Andrarex's legitimate interest in negotiating a fair and reasonable settlement with Argentina and the risk of irreparable harm that Andarex may suffer.

While the new Macri administration *says* it is open to negotiations and settlement of bondholders' claims, no such negotiations with Andrarex in fact have occurred, and, as a result, Appellant has not settled. For Andrarex, the practical effect of vacating the Injunction would be to apply extreme pressure: Argentina is

[1] Andrarex, Ltd. is the appellant in No. 16-694.

trying to enforce its unilateral "public offer" terms, or worse, on the remaining bondholders, without real negotiations.

Andrarex's situation is thus consistent with that of the individual Bondholders but differs from that of the NML Group in one simple way. The NML Group wants to keep the Equal Treatment Injunctions in force because they are worried their negotiated settlement with Argentina might not close, and they want to preserve the Injunctions in case they need to continue litigating.

Andrarex and the similarly situated bondholders, on the other hand, have not settled with Argentina – so their need for the continued protection of the Equal Treatment Injunctions is immediate, ongoing, and direct.

As discussed in the rest of this brief, none of the "changed circumstances" identified by the District Court as justifying vacatur of the Injunctions applies to Andrarex.

The government's claimed openness to negotiations has been empty rhetoric as far as these bondholders are concerned. The undisputed facts in the record before the District Court showed that no real negotiations had occurred with the Andrarex's representatives. This is not to say that Argentina was required to negotiate with them. But in the absence of some real discussions, mere pro-negotiation statements by the government cannot qualify as a real changed circumstance for Appellant.

The settlements with other bondholders that were announced did not represent a changed circumstance for Appellant either. Andrarex had bought the almost all of its bonds at full face value prior to the default. Unlike investment funds that bought their bonds post-default at 20 cents on the dollar, Andrarex is in for 100 cents on the dollar, and will never be made whole with "haircut" settlements – yet in ordering vacatur, the only settlements the District Court focused on were by hedge funds that were multiplying their original investments almost regardless of the settlement level. Again, that does not mean those settlements were wrong. But the District Court was not acting equitably when the investors with the strongest equitable claims were, and are, the ones being left behind.

While there may be circumstances in which a district court would be justified in vacating an injunction so that last-stand holdouts cannot exploit extraordinary leverage, this is nowhere near one of those situations. Andrarex was not even able to engage in meaningful negotiations, and is a "holdout" only in the sense that it has refused Argentina's unilateral settlement edicts since 2005. No matter how fervently the District Court wanted to bring this 14-year-long litigation to a close, its over-hasty vacatur of the Injunctions necessary to enforce the Appellant's Equal Treatment right was legally improper and an abuse of discretion, and should be reversed.

JURISDICTIONAL STATEMENT

The Individual Bondholders adopt the Jurisdictional Statement of the NML Group.

STATEMENT OF THE ISSUES

The Individual Bondholders adopt the Statement of the Issues of the NML Group.

STATEMENT OF THE CASE

A. Introduction

These cases are contract actions in the Southern District of New York to recover principal and interest on defaulted bonds issued by the Republic of Argentina. The cases were brought starting shortly after the default in late 2001. Many money judgments have been obtained but Argentina refused to pay them and has evaded enforcement efforts. In 2012 and 2015, many bondholder plaintiffs obtained injunctions to enforce the Equal Treatment provisions of the bonds. The first injunctions were affirmed by this Court and certiorari was denied by the Supreme Court. In December 2015, a new president took office in Argentina, and he announced openness to negotiating with bondholders. In February 2016, soon after negotiations with some investment fund bondholders had begun, the District Court (Griesa, J.) issued an indicative ruling and then an order vacating the

injunctions once two conditions were met. Those decisions, from which the present appeals are taken, are not reported.

B. History of the Default and Litigation by Appellant Andrarex

Argentina marketed its bonds to individuals around the world, largely through local banking chains, in the 1990s and early 2000s. The bonds ended up in the hands of ordinary citizens of Argentina, Italy, other parts of Europe and Latin America, and to some extent the United States.[2]

Argentina announced it would stop paying on the bonds in December 2001. That default, on about $90 billion in bonds, was cataclysmic news for the bondholders. Prices of the bonds on the secondary market dropped precipitously. Bondholders began to bring lawsuits in the Southern District of New York, based on the jurisdiction, venue, choice of law, and waiver of sovereign immunity provisions in the bonds' governing instruments.

Andrarex adopts the NML Group's Statement of the Case and will not repeat that material here.

Andrarex filed suit in 2007 and obtained a money judgment on its bond claim on October 1, 2008. Argentina would not pay the judgment and defended efforts to enforce the judgments. Andrarex has not recovered on its bonds at all.

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[2] The facts recited in the first eight paragraphs of this section are taken from *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (*"NML I"*), and 727 F.3d 230 (2d Cir. 2013) (*"NML II"*).

Argentina made two unilateral public offers to bondholders to compromise their claims, in 2005 and 2010. Both offers were valued at 30 cents on the dollar, and provided those who accepted with new Exchange Bonds, not cash. Because Argentina had been so intransigent in litigation, and because many bondholders were exhausted from the conflict or had no choice due to economic exigencies, the two exchange (or "swap") offers reportedly ended up retiring about 93% of the outstanding defaulted bonds. The holders of the remaining 7% came to be known as "holdouts" due to the fact that they had refused Argentina's 70%-haircut offers.

The governing instruments for virtually all of the defaulted bonds (including the 1994 Fiscal Agency Agreement, which governs most of them) contain a "pari passu" clause, one part of which is an "Equal Treatment" provision. As the term indicates, the provision prohibits Argentina from paying other debt holders unless it also makes equal ("ratable") payments to holders of the defaulted bonds.

In 2011, the three largest investment fund bondholder plaintiff groups (NML, Aurelius, and Olifant[3]) and the Individual Bondholders group chose certain of their bonds issued under the 1994 Fiscal Agency Agreement, and the

[3] The group has sometimes been referred to as having three or four members, sometimes by different names. NML Capital is affiliated with Elliott Management. Aurelius, the second member, is often referred to as also including, for purposes of these investments, Blue Angel Capital, which is affiliated with Davidson Kempner. Olifant Fund Ltd., FYI Ltd. and FFI Fund Ltd., are affiliated with Bracebridge Capital. *See* A1920 (Special Master announcement of settlements); A2373-2377 (Agreement in Principle for settlement, signature pages).

corresponding actions, as test cases to enforce the Equal Treatment provision. The movants asked Judge Griesa to require Argentina to make ratable payments on the movants' bonds if Argentina made payments on other outstanding bonds (the Exchange Bonds), which were not in default and Argentina was servicing. The requested Equal Treatment Injunctions were entered in February 2012 (A533, A540, SPA1); those orders were affirmed by this Court in *NML I* and *NML II*; and the Supreme Court denied certiorari on June 14, 2014. 134 S. Ct. 2819 (2014). The Injunctions took effect four days later. *NML Capital, Ltd. v. Republic of Argentina,* No. 12-105(L), D.E. 1055. Argentina then tried to evade the Injunctions in connection with the next Exchange Bond interest payments; Argentina was held in contempt by Judge Griesa, *see* A204, D.E. 687 (Sept. 29, 2014), D.E. 693 (Oct. 3, 2014); and the "unequal" payments were stymied.

Along with other holders of defaulted bonds issued under the 1994 Fiscal Agency Agreement, Andrarex applied for and received "me too" Equal Treatment Injunctions in October 2015. A549, SPA9. This included other bonds held within the Individual Bondholders group, other bonds held by the NML Group funds that were not included in the initial cases, and other bondholders who had sued in the Southern District of New York.

C. Description of Appellant Andrarex

Andrarex is an individual investor that bought almost all of its bonds prior to default, at full face value. By no stretch could it can be called "speculator." Andrarex would never have bought its bonds had it known what lay ahead.

The face value of its bonds exceeded $2 million. The current value of its claim (including almost 7 years of post-judgment interest) exceeds $6 million.

Andrarex declined Argentina's swap offers in 2005 and 2010 as it found the offers inadequate, and offensive because they were unilateral edicts by the government, not preceded by any negotiations with any creditor groups. Andrarex was able to resist the swaps in the hope that more equitable terms would be forthcoming. On the other hand, Argentina persisted with not paying the judgment and resisted enforcement efforts. Because those legal remedies were unavailing, many bondholders who bought bonds issued under the 1994 Fiscal Agency Agreement, including Andrarex, obtained Equal Treatment Injunctions in 2012 and 2015, as described above.

The bondholders' hopes skyrocketed in November 2015, when Mauricio Macri was elected president. Macri had campaigned on his promise to resolve defaulted bondholders' claims so as to clear the way for Argentina's return to international markets. It seemed that years of refusal and rejection by the government were coming to an end.

D. Appellant Andrarex's Fruitless Efforts to Negotiate

With Argentina[4]

Argentine government officials, led by finance secretary Luis Caputo, first traveled to New York to meet with bondholder representatives in mid-January 2016, under the auspices of Daniel Pollack, the Special Master appointed to facilitate mediation by Judge Griesa. The holdouts welcomed the news that settlement negotiations would finally occur.

The Settlement Master and Argentina insisted that several large hedge fund groups would negotiate first, starting on February 1, 2016. Other bondholder representatives were excluded from the meetings. Two of the funds, with claims of close to $1 billion, split off and settled on February 3. The remaining NML Group funds, which had claims of about $5.9 billion (virtually all covered by Equal Treatment Injunctions), showed Mr. Caputo a term sheet on February 4, but the meeting ended in 20 minutes and the Argentines headed home.

From that time onward throughout February, the Special Master and Argentina concentrated nearly exclusively on negotiations with investment funds, including primarily the NML Group. The Special Master later described those efforts as "three months of intense, around-the-clock negotiations under my

[4] Descriptions of these events appear in the Declaration of Jay Newman, A1642; the Declarations of Santiago Bausili, A652, A1678, A1922; the Declaration of Andrea Boggio, A7509; and Statements of the Special Master, A642, A1668, A1672, A1677, A1916, A1918, A1920.

supervision." A1920. The settlements and negotiations identified by Argentina at the end of February all involved investment funds, and not individuals. A1938-39 (Bausili Dec. ¶¶ 6-15).

In his later order vacating the Injunctions (A2314), the District Court stated that the assertion by the lawyer for the bondholders that he had been "excluded" from the negotiations was "exaggerated" (without source attribution or further explanation). The only evidence in the record on this point is declarations by one of the negotiators for Argentina (Santiago Bausili, undersecretary of finance) and by undersigned lawyer for Andrarex.

Mr. Bausili stated that "[n]egotiations with other plaintiffs are ongoing. I have personally had discussions with a number of plaintiffs, including Andrarex, Ltd." and 11 other bondholders. (Bausili Dec., Feb. 29, 2016, ¶ 15, 17). No further information was given.

Mr. Boggio stated as follows:

> 6. Several bondholder groups with large claims conferred in advance of the visit by Luis Caputo, Argentina's finance secretary, to New York in mid-January. In accordance with normal creditor self-organization in workout situations, this group of the largest creditors presented itself to the Special Master for the initial meetings with Argentina. The group included principals of NML, Aurelius, and Olifant, as well as me, representing the largest group of individual and Individual-fund bondholder plaintiffs. To the surprise of this entire group, the Special Master refused to allow me to attend the initial meeting with Mr. Caputo on January 13, 2016. The only stated reason was that I am a lawyer, whereas other attendees were to be principals of the funds. My numerous bondholder clients do not have a non-

lawyer representative; also, Mr. Caputo reportedly was accompanied by counsel at the meetings. The Special Master did arrange for Anthony Costantini of Duane Morris, who represents another large group of individual and fund bondholders, and me to meet with Mr. Caputo separately for a half-hour at the end of the day. No negotiations took place at that brief meeting.

7. Several bondholder groups with large claims were able to negotiate directly with the Republic of Argentina at meetings arranged by the Special Master, Daniel Pollack, on January 13, February 1, and February 4, 2016. My client was not invited to any of these meetings has no further knowledge as to the content of the discussions that took place at these meetings.

8. On February 12, 2016, my client became aware that the Republic of Argentina had issued a public proposal to bondholders. As a result, I promptly contacted Defendant's counsel and the Special Master asking for more information regarding the exact terms of the proposal and inquiring on the proper way to accept such proposal if deemed adequate and fair.

9. On the morning of February 20, 2016, the Special Master replied to me more than a week later. This is the day after the deadline for accepting the proposal at more advantageous conditions that the current proposal (a 27.5% rather than 30% "haircut"). In his reply, the Special Master stated that he had forwarded my inquiry to the 2 Argentine authorities and that I would be contacted directly by them. Since then, no further exchanges with the Special Master took place.

10. On February 22, 2016, the Argentine authorities in the person of Santiago Bausili, Undersecretary of Finance of the Republic of Argentina, contacted me for the first time, by email and then by phone. In the subsequent days, Mr. Bausili and I exchanged one more phone calls and several emails. While the content of these communications is confidential, I can certainly report that no real negotiation took place during these exchanges.

11. On February 29, 2016, the Special Master issued a statement announcing that the Republic of Argentina and Elliott Management, led by Paul E. Singer, had reached an agreement for the

> sum of approximately $4.653 billion dollars. The announcement makes explicit reference to "three months of intense, around-the-clock negotiations under [his] clock." The announcement also indicates that the parties reached an agreement that "will pay the [settling] Funds 75% of their full judgments including principal and interest, plus a payment to settle claims outside the Southern District of New York and certain legal fees and expenses incurred by them over a 15-year period." The terms of this settlement are unequivocally more favorable than those contained in the public offer made by the Republic of Argentina and that my Client was never able to negotiate but merely to accept or reject as formulated.

A7510-11 (Boggio Dec., Feb. 29, 2016, ¶¶ 2-3).

E. Argentina's "Public" Offer

On February 5, Argentina unilaterally released a non-negotiated public offer on its finance ministry website. A645-649; *see also* A1617-1636 (subscription materials). A "standard" offer, available to all defaulted bondholders, would pay 150% of the original principal (face) amount of the bonds. A "pari passu" offer, only available to bondholders who had obtained Equal Treatment Injunctions, would pay 70% of the money judgment amount (for judgment holders) or 70% of the accrued value of the claims (for pre-judgment claims) (the latter offers were at 72.5% for bondholders who accepted by February 19). This public offer was also conditioned on repeal of the Lock Law and Sovereign Payment Law and approval of Congress, and on vacatur of the Injunctions. The offer provided assurances of actual payment several months later, if the conditions were satisfied, for bondholders who accepted by February 29. The structure and financial terms of

the offer were defined unilaterally by Argentina and did not represent any negotiations with anyone.

The Special Master hailed the public offer as a "historic breakthrough" and noted that settlements would allow Argentina to return to global financial markets to raise "much needed" capital. He effusively praised Argentine officials for their "courage and flexibility in stepping up to and dealing with this long-festering problem which was not of their making." A642.

F. The District Court's Indicative Ruling on Vacatur of the Equal Treatment Injunctions

On February 11 (just before the Presidents' Day weekend), Judge Griesa signed Argentina's ex parte application for an order to show cause seeking vacatur of the Equal Treatment Injunctions, to occur automatically upon (a) repeal of internal Argentine laws (the "Lock Law" and "Sovereign Payment Law") prohibiting bond settlements and (b) actual payment by Argentina of amounts owed to bondholders who settled on or before February 29. A450. Without hearing argument, Judge Griesa issued a Rule 62.1 Indicative Ruling on Friday, February 19, indicating he would vacate the Equal Treatment Injunctions in certain actions once they were remanded from a pending appeal, and planned to do the same in "all cases." A2329 at A2359; SPA35.

The court justified vacatur on the ground that Argentina was negotiating, the bondholders could now seek settlements, and "[u]ntil February 29, 2016, *all* FAA

bondholders have the right to accept the terms of the Republic's [public] Proposal, and they are certainly free to make counteroffers." A2362.

By coincidence, another pending appeal about the scope of the Injunctions was scheduled for argument in this Court on Wednesday, February 24. At argument, Argentina dismissed both of its appeals so all the cases could go back to the District Court. Later that day, the appeal panel ordered the District Court to hold a hearing before issuing a vacatur order, and required a stay of up to two weeks of any such order so that affected bondholders could seek an extension of the stay, as sought by the present motion. A1715 at A1721. The cases were remanded, and Argentina wrote a letter to the District Court asking for the required hearing, which the court scheduled for Tuesday, March 1.

G. The NML Group Settlement

On Monday, February 29, the Special Master announced that a settlement had been reached with the NML group of holdout funds, whose claims amounted to about 65% of the holdouts with Injunctions. The settlement provides for payment of 75% of the $5.89 billion in claim value asserted by those plaintiffs, plus $235 million attributed to legal fees and other claims -- an actual settlement percentage of 79% of claim value. A1920.

The Special Master's press release stated:

> It gives me greatest pleasure to announce that the 15-year pitched battle between the Republic of Argentina and Elliott Management, led

> by Paul E. Singer, is now well on its way to being resolved. The parties last night signed an Agreement in Principle after three months of intense, around-the-clock negotiations under my supervision. ***
>
> There are many people who have devoted untold hours or special talents, or both, to making this settlement possible. Foremost among them is Hon. Thomas P. Griesa, the Federal Judge who presided over all cases in re Argentina Debt Litigation for 15 years. Others entitled to greatest credit are President Mauricio Macri of Argentina, who immediately upon his election in November, set about to change the negative course that the Republic had steered in this litigation, and his Secretary of Finance Luis Caputo, who led the delegation that met with me in my capacity as Special Master and with the "holdout" Bondholders for countless hours, with patience, good will and intelligence. He was ably assisted by Santiago Bausili, Under Secretary of Finance. Also involved as important decision-makers for Argentina were: Alfonso Prat-Gay, Minister of the Economy, and Marcos Pena and Mario Quintana, the Chief and Vice Chief of the Cabinet. Their course-correction for Argentina was nothing short of heroic. On the "holdout" hedge fund side, Paul E. Singer was the central figure who involved himself intensely with me over the past several weeks on behalf of the "holdout" Bondholders. He was a tough but fair negotiator. His second-in-command, Jon Pollock, also made a key contribution to the success of the negotiations. All of the senior principals of the "holdout" hedge funds demonstrated vast talent. No party to a settlement gets everything it seeks. A settlement is, by definition, a compromise and, fortunately, both sides to this epic dispute finally saw the need to compromise, and have done so.

A1920-1921.

Some other bondholders, mostly investment funds, reportedly also reached settlements on or before February 29, apparently within the "public" offer parameters. A1938-1939. No meaningful negotiation with movants' counsel had occurred.

H. Vacatur of the Equal Treatment Injunctions

The District Court heard argument on the vacatur motion on the afternoon of Tuesday, March 1. Non-settling bondholders, and even the NML funds that had just settled, opposed vacatur, and asked at least for a 30-day extension while excluded bondholders could try to negotiate settlements to stabilize the situation. Nevertheless, the District Court confirmed its prior Indicative Ruling and issued its Opinion and Order the next day, vacating the Equal Treatment Injunctions automatically once the two conditions were satisfied. A2314, SPA70.

The excluded bondholders comprise about 15% by claim value of the aggregate Equal Treatment Injunction holders, or a total of about $1.4 billion.

I. Further Negotiations and Settlements?

As of this writing, the Special Master has announced settlements with several more investment fund bondholders, and it would not be surprising if more follow. The terms have not been disclosed, but it seems likely that the settling funds are also post-default purchasers with low basis.

There have been some initial communications between Argentine officials and co-counsel for the Individual Bondholders in Buenos Aires, but no exchange of proposals or anything that could yet be termed a proper negotiation.

SUMMARY OF ARGUMENT

The District Court abused its discretion, made clearly erroneous factual findings, and committed legal error in vacating the Equal Treatment Injunctions as to the Individual Bondholders.

The District Court downplays the fact that it entered the Equal Treatment Injunctions in order to enforce defaulted bondholders' contractual rights under the Equal Treatment provision of the bonds. The court acknowledges that vacatur will allow Argentina to resume paying the Exchange Bondholders without making ratable payments on the defaulted bonds, and goes so far as to say that change is in the public interest. But Andrarex, this would simply be a reversion to the days of Unequal Treatment and non-payment on their bonds, and the purpose of the Injunctions would be wholly thwarted.

There is no factual basis for the emphatic statements by the District Court that Argentina has negotiated in good faith with bondholders, at least as concerns Andrarex. The record facts show that no such negotiations occurred. Only the large investment funds have had that privilege. While Argentina is free to negotiate or not negotiate with whomever it chooses, the District Court should not and cannot properly base its decision to vacate the Injunctions on a factual supposition about negotiations that is unsupported and untrue.

The fact that many large fund bondholders have now reached settlements similarly is cold comfort to Andrarex and similarly situated bondholders, who have

not had similar opportunities to negotiate or settle. The settlements to date, no matter how large, do not provide any lawful reason to deprive Andrarex of its Injunction. The settlements only accentuate that the present situation is inequitable.

Nor is there any basis for the District Court's concern that remaining individual bondholders will derive undue "leverage" if their Injunctions are not vacated, or that "some plaintiffs [will] hold other plaintiffs hostage." A 2361. There is no evidence that that is happening, and in any event, the Injunctions restrict payments to Exchange Bondholders, not other settlements or financings. If anything, vacatur would allow Argentina to hold the remaining bondholders hostage, not the other way around.

The obvious effect of vacatur of the Injunctions would be to try to coerce Andrarex into taking Argentina's unilateral 70% public offer (if it even remains open), or to resort again to probably futile judgment enforcement efforts. That is essentially where Andrarex was before the Injunctions were issued: accept unilateral compensation offers, or try to enforce their judgments. A court should not try to exert pressure toward particular settlement outcomes in this way. Vacatur would be particularly inequitable here because the parties being excluded are those who should receive the greatest protection in law and equity: individual investors who paid full face value for their bonds, and deserve an offer at least

comparable to that enjoyed by the large investment funds that have received most of the District Court's solicitude.

ARGUMENT

I. THE DISTRICT COURT LACKED ANY PROPER BASIS FOR VACATING THE INJUNCTIONS AS TO THE INDIVIDUAL BONDHOLDERS

Andrarex adopts the arguments of the NML Group against the District Court's vacatur of the Injunctions. The following additional argument describes why vacatur of the Injunctions *as Andrarex* is particularly unlawful, inequitable, and unwise.

A. Vacatur of Andrarex's Injunction Was Legally Impermissible Because Their Purpose Has Not Been Achieved

An injunction "may not be changed in the interest of the defendants if the purposes of the litigation as incorporated in the decree have not been fully achieved." *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir. 1984). The purpose of the Injunctions is to "hold Argentina to its contractual obligation of equal treatment." *NML II*, 727 F.3d at 241. Because Andrarex's bonds remain relegated to a non-paying class, that purpose remains unfulfilled. The District Court acknowledges that vacatur will in fact lead to Argentina's breach of the Equal Treatment provision when it pays Exchange Bondholders without making ratable payments to defaulted bondholders holding Injunc

tions. That result makes vacatur either legally impermissible or outside the District Court's range of permissible decisions. *See In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013).

The District Court held that it could vacate the Injunction "even though the purpose of the decree has not been achieved," Op. 12, A2352, but that holding does not reflect the law. Federal Rule of Civil Procedure 60(b) bars vacatur of a permanent injunction absent "exceptional circumstances." *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009). No such circumstances were present, at least as regards Andrarex. Even if limited *modification* of an injunction is sometimes permissible before that injunction's purpose is *fully* achieved, the wholesale vacatur of an injunction – leaving no alternative remedy in place – is inappropriate where the "conduct . . . sought to be prevented will recur absent the injunction." *Bldg. & Constr. Trades Council of Phila. & Vicinity, AFL-CIO v. N.L.R.B.*, 64 F.3d 880, 888 (3d Cir. 1995); *cf. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991) (injunction has served its purpose when it is "unlikely that the [defendant] would return to its former ways"). Any "modification must not create or perpetuate [the] violation" that the injunction was intended to remedy. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992).

Here, Argentina has openly acknowledged that, upon vacatur, it intends to resume violations of Andrarex's Equal Treatment rights by making payments on

Exchange Bonds without making ratable payments to Andrarex. The District Court's Indicative Ruling touted this as a *virtue* of vacatur. Op. 19, A2359. Since the District Court already determined, in entering the Injunctions, that Andrarex has no "adequate remedy at law" to collect on their defaulted bonds, vacatur would thus turn the rules of equity upside-down, removing Andrarex's only effective means of enforcing its contractual rights while pretending that equity is being served. In fact, Andrarex's contract rights will be grievously harmed if vacatur is allowed.

While the Injunctions may be a "discretionary remedy," the contract rights they secure are a "legal entitlement." Op. 21, A2361. The District Court's invocation of discretion to justify depleting these contract rights undermines the central premise – "essential to the integrity of the capital markets" – that "borrowers and lenders" who "negotiate mutually agreeable terms for their transactions . . . will be held to those terms." *NML II*, 727 F.3d at 248. The Injunction is necessary to achieve that purpose.

B. The District Court Based Vacatur of the Andrarex's Injunction on the Clearly Erroneous Factual Finding That Argentina Engaged in Settlement Negotiations With Appellant

According to the District Court, "Put simply, President Macri's election changed everything." Op. 13, A2353. The District Court was so relieved at the election results, and the new administration's promises to negotiate, that he

concluded that circumstances were so changed that the Injunctions were rendered "inequitable and detrimental to the public interest." *Id.*

Review of the Indicative Ruling reveals clear factual errors in the District Court's account of negotiations, at least as applied to Andrarex. The Indicative Ruling stated:

> The Republic's high-level officials met with the Special Master and a group of plaintiffs in January 2016 to establish a framework for substantive talks. And, through the first week of February, the Special Master convened a series of meetings in New York. As the Special Master continually informed the court, he communicated intensively with the Republic's officials and the plaintiffs' lead principals on a virtually daily basis. The Republic's senior officials met with a substantial number of plaintiffs as a group, and also spoke separately with a number of those plaintiffs who sought private dialogue with the Republic.

Op. 14, A-2354. The District Court also stated:

> The court notes … that the Republic and the Special Master worked diligently to give plaintiffs the opportunity to negotiate and settle their claims.

Op. 22, A2362.

Absent from that account is the fact – described in A1642, A652, A1678, A1922; A7509, A642, A1668, A1672, A1677, A1916, A1918, and A1920 – that these meetings and communications really involved only the large investment funds and that Andrarex was neither invited nor involved in any other manner. The sworn declarations from both the Argentine and Andrarex's representatives, described earlier in this brief, confirm that no meaningful negotiations occurred.

It bears repeating that Andrarex does not make these observations as complaints about the negotiations or the Argentine representatives or the Special Master (or the settling funds). Rather, the point is that the District Court's factual assertions about the negotiations, and the statement that "the Republic has shown a good-faith willingness to negotiate with the holdouts," Op. 13, A2353, are clearly erroneous with respect to Andrarex. Those findings were so integral to the District Court's thinking that they infected the entire vacatur decision as to these bondholders.

C. Coercing Andrarex to Accept a Settlement They Had No Opportunity to Negotiate Is Not Permissible

Although the District Court acknowledged that it "does not have the power to force plaintiffs to accept a settlement," Op. 22, A2362, vacatur of the Injunctions will have essentially that result. The judicial power does not exist to impose "'pressure tactics' designed to coerce a settlement." *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 382 (S.D.N.Y. 2011) (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)). Adhering to that black-letter law, the Second Circuit already has ruled in affirming the Injunctions that bondholders are "completely within [their] rights to reject" Argentina's take-it-or-leave-it swap offers, and that such rejection does not constitute a basis for denying equitable relief. *NML I*, 699 F.3d at 263 n.15.

Argentina's February 5 public offer to bondholders thus cannot provide the "exceptional circumstances" necessary to deprive Andrarex of a remedy. *Uzan*, 561 F.3d at 126. To conclude otherwise would permit precisely the "pressure tactics" that *A.T. Reynolds* and *Kothe* forbid.

The District Court professed not to be "tak[ing] [a] position on the reasonableness of the Republic's Proposal," Op. 16, A2356, but in fact it was doing exactly that -- both by relying on the proposal as an exceptional changed circumstance, and by proceeding with vacatur on that basis. Depriving remaining bondholders of their injunctions, which were entered because legal remedies were inadequate, would have the inevitable effect of leaving bondholders with no practical alternative but to accept the proposal. Undoubtedly this is the result Argentina seeks. And because there is nothing to prevent the government from withdrawing the public proposal as an offer at any time, the situation is time-coercive as well as content-coercive for bondholders.

Whether maintaining an injunction is equitable "depends on each suit's facts." *Rogers v. 66-36 Yellowstone Blvd. Co-op. Owners, Inc.*, 599 F. Supp. 79, 82 (E.D.N.Y. 1984). At a minimum, the new administration's announcement of its intention to negotiate cannot be used as a reason to vacate Andrarex's Injunction until real negotiations actually occur. Otherwise, Argentina is just continuing its former approach of making unilateral "offers," like the exchange offers in 2005

and 2010. It was that situation that gave rise to the Injunctions; the same approach cannot also justify vacatur.

Vacatur of Andrarex's Injunction would be particularly inequitable for plaintiffs like Appellant. It has the same Injunction as everyone else in this category, and for the reasons previously described, they have *greater* equitable entitlement to the courts' solicitude than do funds that bought their bonds at steep discounts. Under these circumstances, it is particularly inequitable for the Special Master to countenance a negotiation program, and for the District Court then to use the court's power to enter a vacatur, that coerces these bondholders into accepting the public offer.

D. Preserving the Injunction Would Not Prevent Argentina From Implementing Its Settlements With Other Creditors

One of the key justifications given by the District Court for vacatur was that continuation of the Injunction would allow non-settling injunction holders to "scupper" settlements reached by other defaulted bondholders, Op. 19, A2359 (using the EM Limited settlement as an example), and to "hold other plaintiffs hostage." Op. 23, A2363.

That fear is baseless. The Injunction require Argentina to make ratable payments to Injunction holders if (and only if) Argentina makes payments to *Exchange Bondholders*. That has nothing to do with the EM settlement (or the

NML Group settlement, or any of the other recent settlements). Payments made by Argentina to effectuate those settlements are not engaged by the Injunction

The only link between the Injunction and the settlements arises from Argentina's *self-imposed* condition that it will not pay the settlements until all Injunctions have been lifted. Op. 8, A2348. Neither Argentina nor the District Court can credibly argue that a self-imposed condition of the settlements that all Injunctions be lifted in turn provides a valid argument that the need to consummate settlements is a basis for lifting the Injunctions. The reasoning is circular. *Cf. NML II*, 727 F.3d at 246 (consequences that are "entirely of the Republic's own making" do not weigh against the Injunctions).

The District Court used that fallacious idea – that *some bondholders' Injunctions* could impede *other bondholders' settlements* – as its justification for concluding that "if the court lifts the injunctions, it will do so in all cases." Op. 19, A2359. That effectively precluded the logical approach of vacating the Injunctions as to each settling bondholder once that bondholder has been paid its settlement consideration. None of this justifies vacatur as to non-settling bondholders like Andrarex.

Because maintaining the Injunctions is irrelevant to Argentina's ability to implement its settlements with other bondholders, the District Court's consideration of this factor when weighing the equities was legal error.

CONCLUSION

The vacatur of the Injunction in Andrarex's action should be reversed and the cases remanded to the District Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief contains 6,114 words, in compliance with the type-volume limitations of Rule 32(a)(7)(B). This brief uses a proportionally spaced typeface, Times New Roman, and the size of the typeface is 14 points, in compliance with Rules 32(a)(5)(A) and (a)(6).

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