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16-628(CON), 16-639(CON), 16-640(CON), 16-641(CON), 16-642(CON), 16-643(CON), 16-644(CON), 16-649(CON), 16-650(CON), 16-651(CON), 16-653(CON), 16-657(CON), 16-658(CON), 16-659(CON), 16-660(CON), 16-661(CON), 16-662(CON), 16-664(CON), 16-665(CON), 16-666(CON), 16-667(CON), 16-668(CON), 16-669(CON), 16-670(CON), 16-671(CON), 16-672(CON), 16-673(CON), 16-674(CON), 16-675(CON), 16-676(CON), 16-677(CON), 16-678(CON), 16-681(CON), 16-682(CON), 16-683(CON), 16-684(CON), 16-685(CON), 16-686(CON), 16-687(CON), 16-688(CON), 16-689(CON), 16-690(CON), 16-691(CON), 16-694(CON), 16-695(CON), 16-696(CON), 16-697(CON), 16-698(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

REPUBLIC OF ARGENTINA,

Defendant-Appellee,

(Caption Continued on subsequent pages)

On Appeal from the United States District Court
for the Southern District of New York

OPENING BRIEF OF APPELLANTS NML CAPITAL, LTD., OLIFANT FUND, LTD., FFI FUND LTD., AND FYI LTD.

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Plaintiffs-Appellants,

GIOVANNI BOTTI, CLAUDIO MORI, SILVIA REGOLI,

Plaintiffs,

V.

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,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel state that:

NML Capital, Ltd. is not publicly traded and has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

Olifant Fund, Ltd., is not publicly traded; its parent corporation is ABIL, Ltd.; and no publicly held corporation owns 10% or more of its stock.

FYI Ltd. is not publicly traded; its parent corporation is New FYI Ltd.; and no publicly held corporation owns 10% or more of its stock.

FFI Fund Ltd. is not publicly traded; its parent corporation is BIL, Ltd.; and no publicly held corporation owns 10% or more of its stock.

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Rules

PRELIMINARY STATEMENT

NML Capital, Ltd., Olifant Fund Ltd., FFI Fund Ltd., and FYI Ltd. (collectively "NML and Olifant") hold bonds issued by the Republic of Argentina ("Argentina") under a Fiscal Agency Agreement ("FAA" and "FAA Bonds"), and were among the group of plaintiffs (the "Lead Plaintiffs")[1] who first obtained injunctions (the "Injunctions"), twice affirmed by this Court, that were issued to enforce their rights under the Equal Treatment Provision of the FAA. NML and Olifant together own approximately 48% of claims by plaintiffs with Injunctions. The Injunctions prohibit Argentina from making any payments on bonds issued pursuant to its 2005 and 2010 debt exchanges (the "Exchange Bonds"), unless Argentina also makes a ratable payment to Lead Plaintiffs. These parties have been litigating against Argentina for the better part of 13 years to recover on bonds after Argentina's 2001 default. Until the district court entered the Injunctions, Argentina made no effort whatsoever to negotiate an end to this matter. On February 29, 2016, however, Lead Plaintiffs finally reached an agreement-in-principle with Argentina (the "AIP") to settle their claims, though whether Argentina will perform on that agreement remains to be seen.

On March 2, 2016, the district court entered an unprecedented *springing* order providing that the Injunctions will dissolve automatically, upon the

[1] The Lead Plaintiffs also include the Aurelius group of plaintiffs, as well as Blue Angel.

occurrence of two future events: (1) important changes to Argentine law, and (2) Argentina's payment in full to Lead Plaintiffs and other bondholders who entered into agreements with Argentina by February 29, 2016. At a bare minimum, the district court's order should be reversed with instructions for the district court to consider whether to dissolve the Injunctions only after it evaluates whether the conditions for that relief established by the district court actually have been satisfied.

First, the district court abused its discretion by ordering that the Injunctions dissolve automatically, based on merely Argentina's untested assertion that it satisfied the conditions, without any further order of the Court and without allowing Plaintiffs to be heard. Whether or not the district court could find for itself that the conditions are met, the court could not outsource its factfinding responsibility to Argentina. Both of the conditions established by the district court are complex matters that are replete with the potential for disputes. It is predictable that Argentina and its bondholders could have different views about whether Argentina's legislation or payments comply fully with the district court's condition. It is also predictable that third parties could be uncertain about when these events have occurred and whether the Injunctions remain in place.

These potential disputes and uncertainties create an unacceptable risk that appellants will be denied their right to be heard on these matters before their legal rights are radically (and irrevocably) altered, and that third-party financial

institutions will be left in the dark about their risk of contempt. Yet the district court has ruled that its decision will take effect at an unspecified time in the future, with patently inadequate process afforded to date and no further process available to the litigants, and without further guidance to the world. In sum, as it stands, the injunctions could automatically dissolve based solely on an announcement from Argentina that the conditions have been fulfilled. What there will not be, under the terms of the district court's ruling, is a further *judicial* finding that the conditions actually have been satisfied. NML and Olifant are not aware of any self-executing order of this kind that has ever withstood appellate scrutiny. This should not be the first.

Even beyond the serious procedural flaw embedded in the order, the district court further abused its discretion in concluding that Argentina had presented sufficient grounds to conditionally vacate the Injunctions. Right now, there are no new circumstances that would warrant vacating the Injunctions. That conceivably could change once Argentina finally settles the vast majority of claims against it by making the settlement payments it has promised, but that has not happened yet. The equities are thus unchanged, and the Injunctions are warranted just as they were when they were first entered.

Certainly, in no event should all plaintiffs' injunctions dissolve automatically merely upon the basis of payment to a small number of settling creditors, as the district court initially ruled. If dissolution of non-settling

plaintiffs' injunctions ever might be appropriate, it could be so only if Argentina had resolved the vast majority of plaintiffs' claims, had carried out the terms of the negotiated resolution, and was well on its way toward resolving the remainder by working in good faith to resolve claims of the remaining plaintiffs, including through robust negotiations. Nothing less could demonstrate a shift in the equities sufficient to justify vacatur of the Injunctions.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over the underlying actions under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1605(a)(1), and 28 U.S.C. § 1331. NML and Olifant filed timely notices of appeal on March 3, 2016 of the district court's March 2, 2016 order. *E.g.*, A-2387, A-2692, A-3022, A-6387, A-7360, A-5059, A-6541. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, and 1292(a)(1).

STATEMENT OF THE ISSUES

Did the district court err by issuing a springing order that vacates all plaintiffs' Injunctions automatically upon the presumed satisfaction of two conditions precedent while denying the plaintiffs any opportunity to be heard as to whether those conditions were actually satisfied and whether the equities actually support vacatur when they are?

Did the district court err by deciding the equities had changed and the Injunctions should be lifted based on Argentina's tentative agreements to pay?

At a minimum, did the district court err by refusing to clarify its Order to rule out Argentina's assertion that it could breach its commitment to pay Lead Plaintiffs by April 14, 2016, cause Lead Plaintiffs to terminate their own reciprocal commitments under the AIP, and still secure dissolution of Lead Plaintiffs' Injunctions?

STATEMENT OF THE CASE

These cases arise from Argentina's breach of its contractual obligations. To remedy that breach, the district court (Griesa, J.) entered injunctions ordering specific performance. Argentina subsequently moved the district court to vacate those injunctions upon the satisfaction of two conditions. The injunctions were then on appeal to this Court, but the district court entered an indicative ruling (see Fed. R. Civ. P. 62.1(a)) that it would grant Argentina's motion. *NML Capital, Ltd. v. Republic of Argentina*, No. 11 Civ. 4908, 2016 WL 715732 (S.D.N.Y. Feb. 19, 2016) (SPA-35). This Court then dismissed the pending appeals, *Aurelius Opportunities Fund II, LLC v. Republic of Argentina*, No. 15-1060 (2d Cir. Feb. 24, 2016), and the district court entered an order formalizing its indicative ruling, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978, 2016 WL 836773 (S.D.N.Y. Mar. 2, 2016) (SPA-70).

A. The District Court Enters The Injunctions To Remedy Argentina's Violations Of The Equal Treatment Provision.

Beginning in 1994, Argentina issued bonds pursuant to the FAA. A-478-531 ("FAA" and "FAA Bonds"). The FAA includes a provision requiring that "[t]he payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness," often referred to as the "Equal Treatment Provision." A-482 ¶ 1(c). In 2001, Argentina declared a moratorium on the payment of its outstanding public debt, including the FAA Bonds. It passed legislation prohibiting payment on the FAA Bonds, which Argentina has renewed every year since. *See NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012) ("*NML I*"); *see also* A-733-1032.

When Argentina's economy recovered, rather than resume payment, Argentina made a series of unilateral offers to exchange defaulted bonds for new bonds worth a fraction of what Argentina owed (the "Exchange Bonds"). *NML I*, 699 F.3d at 252; A-6255-56. To coerce investors to accept these offers, Argentina told investors that "it has no intention of resuming payment" on defaulted bonds, and informed the SEC that "it has classified unexchanged FAA Bonds as a category separate from its regular debt." *NML I*, 699 F.3d at 252-54. In order to exert additional pressure on bondholders it also passed a law, known as the "Lock Law," which prevents the Argentine executive from making payments on the

defaulted debt, or otherwise settling the debt. *Id*. at 252; *see also* A-1061. Argentina violated the Equal Treatment Provision by making regular payments to those who accepted the Exchange Offers without paying a penny on the FAA Bonds. *NML I*, 699 F.3d at 253, 259-60; A-6266 ¶ 6.

In 2010, NML—one of the FAA Bondholders that did not participate in the exchanges—sought to enforce its rights under the Equal Treatment Provision, followed thereafter by the other Lead Plaintiffs.[2] These bondholders sought and obtained summary judgment that Argentina had violated, and was violating, those rights (A-239-43), as well as Injunctions to remedy this violation (A-533-38). The Injunctions require Argentina to make a "Ratable Payment" to Lead Plaintiffs if and when it makes a makes a payment on the Exchange Bonds. A-535 ¶ 2(a). In holding that Argentina had disregarded the bondholders' contractual guarantee, the court found that Argentina violated Lead Plaintiffs' rights by "relegating [Lead Plaintiffs'] bonds to a non-paying class . . . while at the same time making payments currently due" on the Exchange Bonds. A-242 ¶ 4.

This Court twice affirmed the Injunctions. *See NML I*, 699 F.3d at 265; *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 238 (2d Cir. 2013) ("*NML II*"). The Court concluded, with "little difficulty," that Argentina's "course of conduct"—including its persistent refusal to honor the payment obligations

[2] The Varela group of plaintiffs also obtained Injunctions at this time.

under Lead Plaintiffs' FAA Bonds while consistently paying what it owed under the Exchange Bonds—had "result[ed] in a breach of the Equal Treatment Provision." *NML I*, 699 F.3d at 260, 264 n.16. That breach caused irreparable injury because "Argentina will simply refuse to pay any judgments." *Id.* at 262. Indeed, at oral argument, Argentina's counsel stated that it "would not voluntarily obey" the Injunctions if affirmed on appeal. *NML II*, 727 F.3d at 238.

When the panel asked Argentina to proffer an alternative payment structure to honor its obligations under the FAA Bonds (Order Directing Argentina to Submit the Precise Terms of any Alternative Payment Formula and Schedule, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105(L) (2d Cir. Mar. 1, 2013) (D.E. 903)), Argentina proposed that, instead of paying its obligations or some fraction thereof, it would give Lead Plaintiffs new bonds worth less than they were owed under the FAA Bonds (Argentina's Letter in Response to the Court's March 1, 2013 Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105(L) (2d Cir. Mar. 1, 2013) (D.E. 935)). The Court rejected this proposal as not "productive," as it "ignored the outstanding bonds." *NML II*, 727 F.3d at 238.

The Court also held that the Injunctions advanced the public interest—specifically "a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms." *Id.* at 248.

Trying to obtain Supreme Court review of this Court's decision affirming the Injunctions, Argentina purported to abandon its posture of defiance: It told the Supreme Court that "absent relief Argentina will comply with the [Injunctions] under review." Reply Br. for Pet'r at 13, *Republic of Argentina v. NML Capital, Ltd.*, No. 13-990 (U.S. May 27, 2014). The Court denied certiorari, yet Argentina did not keep its commitment and did not obey the Injunctions.

Rather, after the Supreme Court denied review and the Injunctions went into effect, the district court appointed a Special Master to facilitate settlement discussions (A-593-94; A-247-49), but Argentina refused to participate. Instead, Argentina continually attempted—and purported—to make timely payments on the Exchange Bonds, without making any payments on the FAA Bonds. *See* A-6266 ¶ 6; A-6214-16 ¶¶ 64-65, 77-78; A-6232-36; A-6259-64; A-6317-20; A-1139-41, A-6232-54. Argentina also passed a law (the "Sovereign Payment Law") purporting to change to Buenos Aires the location for payment on the Exchange Bonds, with the stated purpose of evading the Injunctions. A-1143-51. Argentina's misconduct earned it a contempt citation (which Argentina has yet to purge). A-244-46; A-9730-32; A-1460-88. In large part due to Argentina's demonstrated "willful defiance of its obligations to honor the judgments of a federal court" (*NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 196 (2d Cir. 2011) (punctuation omitted)), the district court correctly recognized on numerous occasions that the most realistic path to resolution of this

litigation was through settlement. *See*, *e.g.*, A-583:24-84:1 ("[T]he really truly important thing is to recognize that this matter will not be resolved without a successful settlement."); A-605:24-25 (noting that it "is of paramount necessity [] to have a settlement").

In spite of this Court's affirmance and the district court's repeated admonitions that Argentina should engage in settlement talks, Argentina decided to continue to litigate the propriety of the Injunctions. Notably, Argentina challenged the Injunctions' application to *all* Exchange Bonds issued under Argentine law. Those appeals were docketed at 2d Cir. No. 15-1060(L) and scheduled for argument on February 24, 2016.

As Argentina continued to fight the existing Injunctions, Lead Plaintiffs and other FAA Bondholders brought actions for Argentina's breaches of the Equal Treatment Provision in FAA Bonds that were not at issue in the original Equal Treatment cases brought by Lead Plaintiffs. These actions—49 in all, involving dozens of plaintiffs—came to be known as the "me too" pari passu actions. The district court granted the "me too" bondholders' request for equivalent Injunctions, explaining at a hearing that the Injunctions were designed to protect "legal rights," *not* to "coerc[e] a settlement." A-1600:8-16. In its orders, the court noted that Argentina had violated the Equal Treatment Provision "[b]y making payments on this superior class of debt," the Exchange Bonds (A-6307), and that there was "no adequate remedy at law" for the breach of the assurance of equal rank (A-568). In

addition, the balance of equities favored the "me too" plaintiffs "because the Republic has engaged in a scheme of making payments on other external indebtedness after repudiating its payment obligations to plaintiffs." *Id.* The court therefore issued additional Injunctions in each of the "me too" actions that are substantially identical to the ones this Court approved in *NML I* and *NML II*.

Argentina appealed these new Injunctions to this Court in 49 cases that were consolidated in appeal No. 15-3675(L).

B. Argentina Pressures Bondholders To Accept Its Public Offer.

On November 21, 2015, Argentine voters elected a new President, Mauricio Macri. To his credit, days after his election, President Macri announced his intention to negotiate a resolution to these long-pending actions. A-1163-65. This development was, and remains, encouraging.

In December 2015, President Macri took office and Argentina finally initiated settlement negotiations. Through the Special Master appointed by the district court, representatives of Argentina communicated with some—but not all—holders of Argentina's defaulted debt. SPA-110; A-1644-45 ¶¶ 3-5; A-5119-20 ¶¶ 6-9. Those bondholders who were able to negotiate with Argentina indicated their desire to resolve their dispute promptly, on mutually agreeable terms with substantial haircuts. *See* Memorandum of Law in Opposition to Order to Show Cause at 3, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 18, 2016) (D.E. 874); A-1645 ¶ 6.

On February 5, 2016, Argentina publicly announced the terms of its first offer, which some bondholders accepted. Memorandum of Law in Support of Order to Show Cause at 9-10, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 11, 2016) (D.E. 863). Under the terms of the offer, bondholders were to be paid 150% of the principal of their bonds, unless they had a pari passu Injunction, in which case they could alternatively obtain between 70 and 72.5% of the full value of their claim (including pre-judgment and post-judgment interest). *Id.* The 150% option allowed a few plaintiffs—EM Ltd., Old Castle, and Lightwater, which hold roughly half of all claims that have agreed to take the public offer—to "settle" for 100% of the value of their claims against Argentina. Memorandum of Law in Opposition to Order to Show Cause at 14, 20, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 18, 2016) (D.E. 874). Commentators thus aptly observed that Argentina's offer was designed to "divide" its creditors into competing groups—most prominently among those plaintiffs that have pari passu Injunctions and those that do not. *See* A-1181-87. Lead Plaintiffs decided to continue negotiating rather than immediately accept this unilateral proposal. They offered a succession of term sheets including sizeable haircuts of their own. Memorandum of Law in Opposition to Order to Show Cause at 3, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 18, 2016) (D.E. 874). *Id.* at 3.

C. Acting Ex Parte, Argentina Asks The District Court To Vacate The Injunctions Based On Settlement With A Handful Of Plaintiffs.

Argentina immediately sought to free itself from the Injunctions based on the supposed progress toward settlement—even though little real progress had yet been achieved. Only the Montreux creditor group, with a mere 4.8% of the total claims covered by Injunctions, initially accepted a settlement for less than the face value of its claims. Yet on February 11, 2016, Argentina went *ex parte* to the district court and persuaded that court to enter an order directing the plaintiffs to show cause why the Injunctions should not be lifted, based principally on Argentina's own avowal that it had a new attitude toward settlement. A-450-53. Argentina proposed that the district court enter an order which would automatically vacate the Injunctions once two conditions were met: (1) Argentina's legislature lifted two of its laws prohibiting payment on the FAA Bonds and (2) it made payment to those plaintiffs who had reached agreements-in-principle to settle their claims "on or before February 29, 2016." A-6331-44, A-6360.

The order to show cause required plaintiffs to respond by noon on the next day the court was open, February 16, 2016. A-6344. One hour before that deadline, the district court extended it two days, to February 18. A-699. A variety of plaintiffs opposed lifting the Injunctions on the terms Argentina proposed and repeatedly implored the district court to hold a live hearing to consider the issue. A-699; A-1647-48.

On the day of the new deadline, Lead Plaintiffs and Argentina negotiated for eight hours and reached an agreement-in-principle as to the economic terms of a settlement agreement. *See* A-1694 ¶ 8. The remaining terms, including important matters of payment and process, were not yet resolved. The partial agreement therefore was not disclosed to the district court in the February 18 filings.

D. The District Court Issues An Indicative Ruling Stating That It Would Grant Argentina's Motion To Vacate.

On February 19, thirty hours after Appellants filed their opposition briefs, barely four hours after Argentina filed its reply, and without holding a hearing, the district court issued a lengthy opinion and order proposing to lift the Injunctions exactly as Argentina wanted. The order took the form of an indicative ruling under Rule 62.1(a)(3), because the court then lacked jurisdiction while the Injunctions were on appeal. The district court accordingly stated that it would grant Argentina's motion to vacate if this Court were to remand. SPA-85-119.

The district court reasoned that changed circumstances warranted the vacatur of the Injunctions. SPA-109-114. Emphasizing the departure from the previous administration's stance, the district court noted that Argentina now appeared willing to engage in productive discussions with holdout bondholders. SPA-110. The district court further reasoned that the circumstances had changed because Argentina's new President had evinced a willingness to campaign for the repeal of the legislation preventing settlement with the holdout bondholders. SPA-111.

Argentina's proposal to vacate the Injunctions "contemplate[d] repeal" of the laws and, in fact, "the lifting of the injunctions would require it." *Id.* The district court noted that "a number of plaintiffs have now agreed in principle to settle," and stated that maintaining the Injunctions "would unfairly deny those plaintiffs the opportunity to resolve their disputes amicably with the Republic." SPA-113.

The district court acknowledged that "[i]f the court vacates the injunctions, the Republic may once again pay the exchange bondholders" without ever paying a penny to non-settling FAA Bondholders. SPA-115. But it reasoned that the handful of plaintiffs that had settled by that point (a small minority that did not yet include Lead Plaintiffs) would stand to benefit from the dissolution of the injunctions, assuming they were paid. Several third parties, including the Exchange Bondholders, financial intermediaries, and Argentine citizens, stood to benefit as well. SPA-114-15. The district court also explained that "vacating the injunctions serves the public interest . . . . in encouraging amicable resolution of longstanding legal battles." SPA-116. The district court recognized that it "does not have the power to force plaintiffs to accept a settlement," but emphasized that the plaintiffs would now have "the opportunity to negotiate and settle their claims," and that this "process may still continue." SPA-118.

The district court's indicative ruling proposed that the Injunctions would be vacated *automatically* "upon the occurrence of two conditions precedent": (1) the repeal of Argentina's laws preventing it from settling with holdout bondholders,

and (2) "full payment in accordance with the specific terms" of the agreements-in-principle entered into "on or before February 29, 2016." SPA-119.

Argentina immediately moved this Court to remand some of its pending appeals and to dismiss others with prejudice to allow the district court to enter its indicative ruling as an order. This Court already had scheduled argument in one of the pending appeals for February 24, 2016, and at that argument it heard Argentina's motions. Members of the panel noted their "concer[n] about the fact that Judge Griesa has not accommodated the other side here in terms of meeting with them to discuss . . . or to go over th[e] indicative ruling." A-1837:19-22 (Walker. J.).

Ultimately, Argentina's counsel acknowledged that an order vacating the Injunctions must afford affected parties the opportunity for appellate review. A-1844:7-19. This Court therefore dismissed Argentina's appeals with prejudice in reliance on Argentina's agreement that the district court would provide plaintiffs with an opportunity to be heard by entertaining a "motion" from Argentina, *and* would stay any order dissolving the Injunctions for two weeks. A-1715-21.

Argentina filed no motion. Instead, the next day, Thursday, February 25, Argentina filed a cursory letter with the district court requesting that it enter the indicative ruling as an order and schedule a hearing pursuant to this Court's instructions. A-1722-23. Later that day, the district court granted Argentina's request, scheduling a hearing for Tuesday, March 1, 2016, and ordering that any

party wishing to file papers do so by noon on Monday, February 29, 2016. A-1731-42. That same day, February 25, Lead Plaintiffs submitted a letter informing the district court that such a hasty briefing and argument schedule was contrary to this Court's remand instructions, as it would provide no practical opportunity for the disparate creditors in the 62 actions to coordinate joint briefing and argument. A-1743-44. The district court refused to change the schedule, insisting that it was necessary for "a prompt resolution." A-1745-56.

E. Lead Plaintiffs Reach An Agreement-In-Principle With Argentina.

On February 29, Lead Plaintiffs and Argentina finalized their agreement (the "Agreement-in-Principle" or "AIP") that was the product of the parties' negotiations in the previous weeks. A-2366-86. The AIP provides for a 25% haircut on Lead Plaintiffs' claims against Argentina pending in the Southern District of New York and for the release claims in other jurisdictions. A-2366. The AIP also provides for Argentina to repay a portion of Lead Plaintiffs' legal fees. *Id*. The parties to the AIP recognized that consummation of the settlement

would terminate Lead Plaintiffs' Injunctions. A-2367.[3] But a number of steps remained before consummation—and before termination of Lead Plaintiffs' Injunctions would be appropriate.

Lead Plaintiffs' AIP is subject to a number of conditions that were agreed to by the parties. First, the AIP is conditioned on the repeal by Argentina's Congress of all legislation preventing settlement of its outstanding debt, including the Lock Law and the Sovereign Payment Law. *Id.* The parties also agreed that, "[u]ntil the [Lead Plaintiffs] are paid in full pursuant to [the terms of the Agreement-in-Principle], the Republic of Argentina agrees that it will not request the Court to vacate or modify the Injunctions in the Plaintiffs' cases or support the request by any third party to vacate or modify such Injunctions," other than automatically upon full payment according to the terms of the Agreement-in-Principle. A-2367-68.

In addition, although Lead Plaintiffs sincerely hoped—and hope—that Argentina will perform its obligations under the AIP, they sought protection in the

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[3] Plaintiffs agreed that, upon Argentina's "payment in full, each Plaintiff will provide the Republic of Argentina with Stipulations of Dismissal with Prejudice" (A-2367 ¶ 4), thereby ensuring that "Plaintiffs' Injunctions will be automatically vacated" (A-2367 ¶ 5). The parties expressly anticipated, however, that the district court would "effect the lifting of the Plaintiffs' Injunctions as set forth in the prior sentence," and Plaintiffs accordingly agreed to provide the court with any "additional documentation" it might require for that purpose. *Id.*

event that did not occur. In order to secure Lead Plaintiffs' rights in case Argentina does not timely follow through on its promises (whether because of legislative intransigence or other reasons), the parties agreed that each Lead Plaintiff "will have the right to terminate this Agreement-in-Principle as to itself if . . . the payment in full . . . as contemplated by this Agreement-in-Principle is not made in accordance with the terms hereof by 12:00 noon EST, Thursday, April 14, 2016." A-2371. In the event the AIP were terminated according to this provision, the parties agreed that they "shall thereupon be restored to their respective prior positions as if there had been no Agreement-in-Principle." *Id*. In announcing the settlement, the Special Master confirmed that point and told the world that Argentina "will pay" Lead Plaintiffs before their Injunctions are lifted. A-1920.

F. The District Court Enters The Vacatur Order.

Lead Plaintiffs again opposed Argentina's request to vacate the Injunctions, laying out their reasons as to why the court should not immediately vacate the Injunctions. Supplemental Memorandum of Law in Opposition to Letter from M. Paskin to Judge Griesa, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 29, 2016) (D.E. 901). Lead Plaintiffs also submitted a proposed clarification that would have harmonized the Indicative Ruling with how the parties themselves had addressed the need to safeguard Lead Plaintiffs against the possibility that Argentina might not pay once the Injunctions were lifted. Lead

Plaintiffs proposed to clarify the terms of the Indicative Ruling with an addition reading:

> For the avoidance of doubt, if Plaintiffs do not receive full payment in accordance with the specific terms of the AIP for any reason, including if Plaintiffs terminate the AIP on or after April 14, 2016 at 12:00 noon EST in accordance with the terms of the AIP, the Injunctions shall remain in place.

A-1860.

At the March 1 hearing, the district court heard argument from all parties on the matter, including from several plaintiffs and interested third parties. The court opened the hearing by stating that its purpose was "to give those who favor my indicative ruling and those who oppose my indicative ruling the opportunity to be heard." A-2256:6-8. The district court gave each party eight minutes to issue a statement, and two minutes to issue a rebuttal statement. Fifteen attorneys spoke on a variety of complicated and pressing issues. The court asked no questions. *See* A-2252-2311.

Lead Plaintiffs also renewed their request that any order by the district court protect them against the possibility that Argentina would not timely meet its commitment. They again asked the court to enter "one very important clarification that is essential" to the functioning of the AIP. A-2274:24-25. Lead Plaintiffs noted that the AIP "spells out the specific terms for payment and other terms and conditions" that must occur for the Injunctions to be vacated, and that those conditions were agreed to in order to protect rights that are "very important to

[Lead Plaintiffs]" and which were specifically bargained for—and agreed to by Argentina. A-2276:8-15. Specifically, the AIP provides that, if payment is not made by April 14, 2016, then each Lead Plaintiff would have the right to terminate the agreement. A-2371.

"[F]or the avoidance of doubt," Lead Plaintiffs requested that the district court clarify the proposed order to state that, if they do not receive full payment according to the specific terms of the Agreement-in-Principle for any reason, including if they terminate the agreement for Argentina's failure to make timely payment, "the injunction shall remain in place." A-2276:21-77:1. Lead Plaintiffs explained that this clarification "is exactly consistent" with the Indicative Ruling (A-2277:2-3), which requires as a "condition[] precedent" to the vacatur of the Injunctions that Argentina "make full payment *in accordance with the specific terms* of each [agreement-in-principle]" (SPA-119 (emphasis added)). They again reiterated that this clarification was necessary because Argentina took the position that "if Argentina goes forward and pays other plaintiffs who have settlement agreements, then the injunctions in favor of [Lead Plaintiffs], 65 percent of the plaintiff group, those injunctions will be terminated, vacated." A-2277:11-15.

Lead Plaintiffs submitted a letter the next day, again requesting that the district court make clear that the Injunctions would not be vacated if Lead Plaintiffs terminated the AIP due to Argentina's failure to make timely payment. A-2312-13. Lead Plaintiffs explained that the requested clarification "is consistent

with the terms of the AIP" and that "Argentina's opposition to the clarification is a breach of what Argentina agreed to in the AIP." A-2313. Argentina had specifically agreed that it would "not request the Court to vacate or modify the Injunctions . . . other than automatically upon payment in full to [Lead] Plaintiffs of the amounts set forth in paragraphs 1 and 2 above" (A-2367), but it was "asking the court for an order that would vacate [Lead] Plaintiffs' Injunctions even if [Lead] Plaintiffs are not paid" (A-2313).

The very next day, March 2, 2016, the district court entered an order providing for the automatic vacatur of the Injunctions on the anticipatory terms and for the reasons set forth in the Indicative Ruling (the "Vacatur Order"). SPA-70-84. In the Vacatur Order, the district court again noted the "pressing need for certainty and finality" in this litigation (SPA-82), but it did not address Lead Plaintiffs' request to clarify the proposed order to state that if Argentina does not pay Lead Plaintiffs and the AIP is dissolved as a result, Lead Plaintiffs' Injunctions remain in effect. The court explained that it was issuing the Order in part because "recent developments" had confirmed its hope that Argentina would reach settlements, required to be paid before vacatur of the Injunctions, with the vast majority of its creditors. SPA-83. It noted that "the Republic has now signed Agreements-in-Principle with plaintiffs representing the vast majority of claims in these actions"—indeed, "over 85% of claims held by plaintiffs with injunctions." *Id.* The court also reasoned that "the Republic has abandoned all former

challenges to the injunctions" and that "President Macri addressed the Argentine Congress to urge approval of settlements in this litigation." SPA-83-84.

NML and Olifant timely appealed, as did many of the other plaintiffs in these actions. This Court consolidated these appeals and placed the consolidated appeal on an expedited schedule.

SUMMARY OF ARGUMENT

I. The Vacatur Order improperly denies plaintiffs in these cases the opportunity to be heard before their Injunctions are vacated because it purports to take effect automatically whenever Argentina asserts that it has satisfied two conditions precedent. The district court cannot vacate the Injunctions, dramatically and irrevocably altering parties' legal positions, without the court itself providing them an opportunity to be heard on the question whether the conditions set forth in the district court's Vacatur Order actually have been satisfied, and the further question whether the equities have shifted in a manner that would suggest that the Injunctions be maintained even if the conditions are satisfied. Here the purported changes have not taken place; the court has merely described two unclear conditions that are likely to be heavily disputed, yet the court has allowed Argentina to certify its own compliance and to let itself out of the injunctions without any findings by the court.

II. Even if the district court had followed proper procedure, Argentina also has not presented any justification for conditionally vacating the Injunctions at this time.

A. The equities most certainly do not favor vacating the Injunctions prior to Argentina paying all of the plaintiffs who have reached agreements-in-principle with Argentina. Until Argentina makes timely payment, vacating the Injunctions would allow Argentina to return to its past practices of "ignor[ing]" its payment obligations and underscores the fact that the purpose of the Injunctions—restoring the rank of Argentina's payment obligations—has not been fully achieved.

B. There are no changed circumstances warranting vacatur yet. Although Argentina has reached agreements-in-principle with plaintiffs to settle this litigation and its new government appears to have changed its attitude regarding negotiations with at least certain of its creditors, nothing yet has changed to warrant vacatur of the Injunctions because Argentina has not yet consummated any of its settlement agreements. And, because the circumstances have not changed, there is nothing new to suggest that the Injunctions harm any third parties or the operation of the agreements that Argentina has reached with other plaintiffs. Argentina has already demonstrated its ability to raise billions of dollars in the international financial system, and requiring full payment prior to vacatur would

not affect Argentina's ability to enter into agreements-in-principle with other bondholders.

III. Finally, it would be inequitable to vacate Injunctions as to non-settling creditors based merely on Argentina's settlement with a trifling proportion of other bondholders. If Argentina fails to pay Lead Plaintiffs by April 14 and Lead Plaintiffs then exercise their right to terminate their AIP, then Argentina will have only made payment to approximately 20% of the plaintiffs with Injunctions. That insubstantial settlement level surely does not justify vacating the Injunctions as to the remaining 80%. The equities could not possibly justify lifting the Injunctions as to non-settling plaintiffs unless the vast majority of plaintiffs had resolved their claims through settlements and been paid, and Argentina was proceeding in good faith to resolve the remaining claims. An order that would permit settlement with a minority to justify vacating the Injunctions as to the majority—which apparently is how Argentina reads the order of the district court that it procured—would be an abuse of discretion.

STANDARD OF REVIEW

This Court reviews the district court's equitable determinations with regard to injunctive relief for abuse of discretion. *See Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990). The district court abuses its discretion when "(1) its decision rests on an error of law . . . or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly

erroneous factual finding—cannot be located within the range of permissible decisions." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 18 (2d Cir. 2003) (citations omitted).

ARGUMENT

I. The Vacatur Order Impermissibly Denies Bondholders The Right To Be Heard About Whether Argentina Satisfied The Conditions To Dissolving The Injunctions.

Federal Rule of Civil Procedure 60(b) provides the basis for a party to vacate or to modify an injunction, and requires the moving party to "demonstrat[e] exceptional circumstances" (*Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (citation omitted)), showing "a significant change in the law or facts" (*Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253,256 (2d. Cir. 1984)). When a party wishes to vacate an order pursuant to Rule 60(b), the standard practice is to do so "[o]n motion," which necessarily would provide the opposing party notice and an opportunity to be heard. *See* Fed. R. Civ. P. 60(b); *Fort Knox Music Inc. v. Baptiste*, 257 F.3d 108, 111 (2d Cir. 2001). And, although a district court may "decide *sua sponte* whether its judgment should be vacated," this is permissible only "provided all parties ha[ve] notice." *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 n.2 (2d Cir. 1977). After considering the parties' submissions, if the court finds that the purported grounds for vacatur satisfy Rule 60(b), then the court would simply enter an order to that effect, giving the

opponent of vacatur the opportunity to appeal from that order. *See* 28 U.S.C. § 1292(a)(1).

The district court here deviated from this accepted practice. The Vacatur Order provides that the Injunctions will be vacated *automatically* "upon the occurrence of the two conditions precedent:"

> (1) The Republic repeals all legislative obstacles to settlement with the FAA bondholders, including the Lock Law and the Sovereign Payment Law;
>
> (2) For all plaintiffs that entered into agreements-in-principle with the Republic on or before February 29, 2016, the Republic must make full payment in accordance with the specific terms of each such agreement.

SPA-84. The Vacatur Order does not contemplate any further process; it simply requires Argentina to "notify the court once those plaintiffs have all received full payment." *Id.*

Such springing vacaturs may be appropriate where they vacate upon a date certain, or readily observable conditions. *See*, *e.g.*, *United States v. Affectionate Heart in Home Care, Inc.*, No. 14-cv-2106 (ELH), 2014 WL 4953748, at *2 (D. Md. Sept. 8, 2014) (issuing injunction that dissolves automatically in five years); *McPherson v. Homeward Residential*, No. 12-cv-5920 (BHS), 2013 WL 4498695, at *2 (W.D. Wash. Aug. 21, 2013) (issuing injunction that would dissolve automatically if plaintiff failed to make payment into court registry). The conditions at issue here, however, are nothing of the sort. The Vacatur Order's

conditions, which may occur at any time in the indefinite future, necessarily involve questions of fact and law over which the parties may have disputes. In its rush to issue the Vacatur Order the district court did not answer these questions, and the Vacatur Order removes the court from the process from this point forward. Plaintiffs deserve an opportunity to be heard on these issues before the district court makes any decision about dissolution.

The first condition precedent is rife with the potential for factual disputes. For example, which of Argentina's statutes constitute "all legislative obstacles to settlement with the FAA bondholders"? SPA-84. The Lock Law and the Sovereign Payment Law certainly do. But what of the other myriad of laws that Argentine courts have cited as evincing Argentina's "public policy" against honoring its obligations under the defaulted FAA Bonds? *See*, *e.g.*, A-733-1032. And how would the Vacatur Order apply if, in repealing the Lock Law and the Sovereign Payment Law, the Argentine legislature imposed a condition or enacted some other legislation that itself was a "legislative obstacle to settlement"?

The second condition precedent is equally subject to dispute; indeed, disputes already have surfaced. For example, Lead Plaintiffs bargained and contracted with Argentina for the right to terminate the AIP if Argentina failed to make payment by April 14. A-2371. Lead Plaintiffs explained to the district court that if Argentina could not meet this deadline, then it will not have "ma[d]e full payment in accordance with the specific terms of" the AIP. A-2304:3-14.

Argentina made clear its view—in blatant contradiction of the AIP—that, if Lead Plaintiffs exercised their termination rights, their Injunctions would still be vacated automatically so long as Argentina paid the other plaintiffs who had entered agreements with Argentina by February 29. *See* A-2300:22-01:3. The Vacatur Order did not touch upon—much less resolve—the dispute. Accordingly, if Argentina fails to make payment in accordance with Lead Plaintiffs' AIP by April 14, and one or more Lead Plaintiffs terminates that AIP, there is no way of knowing ex ante whether Argentina's payments to the other plaintiffs who reached agreements by February 29 would be sufficient to automatically vacate the Injunctions as to all plaintiffs.

Other parties at the March 1 hearing expressed similar concerns regarding the clarity of their agreements with Argentina. Indeed, one group of plaintiffs (the "Attestor Group") explained to the court that "[t]hey don't know exactly what Argentina is agreeing to." A-2286:18-19. Another group of plaintiffs (the "Honero Group") noted that, under Argentina's public tender offer, "Argentina would be able to unilaterally decide which bonds [submitted by a particular plaintiff] are in and which bonds are out of the settlement." A-2294:1-3. Indeed, NML and Olifant understand that Argentina has purported to back out of its agreements with some members of the Honero Group, leaving the status of their Injunctions unclear—as they will explain today in their opening brief to this Court. With Argentina now contesting the terms of written contracts that, a few days ago,

it presented to the district court as settlements, a plaintiff should have an opportunity to contest any assertion by Argentina that Argentina has satisfied the conditions set forth the in March 2 Order.

The problem of confusion is further compounded because the Injunctions impose duties on third parties. Rule 65(d) makes clear that the Injunction binds not only the enjoined party (here, Argentina), but also "other persons who are in active concert or participation with" Argentina or its agents in violations of the Injunctions. Fed. R. Civ. P. 65(d)(2)(C). If some of the plaintiffs dispute the occurrence of certain conditions precedent, then third parties such as those who assist Argentina in making payments on the Exchange Bonds—would not know whether the Injunctions barring such assistance remain in force, or instead had automatically vacated. Thus, the Bank of New York Mellon ("BNY"), the Indenture Trustee named in certain Exchange Bonds, asked the district court to enter an order that would make clear its responsibilities, and provide clear instructions as to *when* those responsibilities will arise. Response of the Bank of New York Mellon to Motion of the Republic of Argentina Seeking to Vacate Injunctions, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 29, 2016) (D.E. 900). The district court ignored this request too. Absent a subsequent order confirming that the conditions precedent have been met, the Vacatur Order creates "'an order so vague that an enjoined party may unwittingly and unintentionally transcend its bounds.'" *SEC v. Lorin*, 76 F.3d 458,

461 (2d Cir. 1996) (quoting *Sanders v. Air Line Pilots Ass'n*, 473 F.2d 244, 247 (2d Cir. 1972)).

The difficulties with the district court's automatic springing vacatur mechanism are yet further magnified by the fact that the order provides no time limit within which Argentina must complete the conditions precedent to vacatur. If for some reason or another, Argentina took several months to satisfy the district court's two conditions, the court's analysis of the equities as to the remaining parties—a topic to which the district court seemed to pay little attention—necessarily would be stale. Even if one accepted the district court's analysis of the equities as valid on March 2, there is no reason to assume it would be unchanged months later, after a lengthy period of noncompliance by Argentina. An order vacating the Injunction requires an analysis of the equities at the time of vacatur, particularly for decrees entered in long-running disputes. *Cf. Evans v. Fenty*, 701 F. Supp. 2d 126, 172 (D.D.C. 2010) ("These structural changes are all extremely positive developments, but they do not necessarily translate into proof of a durable remedy."). But, under the district court's order, no one has any way of knowing when that might be.

These uncertainties could be avoided entirely if the district court had simply adhered to standard procedure—deferring consideration of the vacatur order until affected parties had notice and an opportunity to be heard on the status of these conditions precedent, and other circumstances relevant to the analysis of the

equities, and then entering an order specifying the status of the Injunctions *at that time*. The district court provided no rationale for using this highly unusual springing vacatur mechanism; it simply adopted Argentina's proposal. Indeed, this unsound procedure contrasts sharply with the district court's own view of this issue three decades ago, where it concluded that "[t]he injunctions [in that case] should not be declared automatically dissolved without a hearing." *Sierra Club v. U.S. Army Corps of Eng'rs*, 609 F. Supp. 1052, 1053 (S.D.N.Y. 1985) (Griesa, J.). That procedural error alone is sufficient basis to reverse the Vacatur Order.

II. Argentina Has Not Demonstrated Exceptional Circumstances Sufficient To Warrant Vacating The Injunctions.

To obtain vacatur or modification of the Injunctions, Argentina needed to "demonstrat[e] exceptional circumstances" (*Uzan*, 561 F.3d at 126 (citation omitted)), showing "a significant change in the law or facts" (*Sierra Club*, 732 F.2d at 256). In "deciding whether to modify an injunction," courts consider:

> the circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented; the length of time since entry of the injunction; whether the party subject to its terms has complied or attempted to comply in good faith with the injunction; and the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction.

Building & Constr. Trades Council v. NLRB, 64 F.3d 880, 888 (3d Cir. 1995). But, in all cases, a permanent 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*, 732 F.2d at 256.

Argentina's request to conditionally vacate the Injunctions did not satisfy these criteria, and the district court abused its discretion by concluding that it had. Argentina has not complied with the Injunctions; it has persistently attempted to violate them; and far from forswearing further violations of plaintiffs' equal treatment rights, Argentina is seeking to vacate the Injunctions precisely so it can resume violations of non-settling plaintiffs' equal treatment rights. The district court acknowledged this much but pointed to the fact that the "vast majority" of plaintiffs have reached settlements with Argentina (SPA-83) as the critical changed circumstance. The "vast majority" certainly had not reached agreements when the district court first issued its Indicative Ruling on February 19. And even still, all that has been reached to this point are agreements-*in-principle*. It remains for Argentina to follow through and convert the agreements-in-principle to resolution of plaintiffs' claims.

A. The Injunctions Remain Necessary To Prevent Irreparable Harm.

Whether maintaining an injunction is equitable "depends on each suit's facts." *Rogers v. 66-36 Yellowstone Blvd. Coop. Owners, Inc.*, 599 F. Supp. 79, 82 (E.D.N.Y. 1984). The latest "me too" Injunctions were entered four months ago as an essential remedy for Argentina's decade-long violation of the Equal Treatment Provision. A-549-575. As the district court found in entering those Injunctions, Argentina "violated its promise to rank plaintiffs' bonds equally with its later-issued external indebtedness by making payments on the Exchange Bonds and not

on plaintiffs' bonds." A-568. This "ongoing" course of conduct is "caus[ing] plaintiffs irreparable harm" and plaintiffs have "no other means" but the Injunctions to "enforce [their] rights under the" Equal Treatment Provision. *Id.*

None of this has changed, and none of it *will* change until Argentina fulfills its obligations under the AIP and the agreements that others have entered into by making the agreed-to settlement payments. Until then, it remains true that "Argentina will simply refuse to pay any judgments." *NML I*, 699 F.3d at 262. As neither Argentina nor the district court denied, Argentina has never "complied or attempted to comply" with the Injunctions or to purge its contempt. *Building & Construction Trades Council*, 64 F.3d at 888; *see* A-244-46 (to purge its contempt, Argentina must "comply[] completely with the" Injunctions). Rather than even *promising* to abide by its Equal Treatment obligations in the future, Argentina all but admitted that it would continue to "breach" the Provision (Reply Memorandum of Law in Support of Order to Show Cause at 10-12, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 19, 2016) (D.E. 881)), and the district court touted Argentina's ability to do so as a *virtue* of the Vacatur Order. *See* SPA-115 ("If the court vacates the injunctions, the Republic may once again pay the exchange bondholders."). The district court's recognition that "the conduct . . . sought to be prevented will recur absent the injunction" (*Building & Construction Trades Council*, 64 F.3d at 888) should have precluded it from vacating the Injunctions, not justified it in doing so.

Moreover, vacating the Injunctions now could preclude the district court from ever re-imposing them should Argentina's attitude once again veer away from resolution of the pending claims. Because Argentina will "not voluntarily obey" the Injunctions (*NML II*, 727 F.3d at 238), their effectiveness depends on binding "participants in the payment process of the Exchange Bonds" and forbidding them from assisting "any action to evade the purposes and directives of th[e] order" (A-574; *accord* A-546 ¶ 4). As Judge Raggi explained, once the Injunctions are vacated, those prohibitions would vanish, and Argentina can then carry out its evasion schemes and thereby render itself permanently invulnerable to new Injunctions. A-1836:7-37-13. Notwithstanding Argentina's assurances that it would "continue using" a "New York-based financial institution as the trustee for the exchange bonds" (Supplemental Memorandum of Law in Support of Order to Show Cause at 2, *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (S.D.N.Y. Feb. 29, 2016) (D.E. 904)), members of this Court have recognized that Argentina has "changed its mind before." A-1819:23, 36:16-19.

The Vacatur Order's condition that Argentina repeal its "legislative obstacles to settlement" does not eliminate the violation or the irreparable harm it causes. SPA-84. The district court rightly found that Argentina breaches the Equal Treatment Provision "[b]y making payments on this superior class of debt," the Exchange Bonds. A-6307. As this Court has definitively interpreted that Provision, it "prohibits Argentina, as bond *payor*, from paying on other bonds

without paying on the FAA Bonds," thereby protecting against "the giving of priority to other payment obligations," not just against "legal subordination." *NML I*, 699 F.3d at 258-59. In addition, Argentina has done nothing to repudiate its statements "in the prospectuses associated with the exchange offers that it has no intention of resuming payments on the FAA Bonds" and its declarations to the SEC that it has "classified the FAA Bonds as a separate category from its regular debt." *Id.* at 260 (punctuation omitted). In short, Argentina's treatment of its *payment obligations* under the *FAA Bonds* has not changed at all. And if Argentina fails to live up to its promises in the AIP, its breach will belie any contention that even its attitude toward settlement of this litigation has changed. Thus, because "the purpose[]" of the Injunctions—restoring the rank of Argentina's FAA payment obligations—"ha[s] not been fully achieved," they "may not be changed in the interest of the defendant[]." *Sierra Club*, 732 F.3d at 256.

The district court legally erred in concluding otherwise. SPA-108. The cases on which the court relied—*United States v. Eastman Kodak Co.*, 63 F.3d 95, 102 (2d Cir. 1995), and *Badgley v. Santacroce*, 853 F.2d 50, 54 (2d Cir. 1988), *see* SPA-108—*confirm* that an injunction that has not achieved its purpose should *not* be vacated except in rare circumstances not present here.

In *Eastman*, this Court held that a "defendant should not be relieved of [a decree's] restrictions . . . until the purpose of the decree has been substantially

effectuated, or when time and experience demonstrate that the decree 'is not properly adapted to accomplishing its purposes.'" 63 F.3d at 102. Finding that "the primary purposes of the decrees" in that case "ha[d] been achieved," the Court affirmed the termination of those decrees. *Id*. at 101-02. In *Badgley*, this Court *vacated* an order modifying a consent decree, emphasizing that modifying a decree designed "to achieve precise objectives . . . ought to be disfavored until those seeking change demonstrate that they are in substantial compliance with the decree and that the proposed change will have no adverse effect on future compliance." 853 F.2d at 54. While *Eastman* and *Badgely* both suggested in passing that "total compliance" with an injunction "is not an absolute precondition of any modification" (*id.*; *see also Eastman*, 63 F.3d at 102), neither case allowed a district court to modify or vacate an injunction so that the defendant could resume precisely the violations that had been enjoined.

Eastman and *Badgley* are also distinguishable because they involve a court's authority to modify a consent decree, which by necessity is broader than its authority to modify a judicially imposed injunction. In exercising jurisdiction over a consent decree, courts must balance plaintiffs' need for "certainty that an agreement will be enforced without modification" with defendants' "incentive to settle on reasonable terms," which is promoted by "the prospect of modification as circumstances change or objectives are substantially reached." *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993). Moreover,

consent decrees are often broader than injunctive relief. "Defendants may agree, within limits, to do more than a judicially imposed injunction could have required," and it is therefore "much more difficult to establish that [a consent] decree has fulfilled [its] purpose." *Alexander v. Britt*, 89 F.3d 194, 200 (4th Cir. 1996). "[T]olerance of partial non-compliance" may be "more appropriate in a case . . . [that] involve[s] a broad-ranging decree," but that concern cannot excuse non-compliance with narrow injunctions designed to achieve "precise objectives," like the Equal Treatment Injunctions. *Badgley*, 853 F.2d at 54; *see NML II*, 727 F.3d at 241 (The Injunctions "do[] no more than hold Argentina to its contractual obligation of equal treatment.").

B. The Agreements-In-Principle That Argentina Has Signed Are Not A Circumstance That Itself Could Warrant Vacatur.

1. Circumstances Have Not Yet Changed.

The Vacatur Order, which incorporated the reasoning behind the Indicative Ruling, identified several related facts as changed circumstances sufficient to vacate the Injunctions: (1) that Argentina has signed "Agreements-in-Principle with plaintiffs representing the vast majority of claims in these actions . . . resolving over 85% of claims held by plaintiffs with [I]njunctions." (SPA-83); (2) that Argentina under President Macri has expressed a willingness to negotiate in good faith (SPA-109-110); and (3) that Argentina has promised to lift the Lock Law and the Sovereign Payment Law (SPA-111; SPA-83-84). While

each of these new facts is certainly an encouraging development, given Argentina's history of intransigence, none of these new facts—standing alone or in the aggregate—is sufficient to warrant vacating the Injunctions.

First, while Argentina has negotiated and reached agreements with 85% of plaintiffs with Injunctions, none of those agreements has been consummated. As explained above, there appear to be serious disputes with some creditors as to what exactly Argentina agreed to do. *Supra* at 27-28. Moreover, as to Lead Plaintiffs, if Argentina fails to pay them by April 14, one or more of them may exercise their right to terminate the AIP as it relates to the terminating plaintiff. A-2371. To be clear, neither NML nor Olifant hopes or expects to exercise this right. They desire that this litigation be fully and finally resolved in short order. But that is now in Argentina's hands—the AIP gave Argentina a month and a half to render payment before Lead Plaintiffs may terminate. But, in the regrettable event that each Lead Plaintiff believes that circumstances warrant it terminating the AIP as to itself, that would leave Argentina having reached agreements with only approximately 20% of the plaintiffs holding Injunctions, negating a key premise of the Order. Argentina's tentative agreements with certain creditors, while certainly welcome, is no substitute for Argentina's actual performance under those agreements.

Second, even if Argentina's mere desire to negotiate were a new circumstance, the district court nonetheless erred in concluding that "vacating the injunctions serves the public interest by encouraging settlement." SPA-116.

"[P]ressure tactics to coerce settlement simply are not permissible." *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985). While the district court rotely acknowledged that it "does not have the power to force plaintiffs to accept a settlement" (A-2362), Argentina's own public offer, which sharply distinguishes among those plaintiffs who have pari passu Injunctions and those that do not, amply demonstrates how vacatur of the Injunctions will impact a plaintiff's ability to negotiate a fair settlement with Argentina.

Third, Argentina's promise to lift the Lock Law and the Sovereign Payment Law—assuming that promise is fulfilled—does not significantly change Argentina's long-running refusal to recognize debt that did not participate in the Exchange Offers. Repealing these laws would not itself restore the FAA Bonds to the same rank as the Exchange Bonds. Argentina's courts have refused to recognize claims under Plaintiffs' bonds based not only on the Lock Law, but also on Argentina's "public policy" against paying those bonds. *See* A-969-1032. Argentina's submissions confirm its commitment to this public policy, as it seeks vacatur of the Injunctions precisely so that Argentina may make payments on the Exchange Bonds without making payments on the defaulted FAA Bonds, which it prefers to keep in a restructuring dictated by its unilateral offer.

2. Maintaining The Injunctions Will Not Harm Any Party And Will Advance The Public Interest.

In light of the lack of changed circumstances, none of the harms to Argentina or to third parties that the district court identified, SPA-18-20, warrants vacatur of the Injunctions. Indeed, many of the "harms" identified by the district court were considered by this Court and rejected as a basis for denying equitable relief.

Leaving the Injunctions in place until Argentina consummates the AIP by paying Lead Plaintiffs would not cognizably injure Argentina. *Contra* A-2360. The district court suggested that, unless the Injunctions are dissolved, Argentina will be unable to raise the capital needed to fund its government. SPA-66. Yet, the Injunctions have been effective since June 2014, and Argentina has raised billions in U.S.-dollar funds in the global capital markets during that time. Indeed, Argentina already has tapped those markets this year, recently adding $5 billion to its vault, despite the Injunctions. *See* A-1193-99.

The district court also reasoned that leaving the Injunctions in place would "unfairly deny those plaintiffs" who "have now agreed in principle to settle" (a class that now includes NML and Olifant) the "opportunity to resolve their disputes amicably with the Republic." A-2357. That is plainly incorrect; maintenance of the Injunctions surely will not affect Argentina's financial ability to pay those settlements. Argentina now has $29.7 billion *cash on hand* (A-1189-

91), vastly more than the "$9 billion" Argentina calculates it would need to pay all injunction-protected claims *in full* (A-668-69 ¶ 7). Argentina can thus easily pay any settlements for a lesser amount even without any need to "raise . . . capital." A-2327. And even if a capital-raise were necessary to fund the settlement payments, press reports show that demand for Argentina's debt securities already is strong even *before* this Court has expressed any view as to the propriety of the Vacatur Order. *See* John P. Rathbone & Daniel Politi, *Argentina: Macri's Change of Rhythm*, Financial Times (Mar. 4, 2016), http://on.ft.com/1TVnEvI (quoting Credit Suisse statement that "'[w]e . . . think that demand will be high'"); Mariana Santibanez, *Argentina Nears Return to Int'l Bond Markets*, LatinFinance (Mar. 2, 2016), http://bit.ly/1TVnMLJ (quoting investor: "There are funds that are significantly underexposed to Argentina, so there is space in emerging market debt portfolios to absorb and increase allocations to Argentina"). While Argentina might rather return to the capital markets only after all the Injunctions have been lifted, it cannot bootstrap its wish into a basis for vacating the Injunctions. And similarly, Argentina's apparent decision to condition payment of *any* settlements on the dissolution of *all* Injunctions cannot weigh in favor of the Vacatur Order. The law does not entitle Argentina to manufacture its own equities in this manner.

The district court also worried about "the exchange bondholders' plight." A-2358. But, as this Court has already held, this "plight" is the result of Argentina's decision to default on their bonds rather than paying what it owes on

the FAA Bonds, and "[t]his type of harm—harm threatened to third parties by a party subject to an injunction who avows not to obey it—does not make an otherwise lawful injunction 'inequitable.'" *NML II*, 727 F.3d at 242. And Argentina "expressly warned" the Exchange Bondholders that litigation with FAA Bondholders may interrupt or prevent Exchange Bond payments. *Id.*

The district court's concerns about "the Argentine people" represented by its government and "the financial intermediaries that the Republic engages to help it pay the exchange bondholders" are misplaced for similar reasons. A-2358-60. Indeed, this Court has already rejected each of these arguments when it affirmed the Injunctions. The payment processors have had little practical difficulty complying with the injunctions (*see NML II*, 727 F.3d at 246); it is only Argentina's retaliations against those law-abiding entities (*e.g.*, stripping BNY of its authorization to operate in Argentina, A-245) that have harmed them. But this Court is "unwilling to permit Argentina's threats to punish third parties to dictate the availability or terms of relief under Rule 65." *NML II*, 727 F.3d at 242. All these injuries can be avoided if Argentina simply fulfills the terms of the settlements it already has entered and negotiates mutually agreeable settlements with the remaining plaintiffs. At that point, plaintiffs will dismiss their cases, and the Injunctions with them. But, until then, this Court's conclusion that "Argentina's disregard of its legal obligations exceeds any affront to its sovereign powers" still rings true. *See NML I*, 699 F.3d at 263.

Finally, the public interest continues to weigh in favor of the Injunctions because "the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts." *NML II*, 727 F.3d at 248. This public interest—*and* the public interest in fostering parties' consensual resolution of claims—is vindicated only by enforcement of parties' bargained-for contractual rights. As Argentina's own tender offer demonstrates, permitting Argentina to once again disregard plaintiffs' contractual rights will encourage Argentina to dictate terms as it had in the past rather than negotiate—and fulfill—fair resolutions.

III. The Equities Would Not Support Vacatur Of 100% Of The Injunctions Based On A Settlement Of Merely 20% Of The Claims.

As the district court explained, one of the essential premises of the Vacatur Order is that Argentina "has now signed Agreements-in-Principle with plaintiffs representing the vast majority of claims in these actions[,] . . . potentially resolving over 85% of claims held by plaintiffs with injunctions." A-2327. The district court's assumption that Argentina's negotiations would resolve the vast majority of the claims was a vital underpinning to its decision to vacate the Injunctions. *Id.* It follows that failing to reach a genuine resolution with Lead Plaintiffs—meaning actually paying on time under the Agreement-in-Principle—would preclude vacatur of the Injunctions. The district court should have expressly clarified that

aspect of its ruling, which Argentina has contested. Merely signing agreements with some creditors, without consummation through payment in full of the funds agreed to under the AIP, would not be a sufficient ground to vacate others' Injunctions.

But Argentina reads the Vacatur Order to permit exactly this.

Lead Plaintiffs and Argentina agreed to a provision granting Lead Plaintiffs the right to terminate the AIP should Argentina fail to make full payment by April 14, 2016. A-2371. This freely negotiated provision was included to protect Lead Plaintiffs' rights: After litigating for many years against Argentina, NML and Olifant required certainty of payment, which the April 14 termination date provides. Absent this termination right, NML and Olifant would have demanded more favorable economic terms because, while the AIP is in force, Lead Plaintiffs are prohibited from, among other things, seeking to attach the proceeds of bond offerings Argentina might initiate in the international capital markets. A-2368-69. In the event that any of the Lead Plaintiffs exercised its right to terminate the AIP as to itself, Argentina promised that it would be "restored to [its] respective positions as if there had been no [AIP]." A-2371.

Argentina's position, however, is that, if Lead Plaintiffs terminate and Argentina satisfies its agreements as to the other creditors who entered into agreements on or before February 29, then Lead Plaintiffs' Injunctions would automatically dissolve along with those of any other plaintiff that had not reached a

settlement agreement by February 29. A-2277:11-15. They would have no Injunctions to protect their contractual rights under the Equal Treatment Provision, and freed once more to disregard its payment obligations under the FAA Bonds, Argentina, as shown by its treatment of plaintiffs lacking injunctive relief its public tender offer, would have little incentive to negotiate resolution of those outstanding claims.

And, on Argentina's view, this result would obtain even if Argentina actually resolved only 20% of the claims in these actions.[4]

That certainly would not suffice. Settling 20% of claims is legally insufficient to warrant lifting the Injunctions protecting 80% of claims. Indeed, this Court has repeatedly rejected Argentina's argument that the acceptance of offers by *some* creditors can render Injunctions protecting the rights of *other* creditors inequitable. In *NML I*, the Court explained that Argentina's "frustration with plaintiffs for refusing to accept the exchange offers" was irrelevant because the "plaintiffs were completely within their rights to reject" the offers and instead enforce the Equal Treatment Provision in their bonds. 699 F.3d at 263 n.15. And, in *NML II*, the Court explained that a non-settling creditor is entitled "to receive

[4] As noted before the district court, this figure would actually be closer to 10% because some plaintiffs had their claims "paid in full" by Argentina. A-2277:24-78:1. This would require the "absurd[]" result that, "if Argentina honors settlement agreements with 10 percent of the plaintiffs," every other bondholder would have its injunctions vacated. A-2278:2-5.

what it bargained for" under the terms of its "outstanding bonds," even if others have accepted settlements. 727 F.3d at 238, 241.

Thus, this Court should make clear that Argentina's interpretation of the Vacatur Order is impermissible. *See United States v. McGinn*, 787 F.3d 116, 130-31 (2d Cir. 2015) (remanding an ambiguous order and requiring the district court to adjust the order to clearly exclude a "reading" that would render the order impermissible). Because the Vacatur Order provides for *automatic* vacatur, the district court will not have the opportunity to assess the situation before vacatur takes effect. Before the Injunctions dissolve, the district court should assess all the facts and circumstances and among those, if the situation arises, it must address whether resolutions with a small minority of creditors is a sufficient equitable ground to vacate the Injunctions as to all creditors. Dissolution of all plaintiffs' Injunctions could not possibly be appropriate in the absence of Argentina actually resolving the vast majority of the claims pending before the district court, adhering to its commitments, and demonstrating a good-faith effort to resolve the remaining claims, including through robust negotiations. Only that kind of turnabout—one in which Argentina clearly abandons any desire to continue violating plaintiffs' contractual rights—possibly could show that the Injunctions had fulfilled their purpose in a manner that could allow for their vacatur. That, however, is not where things stand today.

CONCLUSION

This Court should reverse the springing Vacatur Order. It should require that the district court give an opportunity to be heard, and issue a further court order, before lifting the Injunctions, rather than terminating them automatically under the conditions it set. It should also hold that the district court abused its discretion when it refused to clarify that the Injunctions would not be automatically vacated if Argentina does not pay Lead Plaintiffs according to the specific terms of their Agreement-in-Principle.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2016, a true and correct copy of the foregoing Appellants' Opening Brief as served on all counsel of record in these consolidated appeals via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

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