UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund LP, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, MCHA Holdings, LLC, Trinity Investments Limited, White Hawthorne, LLC, White Hawthorne II, LLC and Yellow Crane Holdings, L.L.C., Plaintiffs, v. The Republic of Argentina, Defendant.	16 Civ. 2238 (TPG)

MEMORANDUM OF LAW IN OPPOSITION
TO THE REPUBLIC OF ARGENTINA'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

This action seeks, *inter alia*, declarations that Plaintiffs reached binding agreements with Argentina. Less than two weeks after the action was filed (and a week before oral argument in the Second Circuit appeal from this Court's March 2 Order conditionally vacating the *pari passu* Injunctions), Argentina rushed a dismissal motion here, advancing a single argument: that Plaintiffs have not adequately alleged that contracts were formed. According to Argentina, no agreement could be formed until it took the mechanical step of countersigning an acceptance of its own written offer. This argument contradicts the terms, when viewed as a whole, of the settlement documents that Argentina itself drafted. It is belied by the actions Argentina took *before* learning that the Court was going to conditionally lift the Injunctions, and belied again by Argentina's own submission to the Court of a "settlement" with bondholder Red Pines LLC ("Red Pines") that itself was never manually countersigned.

Argentina has always said that its offer (the "Unilateral Settlement Offer") was open to *all* holders of defaulted Argentine bonds. The language of the Unilateral Settlement Offer provides "Instructions for Bondholders to Accept" Argentina's offer, and that "Holders may become a party to a Settlement Agreement by executing and exchanging with [Argentina] a completed Agreement Schedule." These words are plain, and make clear that Argentina's offer, when accepted by the bondholder's execution and delivery of Argentina's "Agreement Schedule," creates a binding contract. Plaintiffs allege that they did just that.

Plaintiffs have also alleged Argentine conduct and representations to the Court that confirm that contracts were formed. Argentina told this Court, the Second Circuit, Plaintiffs and scores of bondholders that it had made an irrevocable offer open to all, expiring on February 29, 2016. The Court relied on Argentina's promise that its offer could be accepted by any

bondholder on or prior to February 29,[1] and on Argentina's "evidence" of "numerous" Agreements in Principle reached with bondholders (including Red Pines).[2] Argentina is now estopped from arguing that a manual counter-signature on an acceptance —beyond the pre-signed electronic signature ("/s/: Luis A. Caputo, Secretary of Finance") it included on the face of its offer—was also required. Argentina's suggestion that it can pick and choose which bondholders to settle with by withholding a manual counter-signature fundamentally alters the nature of what it disclosed in the Unilateral Settlement Offer, and wholly contradicts its representations to this Court in seeking to have the Injunctions lifted.

In the contracts that Plaintiffs formed with Argentina, the parties committed to a precise formula for calculating the payment amount on settled claims. We show below that "counter-signature" language went not to contract formation, but to a post-contractual reconciliation process, by which the parties would ensure that the settlement figure adhered to the formula to which they had committed in the contract. The argument that a countersignature was required for contract *formation* is flatly inconsistent with other language in the Unilateral Settlement Offer and Argentina's representations to bondholders and the Court. At minimum, factual issues regarding Argentina's intentions and its representations preclude dismissal.

It is well for the Court to consider the tactical motives that surround this motion. Argentina's hurried filing and five-day briefing calendar allow almost no time for measured review. Argentina may want to make this lawsuit "go away" before oral argument in the Court of Appeals, but Plaintiffs' agreements cannot be steam-rolled, and judicial review is not so easily short-circuited. The motion should be denied.

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[1] *See NML Capital, Ltd. v. Republic of Argentina* ("NML"), No. 08 CV 6978, 2016 WL 715732, at * 3, 10 (S.D.N.Y. Feb. 19, 2016) ("Indicative Ruling").

[2] *See NML*, 2016 WL 836773, at *2 (Mar. 2, 2016) ("March 2 Order").

ALLEGATIONS OF THE AMENDED COMPLAINT[3]

A. New York-Law and Foreign-Law Bond Holdings and Earlier Proceedings

Plaintiffs hold defaulted Argentine bonds, issued principally under New York, German, and English law. AC ¶ 27 & Sched. 1. Since 2014, they have been part of two groups litigating with Argentina (one on New York-law bonds, another on foreign-law bonds), each seeking to obtain payment and *pari passu* injunctive relief. *Id.* ¶¶ 44, 46. In the New York-law cases, many of the Plaintiffs obtained partial summary judgment and *pari passu* injunctions, or a ruling that they were entitled to the same. *Id.* ¶ 44. Others have pending motions for the same relief. *Id.* ¶ 46. In the foreign-law cases, the parties litigated at length over, among other things, the timeliness of Plaintiffs' claims. Briefing on the issue was underway in February 2016, when Argentina reversed field and offered to settle, and Plaintiffs accepted. *Id.* ¶ 47.

Among those litigating parties were Procella Holdings, L.P. ("Procella") and Red Pines. Between them, Procella and Red Pines held beneficial interests in every German or English-law bond upon which the current Plaintiffs would later submit acceptances. *See* Declaration of Stephen Scotch-Marmo ("Scotch-Marmo Decl.") Ex. 8 (the "Bausili Decl.") and Bausili Decl. Exhibits 7 (settlement with VR Global Partners ("VR")) (the "VR Settlement")); 8 (settlement with Procella) (the "Procella Settlement"); and 9 (settlement with Red Pines) (the "Red Pines Settlement"). Some of those bonds had maturity dates as old as 2002. AC ¶ 107.

The bonds at issue are subject to contractual "prescription" terms. "Prescription" refers to contract terms contained *within* the governing fiscal agency agreements ("FAA"s"),

[3] On April 7, 2016, Plaintiffs exercised their right to amend under Fed. R. Civ. P. 15(a), adding facts (some occurring just this week) and also dropping several settling parties. Dkt. No. 43. This memorandum cites to the Amended Complaint ("AC ¶ ##"). Certain factual allegations therein are drawn from sworn declarations filed April 7, 2016. *See* Declarations of Murat Korkmaz, Siong Weil Lee, Steven C. Krause, Stephen Scotch-Marmo, Pierre Bour, Daniel Ehrmann, Robert Dafforn, and Jonathan Kolatch. Dkt. Nos. 34-39, 41-42.

indentures, trust deeds, and other debt contracts that impose time limits on claims made for unpaid interest or principal. The FAA's governing certain New York-law bonds contained prescription terms that impose a five-year limit on claims for interest, and a ten-year limit on claims for principal, running from the date when the indenture trustee receives funds from Argentina, which *never* happened. AC ¶¶ 66-67. The English-law bonds were governed by a similar feature. *Id*. ¶¶ 68-69. Some of the German-law bonds limited prescription to ten years (from the statutory thirty-year period)—a period that can be extended to 12 years when "presentation" is made during the ten-year period. *Id*. ¶¶ 70-71.

B. Settlement

On February 5, 2016, before making its February 17 Unilateral Settlement Offer, Argentina issued a press release laying out its economic terms (the "Unilateral Proposal"), but providing no mechanism for acceptance by bondholders. *Id*. ¶¶ 47-48. On February 12, Argentina's Secretary of Finance Luis Caputo and Undersecretary Santiago Bausili contacted Pierre Bour, of Plaintiffs Attestor and Trinity, to discuss the Unilateral Proposal. *Id.* ¶ 74. Mr. Caputo explained that Argentina would shortly publish on its website a formal settlement offer with instructions on how bondholders could accept it. After Mr. Caputo explained the economics, Mr. Bour asked whether the offer would be subject to restrictions. Mr. Caputo said that the offer would be subject to contractual prescription, explaining that the text of the issuance documents for some New York-law bonds contained "timed out" limits on interest and principal. *Id*. He said that this was an issue only for the New York-law bonds: foreign-law bonds would be a "straight 150% of principal." *Id.* Neither Mr. Caputo nor Mr. Bausili stated that there would be any purported statute of limitations exclusion. *See id.*

Four days later, Daniel Ehrmann, of Plaintiff Yellow Crane, spoke by telephone to Mr. Bausili. AC ¶ 77. Advising that the terms of Argentina's Proposal were "set," Mr. Bausili also

said that the offer would be subject to "the time limitations written in the issuance documents," explaining that the New York issuance documents limited claims for principal to ten years and for interest to five years, working backwards from the filing of litigation. *Id.* Mr. Ehrmann then posed a specific question: did Argentina mean to limits payments by reference to a statute of limitations? Mr. Bausili confirmed that the Unilateral Settlement Offer would ***only refer to contractual prescription***. *Id.*[4]

On February 17, 2016, Argentina published on its website, in English, the Universal Settlement Offer to all holders of defaulted bonds. Drafted entirely by Argentina, it included "Instructions for Bondholders to Accept its Settlement Proposal" (the "Instructions"), a "Master Settlement Agreement" (the "MSA"), and an "Agreement Schedule" by which a bondholder could accept the offer. Scotch-Marmo Decl. Exs. 6-7. The Instructions stated that "Holders may become a party to a Settlement Agreement by executing and exchanging with [Argentina] a completed Agreement Schedule, the form of which is attached as Exhibit A to the [MSA.]" *Id.* Ex. 6 at 1. The Agreement Schedule could be accepted by *any* holder of defaulted bonds, and the offer was pre-signed, as reflected by Argentina's signature line ("/s/"). *Id.* Ex. 7 at 8.

The Unilateral Settlement Offer did not exclude any bonds on the basis of *any* statute of limitations argument. *Id*. Ex. 7. It *did* contain a provision excluding claims based on contractual prescription, *precisely as Messrs. Caputo and Bausili had advised Trinity, Attestor and Yellow Crane*.[5] The provision excluded only bonds "as to which the *contractual prescription period set out in the relevant instrument* evidencing those bonds has expired." *Id.* Ex. 7 (MSA at § 1)

[4] Unless otherwise indicated, all emphasis is added.

[5] Just hours before this Court issued its Indicative Ruling, Argentina told bondholder Honero essentially what it had told Trinity, Attestor and Yellow Crane. *See* AC ¶ 114.

(defining "Prescribed Claims"). The Unilateral Settlement Offer said nothing about any statute of limitations exclusion.

The Unilateral Settlement Offer contained a *precise* payment formula governed by the time at which the accepting bondholder delivered its executed form. The holder would receive a stated percentage of principal or claim, depending on (i) the nature of the claim (injunction or non-injunction), (ii) the date of execution and delivery (prior to 5:00 p.m. on February 19 or not), and (iii) the bonds held not being bonds "as to which the contractual prescription period set out in the relevant instrument evidencing those bonds has expired." Scotch-Marmo Decl. Exs. 6-7.

To this formula, the Unilateral Settlement Offer invited acceptance by execution and email delivery of Argentina's form. In bold print, the Instructions state, "Instructions for Bondholders to **Accept** [Argentina's] Settlement Proposal." Scotch-Marmo Decl. Ex. 6. Below that heading are instructions for those "wishing to **accept** the Republic's Proposal." *Id.* Instruction No. 2 provides that "Holders may become a party to a Settlement Agreement by executing and exchanging with the Republic a completed Agreement Schedule, the form of which is attached as Exhibit A to the Master Settlement Agreement." *Id.*

Paragraph 5 of the Instructions reinforced this acceptance mechanism. "Injunction Bond Holders," Argentina wrote, "*will have* the Settlement Amount under options (ii) and (iii)," if they "execute and deliver to the email address included hereby [sic] an Agreement Schedule prior to 5:00 p.m. New York Time on February 19, 2016." Scotch-Marmo Decl. Ex. 6. Those who "execute and deliver to the email address below" after that time "*will have* the Settlement Amount" under a less attractive economic formula. *Id.* Contracts were formed when the holders executed and delivered their acceptances on the schedule Argentina dictated.

Argentina moved for an "indicative ruling" that this Court would vacate the Injunctions if

Argentina first (i) repealed the Lock Law and other similar legislation; and (ii) paid all bondholders that had reached a settlement agreement in principle with Argentina "on or before February 29, 2016." The second condition meant that all bondholders could accept the Unilateral Settlement Offer until February 29, 2016 and be guaranteed payment before the *pari passu* Injunctions were lifted.

On February 19, this Court issued the Indicative Ruling, stating that, on remand from the Court of Appeals, it would lift the Injunctions upon the occurrence of the two conditions. Any bondholder that accepted Argentina's Unilateral Settlement Offer by February 29, 2016, would "receive the protections incorporated by" the ruling. Indicative Ruling at *10. Those who did not risked being left without the protections of Injunctions, and the risk, well-illustrated by years of intransigence, that Argentina might never pay its obligations.

Some Plaintiffs sent lists of their bonds to Argentina, including some older bonds. *See* AC ¶¶ 75, 78, 112. This confirms that bondholders understood that the offer did not exclude bonds based on the statute of limitations. Argentina did not respond with any disagreement, and later submitted "Agreements in Principle" to this Court that contained schedules of bonds with maturities as old as 2002. Bausili Decl. ¶¶ 11-13 & Exhibits 7-9.

With the February 29 deadline looming, each Plaintiff accepted Argentina's Unilateral Settlement Offer by executing an Agreement Schedule and delivering it to Argentina—exactly as Argentina itself had directed. AC ¶¶ 80-100. Argentina acknowledged receipt of almost all of these submissions. *Id.*[6]

On February 29, 2016, urging this Court to grant it relief, Argentina assured the Court that "any plaintiff who has reached an agreement to settle with [Argentina] by [February 29,

[6] Argentina never communicated to Yellow Crane any rejection of its acceptances or advised that its acceptance should be subject to the statute of limitations. Decl. of Daniel Ehrmann ¶ 16.

2016] *must be paid* as a precondition to vacating the Injunctions," and it represented that efforts had "already yielded numerous settlements, totaling in excess of $6.2 billion with plaintiffs in these actions alone, plus additional amounts with other holders of defaulted debt."[7]

Also on February 29, Argentina filed the Second Supplemental Declaration of Mr. Bausili. *See* AC ¶ 103. Mr. Bausili averred that Argentina "has entered into agreements in principle to settle claims made by numerous bondholders" and attached as exhibits several examples. *Id.* ¶¶ 104-07.[8] Among these "agreements in principle" were an agreement with Red Pines that had not been manually countersigned, and contracts with bondholders VR and Procella. These three agreements covered the exact same bonds for which certain of the current Plaintiffs had also submitted acceptances, including bonds with maturity dates from 2002 and 2003 and interest from early periods. Mr. Bausili averred that Argentina "has entered" into these agreements – past tense – without any reservation for further review or additional signature. The Red Pines agreement was acknowledged and binding.

Plaintiffs advised the Court at oral argument on March 1, 2016, that they had formed contracts settling their claims in reliance on the requirement in the Indicative Ruling that they would be paid as a condition to lifting the Injunctions. *See* Scotch-Marmo Decl. Ex. 10 (H'rg Tr., *NML* (Mar. 1, 2016) at 42:6-43:5 (Willett), 35:12-16 (Levine). Argentina did not dispute these statements. *Id.* at 13:6-17:22 , 49:13-50:25 (Paskin). The next day, this Court largely adopted its Indicative Ruling, ordering that the Injunctions would be lifted upon Argentina's

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[7] *See* Supp. Memo. of Law at 2-3, *NML* (Feb. 29, 2016) Dkt No. 904.

[8] Certain Plaintiffs filed a letter with this Court that same day, stating that they, too, had reached agreements in principle to settle with Argentina in reliance on the Indicative Ruling and "Argentina's representations made to the District Court—and its requirement that the Plaintiffs are entitled to payment in full in accordance with their settlements as a condition to the lifting of the injunctions." Scotch-Marmo Decl. ¶ 11 & Ex. 9. *Argentina did not dispute these statements*.

satisfaction of two conditions precedent: (1) the repeal of "all legislative obstacles to settlement"; and (2) the "full payment in accordance with the specific terms" of each "agreement in principle" entered into by any plaintiff "on or before February 29, 2016." March 2 Order at *2. The Court also ordered that Argentina "notify the court once those plaintiffs have all received full payment." *Id.*[9] Nothing in the order contemplated that Argentina could pick and choose which bondholders to settle with by withholding a manual countersignature from acceptances.

Two of the settlements attached to the Bausili Declaration—VR's and Procella's—included riders stating that "no Prescribed Claims exist with respect to the Bonds listed on the attachment to this Agreement Schedule, and [Argentina] will not assert that the Holder's claims to any Bonds listed thereon are untimely, or otherwise time-barred." VR Settlement § vii(a)); Procella Settlement § vii(a). Had Argentina intended its Unilateral Settlement Offer to exclude interest or principal payments that it now contends are barred by a disputed statute of limitations defense, it never would have agreed to those riders. It also never would have drafted and issued an MSA that expressly refers to contractual prescription, and not a statute of limitations exclusion. Nor would it ever have advised the Court as it did.

C. <u>With Judicial Relief in Hand, Argentina Reneges</u>

Argentina's statute of limitations exclusion theory was a post-Indicative Ruling innovation that, as Mr. Bausili confessed to Plaintiffs Attestor and Trinity on March 7, 2016, came from "[its] lawyers." AC ¶ 76. Emboldened by its initial litigation success in obtaining the March 2 Order, Argentina formally advised that it would not honor its Settlements with certain Plaintiffs, even though each accepted the offer in time. *See* Scotch-Marmo Decl. Ex. 11 (email

[9] Argentina's Senate has voted to repeal the "Lock Law" and the sovereign payment law. *See* Virod Sreeharsa, *Argentina's Senate Allows Payment to Bondholders*, N.Y. Times (Mar. 31, 2016), *available at* http://www.nytimes.com/2016/04/01/business/dealbook/argentinas-senate-allows-payment-to-bondholders.html.

from S. Willett to M. Paskin dated Mar. 11, 2016). Ten days later, Argentina told the Second Circuit that its submissions of the VR, Procella, and Red Pines settlements to this Court (annexed to the Bausili Decl.) was "mistaken[]" because they provided for payment on claims that Argentina later decided were "time-barred." *See id.* Ex. 12 (Defendant-Appellee Brief) at 13 n.3.

D. Efforts to Revise the MSA and Moot Review of Argentina's Conduct

With the disputes in this case now an issue on appeal, Argentina turned to efforts to strategically "pick off" those Plaintiffs with whom its prior dealings showed that contracts had been formed. On April 5, 2016, it sent a new form of "master settlement agreement" to Red Pines, AC ¶¶ 116-17, whose earlier agreement Argentina characterized as an "agreement in principle" in a sworn declaration, even though it lacked a manual countersignature. The Complaint alleges that the economics of this new settlement agreement were essentially the same as the Unilateral Settlement Offer. *Id.* ¶ 122. Argentina also sought an agreement with Honero, to which it had earlier said it would be "okay" with a rider confirming that *no statute of limitations defense applies*. AC ¶ 114. The new form added text not in the earlier MSA: for the first time, Argentina included a reference to the "statute of limitations" defense. *Compare* AC ¶ 116 *with* Scotch-Marmo Decl. Ex. 7. The new form also specifically required the settling plaintiff immediately to withdraw from the Second Circuit appeal and from this action. *Id.*[10]

ARGUMENT

I. LEGAL STANDARD

On a motion to dismiss, a court should "draw all reasonable inferences in Plaintiffs' favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104

[10] Argentina's offers of compromise on and after April 5, 2016, are admissible as evidence of motive, knowledge, and intent. Fed. R. Evid. 408(b).

(2d Cir. 2011) (internal quotation marks omitted).[11]

Argentina's Motion raises a single question: whether, as a matter of law, Plaintiffs have alleged that contracts were formed. Questions of contract formation are not suited to summary relief. *Associated Credit Corp. v. Crossley Carpet Mills Ltd.*, No. 97 CIV. 7405, 1998 WL 477719, at *2 (S.D.N.Y. Aug. 14, 1998) (denying motion to dismiss); *Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 382 (S.D.N.Y. 2005) (summary judgment denied where "there remain genuine issues of material fact as to the existence of a contract between the parties."); *see also Atl. Concrete Found., Inc. v. Birchwood Vill. Ltd. P'ship*, 861 N.Y.S.2d 802, 803 (3d Dep't 2008). "The question of contractual intent, and whether the parties meant to be bound," is a factual issue. *Lehrer McGovern Bovis, Inc. v. New York Yankees*, 615 N.Y.S.2d 31, 34 (1st Dep't 1994) (reversing grant of summary judgment).

The district court denied a motion to dismiss in *Associated Credit*, observing that "whether [defendant] meant to be bound by the unsigned purchase order, is largely [a question] of contractual intent and must be resolved by the trier of fact." 1998 WL 477719, at *2. The court reasoned that an argument that a contract is "not valid unless countersigned" invites the Court to rule on the validity of a contract, which "the Court should decide after the completion of discovery." *Id.*

Ambiguities as to contract formation are like any other contract ambiguities, and "[o]n a motion to dismiss a breach of contract claim, [a court] 'should resolve any contractual ambiguities in favor of the plaintiff.'" *Luitpold Pharm., Inc. v. Ed. Geistlich Sohne A.G. Fur*

[11] The Court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, matters of which judicial notice may be taken, or documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

Chemische Industrie, 784 F.3d 78, 86 (2d Cir. 2015) (reversing order dismissing contract claims) (quoting *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005)); *see Paysys Int'l, Inc. v. Atos SE*, No. 14 Civ. 10105, 2015 WL 4533141, at *4 (S.D.N.Y. July 24, 2015) ("It is black letter New York law that when the language of a contract is ambiguous, its construction presents a question of fact, which of course precludes summary dismissal.") (internal quotations omitted); *Bank of N.Y. Trust, N.A. v. Franklin Advisors, Inc.*, 522 F. Supp. 2d 632, 637 (S.D.N.Y. 2007) ("The Court's role on a 12(b)(6) motion to dismiss is not to resolve contract ambiguities.").

Detailed factual allegations concerning conduct, including partial performance and estoppel, that further support contract formation, also preclude summary relief. *See Associated Credit Corp.*, 1998 WL 477719, at *2 & n.3. Questions of judicial estoppel are fact-intensive and thus also inappropriate for disposition on motions to dismiss. *See, e.g., United States v. Apple, Inc.*, 791 F.3d 290, 337 (2d Cir. 2015) (judicial estoppel is "invoked by a court at its discretion," and the propriety of applying the doctrine "depends heavily on the specific factual context") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001)).

II. PLAINTIFFS HAVE ADEQUATELY ALLEGED CONTRACT FORMATION

A. Formation of the Agreements in Principle

Contracts are formed by offer and acceptance. The Amended Complaint alleges that each Plaintiff executed and delivered an Agreement Schedule, as instructed by the offeror, by February 29, 2016. AC ¶¶ 80-100. That is a sufficient allegation that binding contracts were formed. An acceptance that is "clear, unambiguous and unequivocal" forms a contract. *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 84 (2d Cir. 1998) (valid contract formed when a party unconditionally accepts an offer without modification), *rev'd on other grounds*, 238 F.3d 133 (2d Cir. 2000); *Zheng v. City of New York*, 19 N.Y.3d 556 (2012) (contract formed where party

accepted offer in accordance with its terms).

This is not a case in which parties negotiated terms, exchanged drafts, and ultimately failed to reach a meeting of the minds as evidenced by an exchange of signatures. The Amended Complaint alleges something very different—acceptances of a unilateral offer by a group of bondholders, action which formed a contract within a fixed time, provided they accepted on the offeror's terms. By making such an offer with a deadline, the offeror creates an "irrevocable offer for a specified period of time, which if accepted in accordance with its terms will . . . give rise to a contract." *USA Network v. Jones Intercable, Inc.*, 729 F. Supp. 304, 309 (S.D.N.Y. 1990); *see also Wells Fargo Bank, N.A. v. Davidson Kempner Capital Mgmt. LLC*, 32 F. Supp. 3d 436, 441-42 (S.D.N.Y. 2014); Restatement (Second) of Contracts § 25 (1981) ("An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer."); 28 N.Y. Prac., Contract Law § 26:23 ("An option contract is an enforceable promise not to revoke an offer. . . . If accepted in accordance with its terms during the period it is outstanding, an option will give rise to an enforceable contract.").[12]

Once the party to whom a unilateral offer is made states its intent to accept the contract, the unilateral offer "ripens into a fully enforceable bilateral contract." *Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 668 (2001); *Wells Fargo Bank, N.A.*, 32 F. Supp. 3d at 441 (quoting *Kaplan v. Lippman*, 75 N.Y.2d 320, 325 (1990)); *see also Mun. Consultants & Publrs., Inc. v. Town of Ramapo*, 47 N.Y.2d 144, 149 (1979) (valid contract formed between a municipality and a corporation even though a town employee did not sign the agreement, in part, because "[a]ll the terms of the contract had been negotiated and agreed upon"); *Yazdan v. Kerendian*, No. 22272/2011, 2013 WL 5451886, at *4 (Sup. Ct. Queens Cty. Sept. 24, 2013) (a memorandum of

[12] Consideration is not required to make the offer irrevocable. *Fullerton v. Prudential Life Ins. Co. of Am.*, No. 99 CIV. 4453, 2000 WL 1810099, at *8 (S.D.N.Y. Nov. 30, 2000).

understanding contemplating a real estate transaction could constitute a binding contract, even though the memorandum stated it was only an "outline," because it "contain[ed] all of the essential elements of a real estate contract").

This is exactly what happened here. Argentina's Instructions for how to "accept" its "Proposal," Scotch-Marmo Decl. Ex. 6, and its promise that those who delivered "Agreement Schedules" by a certain hour of a certain day "will have" payment under precise formulae, *id*. at Instruction 5, constituted an irrevocable offer that was accepted by each Plaintiff, and thereby "ripen[ed] into a fully enforceable bilateral contract." *Jarecki*, 95 N.Y.2d at 668.

B. Argentina's Statements and Conduct Confirm that Delivery of the Completed Agreement Schedule Formed a Binding Agreement

Argentina's statements and conduct, as alleged in the amended complaint, also show that binding contracts were formed upon delivery of the executed Agreement Schedules. *See Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 97 (2d Cir. 2007) (contract may be "established through the conduct of the parties recognizing the contract") (internal quotations omitted). Argentina told bondholders that delivery of the completed Agreement Schedule would create a binding agreement. *See* AC ¶¶ 112 (Feb. 17 email from Mr. Bausili, stating: "Max, we were working on providing the following link and *agreement for you to execute*"), 75 (Feb. 19 email from Mr. Bausili, stating: "The deadline today was for plaintiffs with an Injunction *taking the Injunction Offer*. . . . If you are saying that you have injunction and would like to *take the Injunction Offer* . . . .").

On February 29, Argentina told this Court (and hence the public) that delivery of an Agreement Schedule created a binding contract. Mr. Bausili stated that Argentina had reached an "agreement in principle" with Red Pines, attaching Red Pines' submission, which *lacked* an additional manual counter-signature from Secretary Caputo. Bausili Decl. ¶ 13 & Exhibit 9; *see*

also AC ¶ 107. Argentina now contends in a footnote that this was a "mistake." *See* Mot. at 7 n. 3. The Court cannot accept this self-serving assertion of "mistake" without providing Plaintiffs discovery on the issue.

C. Argentina's Countersignature Argument Fails

The Motion rests ***entirely*** on the alleged absence of Argentina's manual counter-signature on the acceptances of its offer. We turn below to the text that shows the many failures of this argument, but address first the law showing that counter-signature on an acceptance has no bearing on the legal question whether parties have formed a contract.

Governing Law. Argentina relies on cases in which parties *negotiate*, drafts are circulated (often there is part performance), and a dispute later arises about whether, at some stage in this process, the parties intended to be bound. *Scheck, Jim Bouton Corp.*, and *Longo* all fit this pattern.[13] Where the parties themselves agree that the give and take of their negotiations will not result in a binding agreement until there are signatures, that agreement controls.[14]

This case falls within a very different class of cases. There were no negotiations. Bondholders were issued an irrevocable offer, which could be accepted only on its terms. When accepted, it formed a binding contract by committing the parties to a *methodology* for calculating their obligations, leaving the actual calculation for later reconciliation to the contract. As we show below, that is precisely what Instruction No. 5 is: a precise set of rules for calculating the settlement price for acceptances delivered by a date and hour. In such cases, agreement to the

[13] *See* Mot. at 5-6 (*citing to Scheck v. Francis*, 26 N.Y.2d 466 (1970); *Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074 (2d Cir. 1990); and *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 97 (2d Cir. 1994)).

[14] Argentina itself quotes language illustrating the point: "the parties would not be bound *to the terms of their negotiations* until the agreement was signed." Mot. at 5 (quoting *Longo*, 25 F.3d at 97).

methodology forms a contract. *See Rizkallah v. Forward Air, Inc.*, No. 02 Civ. 2448, 2009 WL 3029309, at *5 (S.D.N.Y. Sept. 22, 2009) (explaining that New York courts enforce agreements that omit a price figure if "the parties have specified a methodology . . . that may be utilized to supply the missing contract term"). As the New York Court of Appeals has explained,

> [W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain. Striking down a contract as indefinite and in essence meaningless is at best a last resort.

166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 (1991) (citations and quotations omitted). There the court enforced a lease with no lease amount term, but a provision that "the same shall be fixed by arbitration as provided for the Civil Practice Act of the State of New York." *Id*. at 90. Even this arrangement was enough, though it lacked the type of precise formula present here, for it "invited recourse to an objective extrinsic event, condition or standard on which the amount was made to depend." *Id.* at 92 (internal quotations omitted); *see also Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483-85 (1989) (contract formed where option price was to be determined by government board."). This case is an example of the "fixed methodology" cases.

The cases do not support Argentina's argument that its offer could not ripen into a contract without a manual counter-signature. *See Blumberg v. Paul Revere Life Ins. Co.*, 677 N.Y.S.2d 412, 414 (Sup. Ct., Erie Cty. 1998) (completed application for insurance coverage constituted the acceptance of a contract "where the soliciting literature spelled out the terms of the insurance, the scope of the insurance coverage . . . and nothing was left open to negotiations"); *see also Haeffele v. Hercules Inc.*, 839 F.2d 952, 956 (3d Cir. 1988) (a completed acceptance form for a retirement plan was an accepted offer, even though the form's countersignature space was left blank, because "[n]othing in the [invitation] packet suggest[ed]

that anything was required in order to take advantage of the plan other than signing and returning the application").

The Allegations of the Amended Complaint. Ignoring these controlling cases, Argentina argues that the lack of a manual counter-signature trumps everything else—including the context and terms of the Universal Settlement Proposal. Argentina's argument fails for several reasons.

First, focusing on a single sentence, Argentina fails to construe the MSA and Instructions as a whole. Plaintiffs have alleged that the relevant documents described the Unilateral Settlement Offer as an open offer inviting acceptance. AC ¶¶ 61-63. In bold print, the Instructions state, "Instructions for Bondholders to **Accept** [Argentina's] Settlement Proposal." Scotch-Marmo Decl. Ex. 6. Below that heading are instructions for those "wishing to **accept** the Republic's Proposal." *Id.* Instruction No. 2 provides that "Holders may become a party to a Settlement Agreement by executing and exchanging with the Republic a completed Agreement Schedule, the form of which is attached as Exhibit A to the Master Settlement Agreement." *Id.* If a manual counter-signature from the offeror was necessary to form a contract, then bondholders could not simply "accept" Argentina's proposal. The repeated use of the term "accept" contradicts Argentina's belated assertion that it had the right to select which bondholders to settle with by withholding a manual signature. Certainly on a motion to dismiss, Argentina cannot deny the Amended Complaint's express allegations that each Plaintiff "accepted" the unilateral offer of Argentina. AC ¶¶ 80-100.

Second, Paragraph 5 of the Instructions leaves no doubt that execution and delivery of the Agreement Schedule bound each party to the contractual methodology. That paragraph is set out below, as it was in the Instructions, in bold text.

> **Injunction Bond Holders that execute and deliver to the email address included hereby an Agreement Schedule prior to 5:00 pm New York time on**

> **February 19, 2016 will have the Settlement Amount under options (ii) and (iii) of Section 4 above calculated using a discount of 27.5%. Those Injunction Bond Holders that execute and deliver to the email address below an Agreement Schedule after 5:00 pm New York time on February 19, 2016 will have the Settlement Amount under options (ii) and (iii) of Section 4 above calculated using a discount of 30%.**

Scotch-Marmo Decl. Ex. 6. "Injunction Bond Holders," Argentina wrote, "*will have* the Settlement Amount under options (ii) and (iii)," if they "execute and deliver to the email address included hereby [sic] an Agreement Schedule prior to 5:00 p.m. New York Time on February 19, 2016." *Id.* Those who "execute and deliver to the email address below" after that time "*will have* the Settlement Amount" under a less attractive economic formula. *Id.* The words contemplate no manual countersignature. They do not say (and Argentina's brief does not explain) how a manual signature was even possible on documents that the holders were directed to "execute and deliver" to an email address by a specific hour. Contracts were formed when the holders executed and delivered their acceptances on the schedule Argentina dictated.

Third, the Instructions do ***not*** say that the parties may reach agreement by first negotiating a list of covered bonds and then signing. They do not invite bondholders to make "offers" that Argentina might then decide whether to accept by countersignature.

Fourth, Plaintiffs have alleged that Argentina's offer *was* signed. Am. Compl. ¶ 63. The MSA and form of acceptance were electronic documents posted to a website and contained an electronic signature—"/s/: Luis A. Caputo, Secretary of Finance"—on the face of the Agreement Schedule. That schedule contains a place for the holder to sign, but it was already electronically signed by Mr. Caputo and contains no obvious place for a further Argentina "countersignature." *See* Scotch-Marmo Decl. Ex. 7 at 8.

Argentina relies on a single sentence in the Instructions: that the "Agreement Schedule, when countersigned by [Argentina], shall constitute a binding agreement between the parties to

settle all claims in respect of the bonds." *Id.* Ex. 6; Motion to Dismiss ("Mot."). at 5-6. This language addressed the reconciliation process for the bonds—by which Argentina would later confirm that listed bonds and the dollar (or Euro) figure in the "Settlement Amount" fit the methodology to which the parties had committed themselves. Particularly on a 12(b)(6) motion, this language cannot otherwise be reconciled with the repeated language—all drafted entirely by Argentina—and the repeated public statements—all made by Argentina—that the offer could be "accepted" by all. Nor can it otherwise be reconciled with Argentina's directive that those who returned an Argentine form by a specified date and time "will have" a defined set of economics. Providing Argentina with a pocket veto—allowing it to pick and choose with whom to settle—is inconsistent with that language, never mind the representations it repeatedly made to the public and the Court. At most, the tension between Argentina's argument, the plain language of the offer and its public statements about the offer would create a factual dispute barring dismissal.

Argentina's litigation argument pivots radically from the nature of its offer to the world. Time and again, Argentina emphasized to this Court and to the Court of Appeals that its conduct was equitable because its offer was made to all. It proposed to this Court that its payment to any bondholders "who reach[] an agreement in principle with [Argentina] on or before February 29, 2016" should be a condition of *vacatur*.[15] Yet what has occurred since February 29 is arbitrary, guided not by the terms of any offer, but by Argentina's perceived self-interest.

If it *were* true that agreements turned on this whimsical countersignature requirement, then what Argentina told this Court about the offer being open to all would not be true. A countersignature requirement in an offer "open to all" makes that offer ***not*** open to all, but a mere invitation to bid, and "turns an otherwise straightforward offer into an illusion." *Wigod v.*

[15] See Memo. of Law in Supp. of Argentina's Mot. by Order to Show Cause at 14, *NML* (Feb. 11, 2016) Dkt. No. 863 ("Show Cause Memo").

Wells Fargo Bank, N.A., 673 F.3d 547, 563 (7th Cir. 2012); *see also Corvello v. Wells Fargo Bank, NA*, 728 F.3d 878, 883 (9th Cir. 2013), *as amended on reh'g in part* (Sept. 23, 2013) (rejecting argument that "there can be no contract unless the servicer sends the borrower a signed Modification Agreement," and finding language that "the Loan Documents will not be modified unless and until . . . (ii) [the borrower] receive[s] a fully executed copy of a Modification Agreement" did not bar binding contract).

Argentina was seeking to settle with hundreds of parties by a set date. It did not premise contract formation on the reconciliation process, but it could and did establish a formula that would reserve to it the ability to ensure that it paid no more—and no less—than the formula amount after contracts were formed. In sum, Argentina did ***not*** reserve the right not to enter into a contract, nor to renege on its offer to pay ***under its own methodology***, should it later decide that the methodology was uncongenial.

The Amended Complaint's allegations concerning Argentina's contemporaneous conduct bear this out. *See* AC ¶¶ 114 (February 19 email from Mr. Bausili to Mr. Lee, indicating agreement, but saying "We will need to however reconcile isins [sic] into cases as mentioned before."), 75 (Mr. Santiago writes to Mr. Bour, "If you are saying that you have injunction and would like to take the Injunction Offer and we did not have time to reconcile your figures in time, we can consider taking your email as a 'stop of the clock.'").[16]

[16] Most Plaintiffs delivering acceptances received an acknowledgment email in response, although some received a warmer email personally written by an agent of Argentina, with actual and apparent authority. *See* AC ¶¶ 80-100. By contrast, when some Plaintiffs had earlier made counteroffers to Argentina, their emails met with silence or disagreement regarding the terms proposed by the Plaintiffs—no counteroffers were met with an acknowledgment of receipt email. *See id.* ¶ 60. The acknowledgment emails show that the Unilateral Option Contracts ripened into binding bilateral contracts, because it was Argentina's practice not to respond to, or even acknowledge, a counteroffer. This, at a minimum, raises another issue of fact.

Finally, Argentina raises a straw-man in asserting that under Plaintiffs' theory, "a bondholder could have entered *any* settlement amount . . . and [Argentina] would be required to pay that amount." Mot. at 7 (emphasis Argentina's). That is not what Plaintiffs allege or contend. Binding Settlement Agreements were created for all bonds within the contours of Argentina's Unilateral Settlement Offer, but the reconciliation process assured Argentina that it would only pay amounts required under its terms.

D. Principles of Contract Interpretation Favor Plaintiffs' Reading of the Unilateral Settlement Offer

If, *arguendo*, the terms for accepting Argentina's offer were found to be ambiguous, they would have to be interpreted against Argentina. The Unilateral Settlement Offer was drafted entirely by Argentina, without input from or negotiation with Plaintiffs. The principle of *contra proferentem* provides that "equivocal contract provisions are generally to be construed against the drafter." *McCarthy v. Am. Int'l Grp.*, 283 F.3d 121, 127 (2d Cir. 2002) (citation omitted). The rule applies even when the counterparty is sophisticated. *See Morgan Stanley Grp. v. New England Ins. Co.*, 225 F.3d 270, 279 (2d Cir. 2000). The *contra proferentem* principle has particular force when, as here, contracts are drafted without input from the other party. *See Saks Inc. v. Attachmate Corp.*, No. 14 CIV. 4902, 2015 WL 1841136, at *2 (S.D.N.Y. Apr. 17, 2015). Thus, any ambiguity must be construed in favor of Plaintiffs. And of course, ambiguities would open the door to parol evidence, foreclosing dismissal under Rule 12(b)(6).

E. Judicial Estoppel Precludes Dismissal

Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire*, 532 U.S. at 749 (2001) (citation omitted). This equitable doctrine prevents parties from playing "fast and loose" with the courts, *id.* at 750 (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d

Cir. 1953)), and applies where (i) a party's new position is "clearly inconsistent" with its earlier position, *id.*, (ii) the party persuaded a court to accept its prior position, *id.*, and (iii) that party "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751; *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012) (citing *New Hampshire*, 532 U.S. at 750-51).

Argentina advised this Court that its proposal was an "*offer to settle the claims of all outstanding holders of defaulted Argentine debt.*" *See* Show Cause Memo at 9. On March 21, 2016, it advised the Court of Appeals that "[e]very FAA bondholder is free to accept the general proposal." (referring to the Unilateral Settlement Offer). Scotch-Marmo Decl. Ex. 12 at 55-56. These statements meet the requirements for judicial estoppel.

First, Argentina made each statement to obtain judicial relief, and its current argument that the Unilateral Settlement Offer was subject to the further requirement of a manual countersignature contradicts its prior representations. It also contradicts the argument it made to this Court on February 29 that it had reached agreement with Red Pines. *Second*, the Court, relying on these representations, granted relief. *See* Indicative Ruling at *3, 10; *see also* March 2 Order at *2. The Court expressly found that these "now signed agreements in principle" "buttress[ed]" its prior finding that *vacatur* of the Injunctions was appropriate. *Id*. *Third*, it would be manifestly unfair to permit Argentina to argue to the Court that *all* bondholders could accept its offer by February 29 and have the protections of the Injunctions and obtain the relief it was seeking, only to then avoid its payment obligations by repudiating agreements at will.

Argentina is judicially estopped from denying that Plaintiffs accepted its offer.

F. The Unilateral Settlement Offer Did Not Exclude Bonds Based on Any Statute of Limitations Defense

This motion is framed as a question of contract formation, but the Court undoubtedly understands what the case is really about. It is not that contracts were not formed. It is that Argentina has had buyer's remorse after forming them. Argentina realized belatedly—apparently on the basis of legal advice—that its Unilateral Settlement Offer might have been, but was not, restricted by a different term—its putative (and disputed) partial statute of limitations defense.

Yet prior to obtaining the Indicative Ruling on February 19, 2016, Argentina regularly communicated the understanding that statute of limitations was *not* a condition: to Mr. Bour on February 12, AC ¶ 74; to Mr. Ehrmann on February 16, *id.* ¶ 77; to VR and Procella, *see* Bausili Decl. ¶¶ 11-12 & Exhibits 7-8; and to Mr. Lee, AC ¶¶ 113-14. During a week of reconciling Attestor's figures, Argentina never mentioned the statute of limitations, and accepted a calculation that cannot be reconciled with any statute of limitations concept. AC ¶¶ 74-75. On February 29, Argentina submitted to this Court the VR and Procella Settlements covering bonds with maturities dating back to 2002 and 2003. Bausili Decl. ¶¶ 11-12 & Exhibits 7-8. Argentina also submitted to this Court the Red Pines Settlement—which it later reneged on— and that *also* covered bonds with maturity dates of similar vintage. *Id.* ¶ 13 & Exhibit 9. In other words, to obtain the judicial relief it wanted, Argentina agreed that the Unilateral Settlement Offer covered claims on bonds that it now contends are subject to a potential statute of limitations argument.

Argentina's current argument is an effort to import the statute of limitations defense into an agreement that does not contain it. Plaintiffs dispute that *any* of their claims is time-barred under any applicable statute of limitations, and briefs in the underlying *Trinity* and *Red Pines* cases explain why. The MSA was intended to, and did make these disputes irrelevant. Just as its

authors advised bondholders on February 12 and 16, it excluded only those claims that were prescribed by the bond documents themselves. Scotch-Marmo Decl. Ex. 7 (MSA § 1).[17] Through this motion, Argentina seeks to resurrect it.

G. In the Alternative, Plaintiffs Should Be Granted Leave to Amend

If the Court determines that the Amended Complaint is inadequate or deficient, Plaintiffs request leave to amend their complaint. Under Fed. R. Civ. P. 15(a)(2), district courts "should freely give leave [to amend] when justice so requires," a standard that the Second Circuit has characterized as "permissive" and "consistent with [its] strong preference for resolving disputes on the merits." *Williams v. Citigroup*, 659 F.3d 208, 212-13 (2d Cir. 2011) (per curiam) (internal quotation marks omitted). This principle has particular force here because (i) the action was commenced two weeks ago on an emergency basis; and (ii) this motion is being briefed and heard in a matter of days.

Litigants who request leave to replead should ordinarily receive it and have the benefit of the court's ruling on a threshold challenge to the viability of a complaint to guide their amendment. The Second Circuit recently underscored this principle in *Loreley Financing (Jersey) v. Wells Fargo Secs., LLC*, 797 F.3d 160 (2d Cir. 2015). The *Loreley* court reversed the district court's refusal to permit an amendment as an abuse of discretion, holding that, "in the critical absence of a definitive ruling" on a motion to dismiss, not allowing an amendment after the court's decision "violated the liberal spirit of Rule 15." *Id*. at 190-91, quoting *Williams*.

[17] It was logical for the MSA to define the offer to exclude prescribed claims and not claims allegedly barred by the statute of limitations. Statutes of limitations vary from jurisdiction to jurisdiction and are subject to tolling principles, equitable defenses and other uncertainties. Statute-of-limitation issues led to months of briefing and warring expert affidavits in the underlying cases with some of these very Plaintiffs. Prescription, on the other hand, is mechanical, appears on the face of the bond instrument, and is easy to apply.

Plaintiffs believe they have pled their claims properly. If the Court rules they have not, Plaintiffs should have an opportunity to file an amended pleading with "the benefit of [that] ruling," *Loreley*, 797 F.3d at 190, that could, for example, provide additional factual allegations regarding the negotiations with Argentina and otherwise address the Court's decision. Because this motion has been briefed on an extraordinarily compressed schedule, leaving no real opportunity for meaningful consideration of a further amendment, denying leave here would be particularly unfair.

CONCLUSION

The motion to dismiss should be denied.

Dated: New York, New York
April 9, 2016

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