UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML Capital Ltd., Plaintiff, v. The Republic of Argentina, Defendant.	08 Civ. 6978 (TPG)

INTERVENORS' MEMORANDUM OF LAW IN OPPOSITION TO THE REPUBLIC OF ARGENTINA'S MOTION, BY ORDER TO SHOW CAUSE, TO VACATE THE INJUNCTIONS ISSUED ON NOVEMBER 21, 2012, AND OCTOBER 30, 2015

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ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Yellow Crane Holdings, L.L.C., MCHA Holdings, LLC, Honero Fund I, LLC, Red Pines LLC, Procella Holdings, L.P., Trinity Investments Limited, Spinnaker Global Emerging Markets Fund, Ltd. and Spinnaker Global Special Situations Fund LP (collectively, the "Intervenors") submit this memorandum of law in opposition to the Republic of Argentina's Motion, by Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012, and October 30, 2015 (the "Motion to Vacate") entered on February 11, 2016 [Dkt. No. 861] and in support state as follows:

SUMMARY OF OBJECTION

The Intervenors hold interests in defaulted bonds governed by foreign law issued by the Republic of Argentina (the "Republic"), and are plaintiffs in related cases pending before this Court.[1] The relevant bonds in the related cases are governed by English and German law, and contain equal treatment covenants substantially similar to those upon which this Court has ruled in granting the November 21, 2012 and October 30, 2015 injunctions (the "Injunctions"). Last year, the Intervenors moved for *pari passu* injunctions on debt governed by English and German law similar in form to the Injunctions.[2] Briefing on those motions is scheduled to close on March 18, 2016.

[1] The related proceedings are *Trinity Investments Limited, et. al. v. The Republic of Argentina ("Trinity")*, Case No. 14-09095 (S.D.N.Y.) (TPG), *Red Pines LLC, et. al. v. The Republic of Argentina ("Red Pines")*, Case No. 14-09427 (S.D.N.Y.) (TPG), *MCHA Holdings, LLC, et. al. v. The Republic of Argentina ("MCHA")*, Case No. 15-08529 (S.D.N.Y.) (TPG), *Procella Holdings, L.P., et. al. v. The Republic of Argentina ("Procella")*, Case No. 15-09579 (S.D.N.Y.) (TPG), *ARAG-A Limited, et. al. v. The Republic of Argentina ("ARAG-A")*, Case No. 16-00905 (S.D.N.Y.) (TPG) and *Honero Fund I, LLC, et. al. v. The Republic of Argentina ("Honero")*, Case No. 16-00911 (S.D.N.Y.) (TPG).

[2] The Spinnaker entities are not plaintiffs in *Red Pines* or *Trinity*, but are plaintiffs in *MCHA*, *Procella*, *ARAG-A* and/or *Honero*. The Intervenors will seek to have *MCHA*, *Procella*, *ARAG-A*

Today the Intervenors have moved to intervene in this case, for the limited purpose of opposing *vacatur* of the Injunctions prior to review of the Intervenors' pending requests in *Trinity* and *Red Pines*. *Vacatur* would harm Intervenors' interests, as well as the broader public interest in a comprehensive settlement. As we show below:

1) The request is premature. The party whose conduct prompted imposition of the Injunctions would vacate them before curing that conduct, and before settlement negotiations have even begun for holders of the vast majority of the relevant obligations. In so doing the Republic would remove the driving incentive for a global compromise. (Argument section II, *infra* at 10).

2) The request seeks the Court's imprimatur on a proposal that itself violates the *pari passu* clauses of Intervenors and other parties, by treating one class of external debt (currently holding injunctions) better than another (not currently holding injunctions). (Argument section III, *infra* at 14).

3) Even if the Court believes that certain discrete settlements should be effected, that result can be accomplished by modifying the Injunctions to permit cash payments (but not new bond financing). A blunderbuss *vacatur* is neither warranted nor appropriate. (Argument section IV, *infra* at 16).

PRELIMINARY STATEMENT

The Need for a Comprehensive Solution. This Court has said, often and accurately, that settlement is the only solution to the Republic's debt problem.[3] Intervenors agree. Happily, progress toward settlement is now underway. The settlement work, however, has only just commenced, and the power of the Injunctions remains critical to achieving the global settlement the Court has long envisioned.

A settlement is, of course, an agreement -- a compromise that follows good-faith negotiations between parties in a dispute. That kind of discussion has yet to occur for most of

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and *Honero* consolidated with *Red Pines* or *Trinity* upon an order granting an injunction in the *Red Pines* and *Trinity* proceedings.

[3] *See* Memorandum of Law in Support of the Republic of Argentina's Motion, By Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012, and October 30, 2015 ("Def. Br.") [Dkt. No. 863] at 6-7.

the holders of the Republic's defaulted bonds. The Republic's proposal was reportedly crafted after discussions with only a few creditors. Absent comprehensive settlement discussions, litigation will linger for years. The Republic's two-tranche offer (itself a *de facto* re-ranking of obligations in violation of *pari passu* clauses) will be challenged with more *pari passu* injunction claims. So too would any new bond sold to finance cash payments under that offer. Thus a global settlement remains as vital today as ever. The irony, as we show below, is that Intervenors have sought actively to collectively engage in discussions to explore compromise, but have been rebuffed.

The Intervenors' Cases. In November 2014, certain of the Intervenors filed complaints against the Republic seeking damages for nonpayment of their bonds and injunctive relief for the Republic's violations of the equal treatment provisions. The bonds in question are governed, respectively, by German and English law. *See Trinity*, Case No. 14-09095 (S.D.N.Y.) (TPG) and *Red Pines*, Case No. 14-09427 (S.D.N.Y.) (TPG). On July 23, 2015, the Republic moved for partial summary judgment. On November 13, 2015, the *Trinity* and *Red Pines* Intervenors filed their opposition papers and also cross-moved for partial summary judgment, seeking injunctions, submitting affidavits from German and English-law jurists and scholars showing that their claims were valid and timely. The Republic filed its responsive pleadings on February 12, 2016. Replies are due in *Trinity* and *Red Pines* on March 18, 2016.

The Republic's Unilateral Offer. Following the Intervenors' first complaints in 2014, they often sought to negotiate. All efforts were met with silence from the Republic. After the recent Argentina Presidential election, the Intervenors tried anew and repeatedly asked to meet representatives of the Republic. On January 29, 2016, the Intervenors were given their first audience with the Republic -- *ever*. In a second meeting on February 4, the Republic sketched

out an offer, which it made public a day later, on February 5. Six days after publishing these terms, on February 11, the Republic submitted the Motion to Vacate. The Intervenors' response to the offer and requests for follow-up meetings to seek clarification and to discuss and negotiate settlement terms have once again been met with silence from the Republic. There has never been a true negotiating session between representatives of the Intervenors and the Republic. The Intervenors are informed and believe that their experience is common. For the holders of billions of dollars of notes, a real back and forth settlement process has not yet begun.

To be sure, the efforts of Argentine President Macri, his administration, and Mr. Pollack are welcome and are beginning to bear fruit. But the Court should recognize that the Republic has elected a particular negotiation strategy: to negotiate with parties *seriatim,* and in a seemingly deliberately sporadic way rather than collectively. That is its choice, and that choice has consequences. Having made it, the Republic should not seek the Court's imprimatur on a global settlement at the first stage. A global settlement should be the result of global discussions, but because of the Republic's approach, there have been no such global discussions yet. Relaxation of the Court's Injunctions must await a comprehensive resolution, which now must apparently await these *seriatim* negotiations. So far, there is little creditor support for the proposal. According to published reports, one of the few parties to sign onto a deal for 150% of its principal holdings is Dart (the parent entity of plaintiff EM Ltd.), but in Dart's unusual case, 150% of its principal actually exceeds its legal claim.[4] That Dart is touted as a supporter

[4] EM Ltd. obtained a judgment in 2003 for $724,801,662.56, which included accrued interest on principal holdings of $595,396,345. *EM Ltd. v. The Republic of Argentina*, Case No. 03-2507 (S.D.N.Y. Oct. 27, 2003) (Dkt. No. 38) (TPG). As of October 16, 2014, the value of EM Ltd.'s judgment, plus interest at the post-judgment rate, was $835,102,544.46. Complaint, *EM Ltd. v. The Republic of Argentina*, Case No. 14-08303 (S.D.N.Y. Oct. 16, 2014) (ECF No. 1) (TPG). The Republic's reported settlement with EM Ltd. would allow for a recovery of roughly $893 million, which is significantly higher than the current value of EM Ltd.'s judgment.

illustrates that, far from enjoying broad support, the deal initially appealed mainly to parties whose circumstance are unusual.[5] The Republic is now attempting to use this Court to help coerce others into that arrangement.

Importance of the Injunctions to a Global Settlement. Given the Republic's negotiation approach, lifting the Injunctions *today* would be precisely the wrong move. The Injunctions provide both fuel and balance to the process: fuel because, with the Injunctions in place, the Republic cannot access the capital markets; balance because, absent good-faith bargaining, noteholders cannot recover any payment. Thus the Injunctions create balanced incentives for all parties to negotiate in good faith. Now that the settlement engine has finally started, the Republic would cut off the fuel. Were that relief allowed, true settlement negotiations would grind to a halt. A premature grant of relief would undermine, rather than promote, a global settlement.

First, the motion puts the cart of injunction lifting before the horse of corrective behavior by the Republic that would merit the lifting. It is impossible to predict what legislation the Republic might pass on or after a repeal of the offensive legislation. The motion focuses on only two of the many official acts that breached the Republic's *pari passu* obligations: Law 26,017, in 2005 (the "Lock Law"), barring any compromise or settlement with bondholders that did not participate in the exchange process, and Law 26,984 (the "Sovereign Payment Law"), a legislative attempt to make payments to the exchange bondholders in violation of the 2012 injunctions. These were hardly the only breaches. In 2010, the Republic passed Law 26,547,

[5] See NML's *Memorandum of Law in Opposition to the Republic of Argentina's Motion to Vacate the Injunctions* regarding further discussion of the deal reached with the Montreux plaintiffs. While the *Brecher* class action group, *Brecher et. al. v. The Republic of Argentina*, Case No. 06-15297 (S.D.N.Y.) (TPG), has now also accepted the settlement proposal, recent statements from *Brecher* class counsel indicate that the class currently is estimated to include less than 0.5% of the total outstanding untendered bonds.

barring payment to non-tendering bondholders in a 2010 exchange of more than the amounts offered to 2005 exchange bondholders.[6] After the Court granted equitable relief in 2012,[7] elected officials declared that the Republic would not comply with the Court's orders, nor treat NML or other plaintiffs in the U.S.-law cases equally with other holders of external indebtedness. In 2013, the Republic enacted Law 26,886, barring the Republic from paying non-tendering bondholders more than that which was offered to exchange bondholders, effectively prohibiting the Republic from complying with its payment obligations in respect of the untendered bonds.[8] In June 2014, the Republic transferred funds to financial intermediaries in an attempt to circumvent its obligations. These measures were undertaken to try to perpetuate the effective re-ranking of the exchange bonds in a higher rank than that of the untendered notes.[9] Many of these legislative measures were approved by the Republic's Congress following this Court's 2012 injunctions, and the motion contains no requirement or assurance that following the vacation of the Injunctions, the Republic's Congress will not revert to legislative patterns that have been well-documented in this Court.

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[6] In 2004, through Decree 1735, the Republic instituted bond exchanges for defaulted public debt. A year later, in 2005, the Republic offered a bond exchange to all holders of non-performing external debt. *NML Capital Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012). Approximately 25% of the Republic's non-performing bonds did not participate in the 2005 bond exchange. In 2010, the Republic effected a new exchange. As in 2005, participants received exchange bonds, as to which payments were made from 2010 until June 30, 2014. *Id*. Participating bondholders received 2005 exchange bonds, *id.*, and the Republic made all scheduled payments on those bonds until June 30, 2014. *Id.* at 252.

[7] *NML Capital, Ltd. v. Republic of Argentina*, 2012 WL 5895786 (S.D.N.Y. Nov. 21, 2012), *aff'd*, 727 F.3d 230, 248 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014). On October 30, 2015, this Court issued injunctions in the "me-too" proceedings, *see NML Capital, Ltd. v. The Republic of Argentina*, 2015 WL 6656573, at *5 (S.D.N.Y. Oct. 30, 2015), *app.*pending, No. 15-3715 (2d Cir. Nov. 10, 2015), which the Republic is also seeking to have vacated.

[8] 2015 WL 3542535, at *3.

[9] *Id*.

Second, now more than ever, the Injunctions are a necessary incentive and tool to ensure that the Republic works towards achieving a global settlement. Premature *vacatur* of the Injunctions would allow the Republic to repeat its 2005 and 2010 behavior: negotiating quietly with a few creditors, proposing a take-it-or-leave-it offer, and then refusing to pay those who decline to agree -- and likely leading to years of more litigation. The Republic has properly identified the relief it will one day need, and its creditors will broadly be in support of such relief when that day arrives. However, granting such relief now would put a potential global settlement at great risk. At most, the Court could consider a limited modification of the Injunctions to allow for one-off settlement payments while maintaining the Injunctions' protections for those plaintiffs who are waiting for true settlement negotiations to begin. The Intervenors are ready, willing, and very eager to reach that day quickly, through prompt collective negotiations. While the Intervenors continue to seek protection of their rights through this Court, they have made it abundantly clear to the Republic that they wish immediately to discuss settlement.

Granting the Republic's requested relief now would endanger all such efforts.

THE RELIEF SOUGHT

The Republic's proposed offer provides three settlement amounts, for three categories of bondholders: (1) those bondholders with debt judgments and an injunction, (2) those bondholders without a debt judgment but with an injunction, and (3) those bondholders who do not yet hold an injunction from this Court. On February 11, the Republic filed its Motion to Vacate, seeking *vacatur* of all Injunctions, to take effect, without further action of this court, upon the occurrence of the following conditions precedent: (1) the Republic takes action necessary to "repeal or otherwise abridge" the Lock Law and the Sovereign Payment law, and

(2) certification to this Court that *any* (not all) plaintiff with an injunction has received a settlement payment.

ARGUMENT

I. Legal Standard

"[C]ourts . . . place a heavy burden on the moving party to show such circumstances that would warrant *vacatur* of an injunction." *SEC v. Broadwell Sec., Inc.*, 514 F. Supp. 488, 490 (S.D.N.Y. 1981) (denying motion to vacate injunction where a defendant "has failed to offer any evidence showing that there is no danger of future violations if the injunction is vacated"); *In re Joint Eastern and Southern Districts Asbestos Litig.*, 237 F. Supp. 2d 297, 316 (Bankr. S.D.N.Y. 2002); *see Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) ("[A] party seeking modification . . . bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.").

The movant must show that the facts and laws in place at the time of issuance of the injunction have significantly changed.[10] *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d

[10] "A Rule 60(b)(5) motion is the appropriate vehicle for modifying a permanent injunction that has prospective effect, regardless of whether the modification expands restrictions or eliminates restrictions in the injunction." *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 (5th Cir. 2008). Rule 60(b) of the Federal Rules of Civil Procedure states in pertinent part:

> On motion and upon such terms as are just, the court may relief a party or his legal representative from a final judgment, order or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged; it Is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). The Republic also cites to Fed. R. Civ. P. 54(b) for support, but even if Rule 54(b) applied, the test would be substantially similar to that which applies under Rule 60(b). *WestLB AG v. BAC Florida Bank*, 912 F. Supp. 2d 86, 95 (S.D.N.Y. 2012) ("54(b) permits a prior decision to be challenged only when an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice . . .

Cir. 2009) ("Rule 60(b) provides a mechanism for extraordinary judicial relief available only if the moving party demonstrates exceptional circumstances.") (citations omitted); *Sys. Fed'n No. 91, Ry. Emp. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) ("Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided."); *see also U.S. v. Swift & Co.*, 286 U.S. 106, 119 (1932) (changed circumstances must be "so important that dangers, once substantial, have become attenuated to a shadow . . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."). Courts look to a number of factors when considering whether this showing has been made, including:

1) The circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented;

2) The length of time since entry of the injunction;

3) Whether the party subject to its terms has complied or attempted to comply in good faith with the injunctions;

4) The likelihood that the conduct or conditions sought to be prevented will recur absent the injunction;

5) Whether the moving party can demonstrate a significant, unforeseen change in the facts or law and whether such changed circumstances have made compliance substantially more onerous or have made the decree unworkable; and

6) Whether the objective of the decree has been achieved and whether continued enforcement would be detrimental to the public interest.

. The movant bears the heavy burden of demonstrating that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion.").

Crutchfield v. U.S. Army Corps of Engineers, 175 F. Supp. 2d 835, 844 (E.D. Va. 2001). No one contends in this case that the law has changed. As we show below, the relevant facts have not changed either.

II. The Republic's Request to Vacate the Injunctions is Premature

A. The Uncertain Status of Argentine Affairs.

Inadequacy of the Conditions. The Republic seeks novel relief: *vacatur* of injunctions, to be effective on a *litigant's* later, discretionary determination that it has met conditions subsequent. It asks for an order *today* that the Court's Injunctions will automatically terminate in future (without further Court review or action) in the event that, in future, the Republic cures a subset of the wrongs that gave rise to the Injunctions in the first place. This has things backwards. Even if it were enough merely to repeal the Lock Law and the Sovereign Payment Law, the Republic concedes that they have not yet been repealed. It cites no authority for the proposition that courts vacate injunctions in advance, before litigants cure the misconduct that led to their entry.

The correct order is: cure first, vacate after. *See CFTC v. Kelly*, 736 F. Supp. 2d 801, 804 (S.D.N.Y. 2010) ("[T]o permit modification of the injunction here based on mere compliance would threaten the efficacy of this remedy as a tool in furtherance of the public interest."); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986) ("A post-judgment change in the law having retroactive application *may*, in special circumstances, constitute an extraordinary circumstance warranting vacation of a judgment.") (emphasis added). *Vacatur* is inappropriate where "conduct . . . sought to be prevented will recur absent the injunction," *Bldg. & Const. Trades Council of Phila. & Vicinity, AFL-CIO v. N.L.R.B.*, 64 F.3d 880, 888 (3d Cir. 1995).

"Vacate first, cure after" would raise unusual risk in this case. As a sovereign litigant, the Republic cannot cure at all without action from its Congress. Not only has that not occurred

yet; it is uncertain whether it will occur at all.[11] The Republic's Congress has not even convened. *See* Def. Br. at 8 ("The [Argentine] Congress will next be in session on March 1, 2016.").[12] No one has proposed or debated a bill to repeal the acts. *See* Def. Br. at 9 ("As part of the efforts to resolve these matters, the government *will* ask Congress to repeal the Lock Law and the Sovereign Payment Law, which now prevent Argentina from completing the settlements.") (emphasis added). In fact, the Republic concedes that the uncertainty is far greater. It states that the order it seeks "…would *boost the government's efforts* to repeal the legislation, *as legislators would understand* that repeal would encourage a prompt resolution." Def. Br. at 15-16 (emphases added). This is a troubling admission: if "efforts" need to be "boosted," then Congress is not yet disposed to correct the Republic's contemptuous behavior. If that is the case, there is no way to predict that Congress will ever act appropriately.

Not only is Congress at this point an unknown: the conditions themselves are insufficient.

The central condition subsequent is that the Republic repeal or "abridge" two statutes. What is an "abridgement?" The Republic does not explain. Suppose the statutes are amended so as to be effective as to some holders and not others -- will that suffice as "abridgement?" Or be effective in some ways but not others against all holders? Again -- is *that* abridgement? Suppose both statutes are repealed, but a new statute having similar effect is simultaneously

[11] The Wall Street Journal reported that President Macri "is expected to face strong opposition from much of the population and some members of Argentina's Congress, who have derided bondholders as 'vultures.'" Julie Wernau, *Argentina Debt Deal Faces Hurdles Despite Bond Offer*, The Wall Street Journal (February 7, 2016), http://www.wsj.com/article_email/argentina-debt-deal-faces-hurdles-despite-bond-offer-1454878184-lMyQjAxMTA2MzE0NTYxMTUxWjat. Public pressures are uncertain: "[o]n social-media networks over the weekend, opponents of the government's offer accused Mr. Macri of selling out." *Id*.

[12] It sits from March 1 through November 30, there is no suggestion that a door is about to close on genuine legislative action.

enacted? Or a proviso is added? Or the Argentine equivalent of a U.S. "signing statement" is appended?

This Court, not the defendant, should have and retain the power to address and respond to all questions like these, and all scenarios, which may arise in the future.

Were the condition subsequent simpler -- that the Lock Law and the Sovereign Payment Law must be repealed, without any mitigating enactment -- that would still not cure the harm. *The conditions impose no requirement that the Republic respect and observe the untendered bonds' pari passu provisions*. There is no prohibition, for example, on a future moratorium (legislative, executory or *de facto*) or any other equivalent violation. Legislatures can act in myriad ways. So too can executives. The Court should wait to see what both branches of the Argentine government actually do, before eliminating the Injunctions that, thus far, have led only one branch to commence, but not complete a process.

The state of affairs the Republic seeks to achieve through immediate *vacatur* would not be functionally different from what it imposed on the noteholders in 2005. In 2005, the Republic settled with a minority of holders, and on that basis imposed a strike exchange on everyone else. Today it would accomplish the same result, not through a bond exchange, but through a judicial order. Its February 5 template of compromise payment would become the *de facto* exchange, and the Court's *vacatur* of the Injunctions would effectively make those terms the only alternative to non-payment.

Comity Concerns. The motion raises a second, troubling concern. The Republic says it wants to "boost" efforts to persuade the Congress. Def. Br. at 15-16. That is a request to use *this Court* as leverage in a political negotiation between one branch of a foreign government and another. That is inappropriate. Our courts adjudicate cases and controversies. They do not enter

into foreign political affairs. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative -- 'the political' -- departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.") (citations omitted); *In re Austrian, German Holocaust Litig.*, 250 F.3d 156, 165 (2d Cir. 2001) ("It is not the office of the court, however, to decide what legislation should be enacted . . . .").

B. If Granted, the Relief Sought Would Dangerously Undermine Negotiations that, Because of the Court's Injunctions, Are at Last Underway.

The Republic states that "…such an order would help bring the remaining holdouts to the negotiating table." Def. Br. at 16. That is a disturbing mischaracterization of the state of affairs -- and a frustrating one for those, like the Intervenors, whose many requests to negotiate have been rebuffed. The Intervenors have implored the Republic -- for *years* -- to come to the table. Until January 29, 2016, the Intervenors were denied any audience with the Republic. They have asked for, and never been granted admission to any true back and forth business negotiation.

Thus the Republic well understands that no order is necessary to bring *the Intervenors* -- or any other holdouts -- to the table. Its real objective appears to be to bring them to heel. The holdouts want to be at the table, and the Injunctions remain necessary to keep the *Republic* there. Its actions since the November 2015 elections are a sign of progress, but the Republic's first post-injunction global settlement proposal, by itself, does not represent a significant change in circumstances or a commitment to resolve the issues. The effect of lifting the Injunctions in the face of the Republic's initial, take-it-or-leave it offer would be to chill negotiations, not encourage them. "Hobson's choice" is a cliché (familiar in briefs, and generally misused), but it

is not out of place here. A hostler, Hobson offered customers a choice: the horse "nearest the stable door" (spavined and swaybacked), or no horse at all. The Republic's offer is the horse nearest the stable door.

Were the Injunctions lifted now, the offer would lead, just as the 2005 strike exchange led in 2005, to one class of holders that submits, and other classes of holdouts that litigate.[13] If the request is denied, the Republic's offer is highly likely to lead to prompt, good-faith negotiations, and the best hope for a comprehensive settlement.

In short, the Court would require any litigant in contempt to cure the grounds for an injunction before removing that injunction. The Republic is no different. The Court's orders make plain what the contemptuous conduct was. The Republic knows how to purge itself of that conduct. All branches of its government understand that the Court would certainly lift the Injunctions on the *plaintiffs'* request, and plaintiffs will certainly seek that relief once a global settlement is reached.

III. The Republic's Proposal is Itself a Re-Ranking of the Untendered Bonds

This Court has already acknowledged that "[i]t would be inequitable" to treat similarly situated bondholders differently, *see NML Capital, Ltd.*, 2015 WL 6656573, at *5. The Republic's proposed settlement does just that. The offer divides the untendered bondholders, who are all *pari passu* to each other and entitled to equal ranking and treatment, into two ranks: those with injunctions and those without. Those two groups -- entitled to equal treatment as they

[13] "'It's not time to pop the champagne,' said Charles Blitzer, an economist and former senior International Monetary Fund staffer, who has been involved in many sovereign-debt restructurings. 'It's this kind of unilateral offer that got them into trouble five and even 10 years ago. They need to communicate with more creditors and actually negotiate.'" Julie Wernau, *Argentina Debt Deal Faces Hurdles Despite Bond Offer*, The Wall Street Journal (February 7, 2016), http://www.wsj.com/article_email/argentina-debt-deal-faces-hurdles-despite-bond-offer-1454878184-lMyQjAxMTA2MzE0NTYxMTUxWjat.

are -- would nevertheless be treated unequally in the offer. In service of unequal treatment, the Republic now moves to vacate injunctions designed to enforce equal treatment.

The Intervenors' bonds are substantially like those of the parties here. The relevant instruments provide that the foreign law bonds will constitute obligations of the Republic and that the "payment obligations of the Republic" shall at all times "rank at least equally" with all its present and future unsecured unsubordinated external indebtedness.[14] The 2005 and 2010 exchanges and the related legislation allowing for the exchange bonds had the direct effect, as this court has held, of re-ranking the Republic's existing external indebtedness. The Republic made a take-it-or-leave-it offer, in each of 2005 and 2010, to exchange defaulted bonds at a significant haircut -- thereby creating a new class of bonds that were, until 2014, receiving timely payments.

The Republic's proposal and request to vacate the Injunctions so soon after receiving agreements in principle from a minority of the untendered bondholders does nothing more than force acceptance of dictated terms -- settle now, or have no practical remedy for default. Instead of negotiating a global settlement, the Republic once again (as it did in 2005 and 2010) makes a take-it-or-leave-it offer that lowers the ranking of the untendered bondholders without

[14] Intervenors moved for injunctions last November, submitting affidavits from a former Chief Justice of the highest Court in the United Kingdom, and of a distinguished practitioner and academic in Germany, each averring that the *pari passu* clause would be understood in those jurisdictions as it is here. Intervenors also addressed the Republic's technical defenses (as to German limitation periods and the English "special circumstances" doctrine that permits plaintiffs to proceed) with the sworn testimony of foreign-law experts. To be sure, the Republic contests all of these points with affidavits of its own. The briefing on these disputes will not close until March 18, after which the matter will be ripe for the Court's review. Intervenors' present purpose is merely to preserve the status quo with the Injunctions, until this Court can effect that review and consider their request for a similar injunction.

As set out elsewhere in this brief, Intervenors have never conditioned settlement discussions on this Court's review: to the contrary, they have repeatedly requested that the Republic engage in negotiations that might moot that review. In any such discussion, of course, all disputes would be fair game for discussion and resolution.

injunctions in hand, even though they are entitled to the same injunctive relief as the bondholders who currently hold an injunction.

IV. In the Alternative, the Scope and Timing of the Republic's Request Are Unnecessary to the Limited Settlements Described.

We have shown above that there is a compelling public interest in preserving the Injunctions, in order to incentivize the parties to negotiate a comprehensive solution to the Republic's debt crisis. A comprehensive solution would return the Republic to the capital markets, end non-compliance with the *pari passu* obligations, end this litigation, and resolve massive numbers of outstanding claims. Because an order permitting the Republic to effect one-off settlements would undermine that broader interest, we submit that relaxation of the Injunctions now is premature.

But even if the Court were to conclude that it is now appropriate to permit the Dart and Montreux settlements to close, blanket *vacatur* of the Injunctions would be unnecessary. It would be enough to *modify* the Injunctions to permit the Republic to pay settling creditors on the published terms from cash on hand. In every other respect, the Injunctions should remain in force, including, most significantly, in their prohibition of new external indebtedness until the remaining plaintiffs' *pari passu* debt claims are resolved on a comprehensive basis (or paid according to their terms). This approach would enable the Republic to harvest the labor of its finance team and the Special Master, while preserving for everyone the necessary incentive to labor further. Many other creditors, including Intervenors, have every desire to share in those labors. It would be inequitable to withdraw the platform for their negotiations now.

The EM Limited and Montreux Declarations show that blanket *vacatur* is not something that those plaintiffs require. Each avers simply that the Republic has made that term a pre-condition of its agreement. Declaration of Kenneth E. Johns, Jr. in Support of Plaintiffs'

Memorandum of Law [Dkt. No. 869 Ex. 2] ("EM's support is conditioned on Argentina receiving the full relief sought because EM understands that Argentina will not consider itself able to effectuate the settlement agreed to in principle with EM unless this Court grants the full relief sought by Argentina in all cases."); Declaration of Michael Straus in Support of the Motion of Defendant the Republic of Argentina for Indicative Ruling and for Relief from an Injunction [Dkt. No. 869 Ex. 3] ("It is important to note, however, that the support of the Montreux Plaintiffs for Argentina's motion is conditioned on a decision by this Court granting Argentina's motion in *all* of the cases in which Argentina is making the motion . . . . That is so primarily because if the Court does not grant Argentina's motion in all of the actions in which Argentina is making the motion, my understanding is that Argentina will not consider itself in a position to complete its settlement with the Montreux Plaintiffs.").

Unfortunately, the Republic's demand for this blanket approach shows a broader purpose: to allow it to finance one-off settlements with new external indebtedness that violates the remaining plaintiffs' equal treatment rights, without actually settling with those parties. Were the Court to permit that now, years of its work would be undone. The Court's *vacatur* order would be exploited by the Republic to coerce other creditors, rather than settle with them. Functionally, the result would not differ, in practical effect, from what the Republic did in 2005 and 2010.

CONCLUSION

For the foregoing reasons, the Court should deny the Republic's request to vacate the Injunctions.

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Respectfully Submitted,

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