UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	08 Civ. 6978 (TPG) 09 Civ. 1707 (TPG) 09 Civ. 1708 (TPG)
NML CAPITAL, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8601 (TPG)
NML CAPITAL, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8988 (TPG)

(captions continue on following pages)

REPLY MEMORANDUM OF LAW IN FURTHER 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

FFI FUND, LTD. and FYI LTD., Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8630 (TPG)
AURELIUS CAPITAL MASTER, LTD. and ACP MASTER, LTD., Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	09 Civ. 8757 (TPG) 09 Civ. 10620 (TPG)
AURELIUS OPPORTUNITIES FUND II, LLC and AURELIUS CAPITAL MASTER, LTD., Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	10 Civ. 1602 (TPG) 10 Civ. 3507 (TPG)

AURELIUS CAPITAL MASTER, LTD. and AURELIUS OPPORTUNITIES FUND II, LLC, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	10 Civ. 3970 (TPG) 10 Civ. 8339 (TPG)
BLUE ANGEL CAPITAL I LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	10 Civ. 4101 (TPG) 10 Civ. 4782 (TPG)
OLIFANT FUND, LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	10 Civ. 9587 (TPG)
PABLO ALBERTO VARELA, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	10 Civ. 5338 (TPG)

PEREZ, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8242 (TPG)
AURELIUS CAPITAL PARTNERS, LP, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8946 (TPG)
BLUE ANGEL CAPITAL I LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8947 (TPG)
EM LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8303 (TPG)

LIGHTWATER CORPORATION LIMITED, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 4092 (TPG)
OLD CASTLE HOLDINGS, LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 4091 (TPG)
SETTIN, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8739 (TPG)
CAPITAL VENTURES INTERNATIONAL, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7258 (TPG)

ADAMI, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7739 (TPG)
CAPITAL MARKETS FINANCIAL SERVICES INC., *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 710 (TPG)
FOGLIA, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 8243 (TPG)
PONS, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	13 Civ. 8887 (TPG)

GUIBELALDE, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	11 Civ. 4908 (TPG)
DORRA, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 10141 (TPG)
BELOQUI, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 5963 (TPG)
TORTUS CAPITAL MASTER FUND, LP, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 1109 (TPG)

TORTUS CAPITAL MASTER FUND, LP, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 3127 (TPG)
TRINITY INVESTMENTS LIMITED, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 10016 (TPG)
MONTREUX PARTNERS, L.P., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7171 (TPG)
LOS ANGELES CAPITAL, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7169 (TPG)

CORDOBA CAPITAL, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7164 (TPG)
WILTON CAPITAL, LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7166 (TPG)
MCHA HOLDINGS, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 7637 (TPG)
MCHA HOLDINGS, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 10064 (TPG)

ANDRAREX LTD., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 9093 (TPG)
CLARIDAE, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 10201 (TPG)
ARAG-A LIMITED, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 9855 (TPG)
ATTESTOR MASTER VALUE FUND LP, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	14 Civ. 5849 (TPG)

ANGULO, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 1470 (TPG)
LAMBERTINI, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 1471 (TPG)
HONERO FUND I, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 1553 (TPG)
TRINITY INVESTMENTS LIMITED, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 1588 (TPG)

BANCA ARNER S.A., *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 1508 (TPG)
TRINITY INVESTMENTS LIMITED, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 2611 (TPG)
TRINITY INVESTMENTS LIMITED, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 5886 (TPG)
MCHA HOLDINGS, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 2577 (TPG)

MCHA HOLDINGS, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 5190 (TPG)
ERCOLANI, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 4654 (TPG)
FAZZOLARI, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 3523 (TPG)
STONEHILL INSTITUTIONAL PARTNERS, L.P., *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 4284 (TPG)

WHITE HAWTHORNE, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 4767 (TPG)
VR GLOBAL PARTNERS, LP, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	11 Civ. 8817 (TPG)
HONERO FUND I, LLC, Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 6702 (TPG)
PROCELLA HOLDINGS, L.P., Plaintiff, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 3932 (TPG)

BYBROOK CAPITAL MASTER FUND LP, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 7367 (TPG)
BYBROOK CAPITAL MASTER FUND LP, *et al.*, Plaintiffs, - against - THE REPUBLIC OF ARGENTINA, Defendant.	15 Civ. 2369 (TPG)

REPLY MEMORANDUM OF LAW IN FURTHER 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

CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Defendant The Republic of Argentina

February 19, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

The Republic of Argentina (the "Republic") respectfully submits this reply memorandum in further support of its motion, by Order to Show Cause, to vacate the injunctions entered in the above-captioned matters on November 21, 2012, and October 30, 2015 (*e.g.*, Case No. 08 Civ. 6978, Dkt. 863).

PRELIMINARY STATEMENT

The Republic and plaintiffs are in agreement that the parties cannot resolve this matter until the Injunctions are vacated. Indeed, plaintiffs concede that "any such resolution must include the dissolution of the *pari passu* injunctions entered in NML's actions". (Newman Decl.[1] ¶ 6.)

The parties further agree that the Republic's new administration has dramatically changed its policy toward this dispute and is working intensely, in good faith, to resolve the claims of holders of its defaulted bonds. Plaintiffs have acknowledged that they welcome "the efforts of Argentina's new government to resolve these long-pending cases" and "are encouraged by the engagement of Argentina's new leadership and by its stated desire to reach agreements to resolve these cases". (Pls.' Mem.[2] at 2.)

Accordingly, there is no dispute that there has been a significant change in circumstances from those that prevailed when the Court entered the Injunctions. The only disagreement between the parties is when, and under what circumstances, the Injunctions should be vacated. The Republic has proposed that they be vacated upon the satisfaction of concrete, Court-ordered conditions designed to address the extraordinary

[1] References to "Newman Decl." are to the Declaration of Jay Newman, executed on February 18, 2016.
[2] References to "Pls.' Mem." are to Plaintiffs' Memorandum of Law in Opposition to the Republic of Argentina's Motion to Vacate the Injunctions, dated February 18, 2016 (*e.g.*, Case No. 08 Civ. 6978, Dkt. 874).

circumstances that gave rise to the need for the Injunctions: repeal of the Lock Law and the Sovereign Payment Law, and actual payment to plaintiffs in these actions who settle with the Republic by the end of this month. In other words, for the Injunctions to be lifted, the Republic recognizes and agrees that it has to "put its money where its mouth is".

Plaintiffs barely address these proposed conditions—indeed, for much of their submission, plaintiffs pretend the Republic is seeking the immediate and unconditional lifting of the Injunctions (which it is not). To the contrary, the Republic has proposed that the Injunctions remain in effect until the Republic actually performs on its commitment to settle unpaid judgments and claims. The Republic's willingness to condition relief on the actual payment of substantial monetary settlements is compelling evidence of its good faith and stands in stark contrast to the policies of the prior administration. And the Court's retention of jurisdiction (*see* 08 Civ. 6978, Dkt. 861-1 (Proposed Order) at 5) should allay any concern that the Republic may return to its old ways.

Rather than proposing an alternative path to vacatur of the Injunctions, plaintiffs' position is that the Injunctions should remain in place (for now) so that they can continue to use the Injunctions as a club in settlement negotiations with the Republic. Plaintiffs admit that they are "willing to cooperate with Argentina to bring about the injunction dissolution in NML's actions if Argentina and NML can reach agreement on fair and equitable payment and other settlement terms that give due consideration to the total amount owed to NML . . .". (Newman Decl. ¶ 6.) But plaintiffs' desire for

additional settlement leverage does not justify the continuation of extraordinary equitable relief.

The Republic's Proposal is a proposal, not an "ultimatum". That should be abundantly clear to plaintiffs, who yesterday alone spent eight hours in bilateral negotiations with senior Argentine officials and who have engaged in intense negotiations for weeks through the Court-appointed Special Master, even after this supposed "ultimatum" was issued. Any plaintiff is free to reject the Republic's proposal, to attempt to negotiate a different deal, or to continue to press its claims in court.

Although they concede the Injunctions will have to be vacated to bring about a resolution, plaintiffs nonetheless advance a legal argument that they do not support in any practical sense: that the Injunctions should not be vacated until the Republic has cured its breach of the *pari passu* clause. That argument rests on the premise that extraordinary equitable relief is available as a matter of right to parties aggrieved by a breach of contract. But that premise is false.

An injunction is an extraordinary measure that is not normally available for breach of contract—rather, it is a function of the Court's equitable power to bring about a fair result. As this Court recognized at the time, the Injunctions were put in place "not literally to carry out the *Pari Passu* Clause", *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 06978 (TPG), 2012 WL 5895786, at *3 (S.D.N.Y. Nov. 21, 2012) ("*NML I*"), but to address the extraordinary conduct of the prior administration, including enacting the very legislation that the new administration now proposes to repeal.

As plaintiffs acknowledge, those circumstances have changed. The Republic is no longer repudiating its payment obligations and is proposing to condition

relief on significant, concrete actions by the Republic. Continuing the Injunctions under these circumstances would be inequitable because it would substantially harm the plaintiffs who have settled, and other bondholders who may wish to settle. In addition, it makes it functionally impossible for the Republic to access the global capital markets to raise the funds to resolve these claims on a global basis. The time has come to vacate the Injunctions, upon the satisfaction of well-defined conditions, to bring about a final resolution of this long-running dispute.

STATEMENT OF ADDITIONAL FACTS

Over the last week since filing this motion, the Republic has continued to make progress toward a resolution of these actions. On February 12, 2016, the Special Master reported that "parties with substantial holdings of defaulted Argentine bonds . . . have come forward, expressed interest in settling, and are in the process of attempting to reach agreements in principle with Argentina". (Reply Ex.[3] A.) The Special Master reported that discussions among "high-ranking Argentine Government officials" and principals of major bondholders "have gone late into the night". (*Id.*)

On February 16, 2016, the Republic reached an agreement in principle to settle the *Brecher* Class Action (also before this Court, No. 06 Civ. 15297) on terms consistent with the public Proposal. (Reply Exs. B, C.) Like the previously arrived-at agreements in principle, the *Brecher* agreement is subject to the approval of the Argentine Congress and this Court's lifting of the Injunctions. (Reply Exs. B, C.)

[3] References to "Reply Ex." are to the exhibits to the accompanying Second Supplemental Declaration of Michael A. Paskin in Further Support of the Republic of Argentina's Motion, by Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012 and October 20, 2015, executed on February 19, 2016.

On February 17, 2016, the Republic disclosed the agreements in principle it had reached with EM Limited and Montreux[4] on February 3, 2016. Those agreements together provide for total payments in excess of $1 billion. (*See* Supp. Exs.[5] A, B.) Also on February 17, the Republic issued a press release with instructions on how to accept the Proposal. (Reply Ex. D.) The press release clarifies certain aspects of the Republic's offer, including that post-judgment interest will be included in the calculation of any proposed settlement amounts. (*Id.*)

On February 18, 2016, the Republic reached an agreement in principle with Capital Markets Financial Services, plaintiffs in 15 Civ. 710 (TPG), to settle their claims for in excess of $110 million. (Reply Ex. E.) The Special Master explained in a statement that the agreement was reached "within the framework of the February 5 Proposal by the Republic" and that, "[a]s with all other Agreements in Principle reached to date, it is subject to two conditions: first, approval of the settlement by the Argentine Congress, including the lifting of the Lock Law and the Sovereign Payment Law, and, second, the lifting of the Injunction" by this Court. (*Id.*)

ARGUMENT

Plaintiffs do not deny that it is within this Court's discretion to grant the Republic's motion. Nor could they. Under Rule 54(b), the Court has the discretion to vacate or modify an interlocutory injunctive order "at any time before the entry of a [final] judgment". *See also United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir. 1982) (explaining that "the district court . . . possesses inherent power over interlocutory orders,

[4] The Montreux plaintiffs are Montreux Partners LP (14 Civ. 7171), Cordoba Capital (14 Civ. 7164), Wilton Capital Ltd. (14 Civ. 7166) and Los Angeles Capital (14 Civ. 7169).

[5] References to "Supp. Ex." are to the exhibits to the Supplemental Declaration of Michael A. Paskin 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 20, 2015, executed on February 17, 2016 (*e.g.*, Case No. 08 Civ. 6978 (TPG), Dkt. 872).

and can reconsider them when it is consonant with justice to do so"). Indeed, even if the Injunctions were final judgments, the Court has the power under Rule 60(b)(5) to modify or vacate the Injunctions if "applying [them] prospectively is no longer equitable", *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F.Supp. 2d 297, 316 (E.D.N.Y. 2002), or under Rule 60(b)(6) if there is "any other reason that justifies relief", *Matarese v. Lefevre*, 801 F.2d 98, 106 (2d Cir. 1986).

Instead, plaintiffs misrepresent—or ignore—the changed circumstances that are at the heart of this motion, and they advance a faulty legal argument that injunctive relief is an entitlement to a party aggrieved by a breach of contract. For the reasons stated below, the Court should reject those arguments and grant the Republic's motion.

I. THE CIRCUMSTANCES THAT LED TO THE ISSUANCE OF THE INJUNCTIONS HAVE CHANGED.

A. Plaintiffs Misrepresent the Changed Circumstances that Have Occurred and Are Contemplated by the Proposed Order.

Plaintiffs misrepresent the changed circumstances that are at the heart of the Republic's motion. According to plaintiffs, the "only new facts Argentina identifies" are (a) the settlements with EM Limited and Montreux and (b) the publicly-issued Proposal. (Pls.' Mem. at 19.)

Plaintiffs are wrong for several reasons. *First*, plaintiffs overlook the most fundamental change in circumstances: that, under the new administration, the Republic has undergone a dramatic and well-publicized reversal of its policy toward its creditors and toward this dispute. While the previous administration was characterized as a "uniquely recalcitrant debtor", *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 247 (2d Cir. 2013) ("*NML II*"), who refused even to engage in "meaningful settlement

discussions" (*see* Ex.[6] D at 10), the Macri administration has made the resolution of this dispute a core policy goal. Plaintiffs do not dispute this. (*See* Pls.' Mem. at 2 (recognizing "the efforts of Argentina's new government to resolve these long-pending cases"); *id.* at 12 ("To his credit, days after his election, President Macri announced his intention to negotiate a resolution of these long-pending actions.")). It is precisely this dramatic policy reversal that is at the heart of the "changed circumstances".

Second, plaintiffs ignore that the vacatur of the Injunctions sought by the Republic would be conditioned on two specific, affirmative steps by the Republic—repeal of legislation enacted by the prior administration that currently prevents a resolution of this dispute, and actual payment to plaintiffs in these actions who reach agreements to settle with the Republic (whether by acceptance of the terms of the publicly-announced Proposal or through bilateral negotiations of the sort plaintiffs acknowledged have occurred between them and the Republic) by the end of this month. Both of these things have to happen, under the proposed order, before the Injunctions are lifted. But plaintiffs do not even mention those conditions until page 15 of their brief (and even then only in a single sentence), painting a false picture of the proposed relief and the changed circumstances giving rise to this motion.[7]

Despite plaintiffs' efforts to gloss over them, however, the proposed conditions are fundamental to the changed circumstances giving rise to this motion. The

[6] References to "Ex." are to the exhibits to the Declaration of Michael A. Paskin, executed on February 11, 2016 (*e.g.*, Case No. 08 Civ. 6978, Dkt. 864).

[7] Plaintiffs' contention that the Injunctions should not be lifted before the Republic cures this Court's contempt finding (Pls.' Mem. at 25) compounds this distortion. In its contempt ruling, this Court held that in order to "purge the contempt", the Republic will need to "re-affirm[] the role of The Bank of New York Mellon as the indenture trustee and withdraw[] any purported authorization of Nación Fideicomisos, S.A. to act as the indenture trustee". *E.g.*, Case No. 08 Civ. 6978, Dkt. 693, at 3. But that is exactly what it means to repeal the Sovereign Payment Law, which the Republic has proposed to make a condition for vacatur of the Injunctions.

Injunctions were issued under circumstances where Argentina had "codified in [the "Lock Law"] its intention to defy any money judgment issued by this Court". (*See* Ex. B ¶ 1(b); Ex. C ¶ 1(b).) But the Republic is now proposing to make repeal of the Lock Law a condition for the lifting of the Injunctions. Moreover, the Injunctions were issued under circumstances where Argentina had engaged in "extraordinary behavior", *NML II*, 727 F.3d at 247, in adopting a "public policy against paying [its] bonds" (Pls.' Mem. at 19). In contrast, as plaintiffs concede, Argentina now has a "public policy" to reach a resolution with all bondholders, and has proposed to make payments in cash to plaintiffs who agree to settle before February 29, 2016—an amount that already would exceed $1 billion and may grow much higher—a Court-ordered condition for the lifting of the Injunctions.

Third, plaintiffs understate the specific progress that has been made. In addition to the settlements of the EM Limited and Montreux actions, which call for total payments in excess of a billion dollars (Supp. Exs. A, B), the Republic has reached agreements in principle to resolve the claims of approximately 50,000 Italian bondholders (in an action that is not before this Court) (Bausili Decl. ¶ 5) and to settle the *Brecher* class action on terms consistent with the public proposal (*see* Reply Ex. B). In addition, the Republic reached an agreement in principle yesterday with Capital Markets Financial Services, the plaintiff in another of the above-captioned actions,[8] to settle its claims for approximately $110 million. (Reply Ex. E.) Despite plaintiffs' attempts to minimize those efforts, including by misrepresenting the extensive nature of the negotiations that

[8] 15 Civ. 710 (TPG).

have taken place, and continue to progress, under the supervision of the Special Master,[9] the Republic continues to work "around the clock" to resolve its creditors' claims. (Ex. I.)

B. The Proposal Is a Settlement Proposal, Not An "Ultimatum".

Plaintiffs' attempt to characterize the Proposal as an "ultimatum" or as a "take-it-or-leave-it restructuring" (Pls.' Mem. at 2) is disingenuous and should be rejected. Plaintiffs themselves concede that they have been engaged in direct, bilateral negotiations with senior Argentine government officials, including the Secretary of Finance, for weeks. (*See* Newman Decl. at ¶ 3.) Plaintiffs concede that they have exchanged "term sheets", participated in meetings with the Special Master, and engaged in face-to-face negotiations with senior officials, even after the supposed "ultimatum" was issued and right up to the minute they filed their brief on this motion. (Pls.' Mem. at 3.) Indeed, just yesterday, principals from the plaintiffs and Argentine officials engaged in intense negotiations under the auspices of the Special Master for more than eight hours. *See* Bausili Supp. Decl. ¶ 8. Conspicuously absent from plaintiffs' submission is any allegation that the Republic has refused to discuss terms beyond what is in the Proposal.

Moreover, plaintiffs or any other holders are free to reject the Proposal. Plaintiffs are also free to try to negotiate another deal, as plaintiffs have been doing aggressively. Thus, contrary to plaintiffs' suggestion, the Proposal is nothing like the exchange offers carried out in 2005 and 2010, because the Republic has not "prohibited Argentina's Executive Branch from reopening the Exchange Offer or accepting any type

[9] Even as Mr. Newman's declaration was filed on February 18, 2016, plaintiffs were participating in intense settlement negotiations in excess of eight hours at the Special Master's offices. *See* Bausili Supp. Decl. ¶ 6, 8.

of settlement involving untendered securities" (Pls.' Mem. at 7). Rather, as plaintiffs acknowledge, the Republic continues to engage in intense settlement discussions with individual bondholders despite having announced the Proposal. The Republic has not proposed to put plaintiffs' bonds at the "end of the line" or to implement new "legislative enactments" to block payments (*id.*). Instead, the Republic has proposed to condition the requested relief on the Argentine Congress repealing such legislation, and it is focused intensely on resolving all outstanding claims.

II. THE *PARI PASSU* CLAUSE DOES NOT PREVENT THE COURT FROM GRANTING THE REPUBLIC'S MOTION.

A. The *Pari Passu* Clause Does Not Entitle Plaintiffs to Extraordinary Equitable Relief in the Face of Changed Circumstances.

Plaintiffs' legal argument rests on the premise that the Injunctions are necessary to protect their contractual rights and should not be vacated until Argentina's breach of contract has been remedied. *See* Pls.' Mem. at 2, 4. However, the purpose of the Injunctions cannot be to compel performance under the contract terms of the bonds and, in fact, the Injunctions have not compelled Argentina's performance under the contracts. The *pari passu* injunctions have been in place for four years, yet no resolution of these actions has been reached and no payment to plaintiffs has been made. That is what has led this Court on multiple occasions to stress that the path to resolution of the plaintiffs' claims must be through settlement. *See, e.g.*, Ex. E at 8:24-9:1 ("[T]he really truly important thing is to recognize that this matter will not be resolved without a successful settlement."), 9:11-14 ("[I]f the parties and if the attorneys wish to resolve this matter, there must be negotiation of issues and there must be a settlement.").

As this Court and the Second Circuit have made clear, the actual purpose of the Injunctions was to remedy the extraordinary circumstances surrounding these

litigations—primarily the attitude and actions of the Republic's former government with regard to its unpaid judgments and unfulfilled debt obligations—and to bring the Republic to the negotiating table to settle its disputes with plaintiffs and other creditors willing to engage in good-faith negotiations with the Republic. Indeed, even plaintiffs and proposed intervenor plaintiffs concede that settlement is the proper resolution of these actions. S*ee, e.g.*, Intervenors' Mem. at 2 ("This Court has said, often and accurately, that settlement is the only solution to the Republic's debt problem. Intervenors agree."). And, remarkably, they concede that such a path ultimately "must" involve vacatur of the Injunctions. *See* Newman Decl. ¶ 6 ("NML appreciates that any such resolution must include the dissolution of the *pari passu* injunctions entered in NML's actions.").

Nonetheless, plaintiffs continue to argue against vacatur of the Injunctions in order to preserve their leverage in settlement negotiations. NML has admitted that it will support an application to vacate the Injunctions as soon as NML has reached its own settlement. Newman Decl. ¶ 6 ("NML is willing to cooperate with Argentina to bring about the injunction dissolution in NML's actions if Argentina and NML can reach agreement on fair and equitable payment and other settlement terms"). But neither the lead plaintiffs here nor any other claimants are entitled to special treatment—their desire for settlement leverage is not a reason to continue with the extraordinary equitable relief that has had a crippling effect on the Republic, particularly given that the plaintiffs concede the circumstances have changed (Pls.' Mem. at 2 (recognizing "the efforts of Argentina's new government to resolve these long-pending cases" and "the engagement of Argentina's new leadership and . . . its stated desire to reach agreements to resolve

these cases"), and that the Injunctions must at some point be vacated to bring about a resolution. *See* Newman Decl. ¶ 6 ("NML appreciates that any . . . resolution must include the dissolution of the pari passu injunctions."); Intervenors' Mem. at 7 (conceding that "[t]he Republic has properly identified the relief it will one day need"). Such a position actively harms the plaintiffs who have already reached settlements in principle worth more than a billion dollars, whose recovery plaintiffs are trying to hold ransom. *See* Br. of EM Ltd. & Montreux (14 Civ. 8303, Dkt. 42), at 15 ("Maintaining the *Pari Passu* Injunction at this stage would substantially prejudice both the Settling Plaintiffs and other bondholders who may wish to settle with Argentina but cannot do so because the *Pari Passu* Injunction remains in force.").

In any event, plaintiffs' premise—that Argentina's failure to remedy the breach of contract entitles them to the Injunctions—is wrong as a matter of law. An injunction is an extraordinary measure that is not available for a breach of contract (or any similar claim for money damages) except under "extraordinary circumstances". *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009); *see also Winter v. N.R.D.C.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course.").[10] As this Court explained at the time, the Injunctions were issued "not literally to carry out the

[10] The Second Circuit's decision in *Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253 (2d Cir 1984), is not to the contrary. As plaintiffs point out, the Second Circuit stated that 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". *Id.* at 256. But plaintiffs take this language out of context. Immediately thereafter, the Second Circuit made clear that "[a]n injunction is an ambulatory remedy that marches along according to the nature of the proceeding. It is executory and subject to adaption as events may shape the need . . . [t]hus, the nature and effect of the decree granting an injunction must be examined first when considering its modification". *Id.* The Court went on to reaffirm the well-accepted standard, which is not that plaintiffs must have obtained complete relief, but that "[a] court may modify a final or permanent injunction" when "conditions have so changed as to make such relief equitable, *i.e.*, a significant change in the law or facts". *Id.*

Pari Passu Clause", *NML I*, 2012 WL 5895786, at *3, but because under the circumstances the equities favored such drastic relief—among other things, Argentina had engaged in an "unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs". *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 255-256 (2d Cir. 2012). Indeed, as the Second Circuit observed, NML's position has always been that "ratable payments [are] a *remedy* for Argentina's breach of the [Equal Treatment] Provision," not that the clause "require[s] ratable payments". *Id.* at 259 n.10 (emphasis in original). Today, those circumstances have indisputably changed and the equities swing the other way. The Republic has publicly announced a new policy regarding addressing outstanding debt claims and it has proposed to resolve its claims with all plaintiffs. And the conditions proposed by the Republic mean that the Republic must actually do what it proposes before obtaining its desired relief.

B. The Proposal Itself Does Not Violate the *Pari Passu* Clause.

Similarly, the Court should reject the suggestion that the Proposal itself constitutes a violation of the *pari passu* clause because it contemplates different settlement offers to differently situated creditors. *See* Intervenors' Mem. at 2. Contrary to plaintiffs' assertion, the *pari passu* clause does not mean that every bondholder, or every class of bondholders, has to be offered the same settlement terms. The *pari passu* clause addresses the priority of interest and principal payments on bonds, not the treatment of litigated claims. Moreover, as the Second Circuit has explained, the *pari passu* clause does not mean that every bondholder has to be treated the same in every circumstance or that every bondholder has to be paid at the same time: "As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its *pari passu*

clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor's rights". *NML II*, 727 F.3d at 247. Indeed, plaintiffs themselves reject the notion that all plaintiffs must be offered the same settlement terms, complaining that an "ultimatum" that offers everyone the same terms would be improper. *See* Pls.' Mem. at 26-27 (arguing that the Republic's Proposal is "coercive and rushed" and that the parties should instead engage in a "settlement dialogue").

Plaintiffs make much in their Opposition of the fact that one of the parties with whom the Republic has reached a settlement agreement will have 100% of their claims paid under their settlement with the Republic. *See* Pls.' Mem. at 16, 19-20. The apparent implication is that this settlement is unfair to the remaining plaintiffs. However, their discussion ignores the important ways in which EM Limited's claims differ from the claims of certain other creditors.

Judgment creditors whose claims consist largely of unpaid principal, like EM Limited, might obtain full, or nearly full, recovery on their claims under the Standard Offer of the public Proposal. *See EM Ltd. v. Republic of Argentina*, 03 Civ. 2507, Amended Final Judgment, Dkt. 38. That is the offer that EM Limited has agreed to accept, and it is open to any plaintiff. By contrast, plaintiffs that have pursued the intentional strategy of not reducing their claims to money judgments in order to collect prejudgment interest, that in some cases exceeds 100% of principal annually, receive an offer that seeks a greater measure of compromise with respect to the potential claim size, but likely a far greater return on the initial principal investments than the up to 150% available under the Standard Offer. *See NML v. Republic of Argentina*, 05 Civ. 2434, March 18, 2009 Opinion, Dkt. 164; Second Amended Judgment, Dkt. 450. While

plaintiffs might not like that approach, nothing about it is impermissible or a violation of their contractual rights. And, as previously stated, they are free to reject that Proposal or to engage in bilateral negotiations (which they have done).

C. It is Not Equitable To Block the Republic From Seeking Access to the International Capital Markets To Finance Settlements.

Plaintiffs' assertion that the Injunctions should remain in place because they believe the Republic could afford to pay settlements of up to $9 billion with the Injunctions still in place is wrong, and is in tension with NML's (accurate) concession that any settlement "must include the dissolution of the *pari passu* injunctions entered in NML's action". Newman Decl. ¶ 6. The Republic has been completely excluded from the international capital markets since its default in 2001. In order to raise capital, the Republic has issued domestic bonds, but in comparison to international offerings, Argentina's domestic offerings have been relatively small. The Injunctions make it effectively impossible for Argentina to access the global capital markets. Without access to the international capital markets, the Republic cannot finance payments to achieve a global resolution of the claims of the holders of its defaulted debt. Therefore, while the Injunctions are in place, the Republic cannot resolve these litigations. Bausili Supp. Decl. ¶¶ 3-4. As the Intervenors candidly acknowledge, "with the Injunctions in place, the Republic cannot access the capital markets". Intervenors' Mem. at 5. It simply makes no sense for such punitive conditions to continue, particularly given that they are now acting as an impediment to resolution of these actions.

Plaintiffs are also wrong in their characterization of the liquid assets accessible to the Republic. The $29.7 billion that plaintiffs claim is "cash on hand" belongs to the legally separate Central Bank—as plaintiffs' citation to the Central Bank's

Twitter feed makes clear. Pls.' Mem. at 24. The government may not freely access those funds, as the Second Circuit recognized in holding that the Central Bank is not the alter ego of the Republic. *EM Ltd. v. Banco Cent. de la República Arg.*, 800 F.3d 78, 96 (2d Cir. 2015) (*cert. pending*) (ordering dismissal with prejudice of plaintiffs' alter ego complaint against the Central Bank). Plaintiffs make no showing as to the amount of those reserves that are liquid and that could be prudently used. Moreover, plaintiffs' assertion that Argentina's settlements with EM Limited and Montreux "suggest[] that Argentina can pay Plaintiffs if it chooses to do so" (Pls.' Mem. at 25) ignores that those settlements, too, are conditioned upon vacatur of the Injunctions and might be paid from the proceeds of a new financing.

III. THE REPUBLIC'S MOTION IS NOT PREMATURE

Contrary to the Intervenors' assertion (Intervenors' Mem. at 10), the relief requested by the Republic is not "novel" or even unusual. Courts frequently issue injunctions that expire or lose effect upon the satisfaction of certain conditions. *See, e.g.*, *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29, 31 (2d Cir. 1972) (affirming preliminary injunction barring shipment of a product "until the labeling was corrected" and approving district court's requirement of FDA approval "as a condition for the lifting of the injunction"); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1204, 1208 (2d Cir. 1970) (affirming injunction prohibiting defendant from making certain contacts with plaintiff's customers until termination of related litigation in New Jersey); *Abbo-Bradley v. City of Niagara Falls*, 293 F.R.D. 401, 410 (W.D.N.Y. 2013) (enjoining plaintiffs from conducting environmental sampling unless plaintiffs provide defendants with four days' advance notice and contemporaneous access to samples); *Lewis v. Rahman*, 147 F. Supp. 2d 225, 238 (S.D.N.Y. 2001) ("Defendant Hasim Rahman is

hereby enjoined from engaging in any heavyweight bout for the next 18 months unless and until he complies with his contractual obligation to fight a rematch with Lennox Lewis . . . ."); *HMI Mech. Sys. v. McGowan*, No. 99 Civ. 376, 2000 U.S. Dist. LEXIS 21231, at *13 (N.D.N.Y. Mar. 8, 2000) (holding that "[t]he preliminary injunction . . . is lifted, conditional upon the [Department of Labor] sending the aforementioned cover sheet and extending the deadline for the grace period"). The relief that the Republic seeks is no different. It is simply a modification of the existing Injunctions to add the circumstances under which the prohibitions will no longer be in effect.

Such an order is consistent with the inherent flexibility of the Court's equitable power and the Court's authority to tailor equitable remedies to the particular circumstances before it. As the Supreme Court has explained, "breadth and flexibility are inherent in equitable remedies". *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *see also Holland v. Florida*, 560 U.S. 631, 650 (2010) (explaining that the "flexibility inherent in equitable procedure enables courts to meet new situations" and to "exercise judgment . . . with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case"); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 423 (2d Cir. 2004) ("[T]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). Just as the Injunctions themselves were tailored to the circumstances at the time, the proposed order is tailored to address the current, changed circumstances.

The "cure first, vacate after" approach proposed by the Intervenors (Intervenors' Mem. at 10) would prolong this litigation needlessly by injecting yet

another round of motion practice after the Republic has satisfied the conditions that are set out in its Proposal and in every agreement in principle reached thus far. The Court should reject that invitation. The Court should also reject the Intervenors' complaint that "there is no way to predict that Congress will ever act appropriately". *Id.* at 11. If plaintiffs were right that the Republic does not truly plan to follow through on its proposals, despite all the indications to the contrary, then plaintiffs would have nothing to worry about because the Injunctions would remain in place.

IV. THE COURT HAS JURISDICTION IN THE *PARI PASSU* ACTIONS.

Plaintiffs' contention that this Court is without jurisdiction to grant this motion in the *Pari Passu* Actions (Pls.' Mem. at 17-18) is wrong. The filing of an appeal divests the District Court of jurisdiction only "over those aspects of the case involved in the appeal". *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). As discussed below, those "aspects" currently on appeal are very narrow, and the District Court retains its jurisdiction over all other aspects of the case, including whether to grant this relief.

The Republic has a pending appeal in the *Pari Passu* Actions from this Court's Order dated March 12, 2015, which denied a motion to modify the Injunctions with the aim of permitting Citibank Argentina to process payments with respect to certain Argentine law bonds. The Court declined to make that modification and the Republic has appealed from that ruling. In contrast to the appeal in the Me Too Actions, the Republic's appeal from the March 2015 Order is limited to the denial of the modification request. And because the appeal is timely only as to the Court's denial of Citibank's motion, not as to the imposition of the November 21, 2012, Injunction, it does not subject the broader Injunction order to the Second Circuit's jurisdiction. *See "R" Best Produce,*

Inc. v. DiSapio, 540 F.3d 115, 121 n.5 (2d Cir. 2008) (explaining that a motion for the modification of an injunction filed more than "ten days [after] the order or judgment at issue . . . when denied and appealed, brings up for review only the order denying the motion"); *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). Therefore, this Court has jurisdiction to grant the Republic's motion in the *Pari Passu* Cases.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Republic's February 11, 2016, Memorandum of Law, the Republic respectfully requests that this Court:

(1) issue, in the Me Too Actions, an Indicative Ruling pursuant to Federal Rule of Civil Procedure 62.1 that this Court would grant the relief sought herein upon a remand by the Court of Appeals for that purpose and/or that the relief sought herein raises a "substantial issue"; and

(2) issue orders, pursuant to Federal Rules of Civil Procedure 54(b), 60(b)(5) and 60(b)(6), and the Court's inherent equitable power, that the Injunctions shall be deemed vacated upon the occurrence of the following conditions precedent:

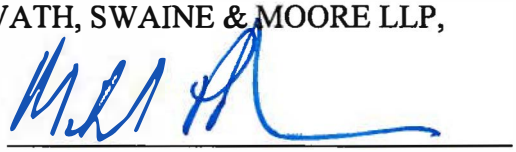
(a) the Republic of Argentina takes action necessary to repeal or otherwise abridge Law 26,017 (the "Lock Law") and Law 26,984 (the "Sovereign Payment Law"); and

(b) with respect to any of the parties in the above-captioned matters that enters into a settlement agreement with the Republic of Argentina on or before February 29, 2016 (each a "Settling Party"), payment is made by the Republic of Argentina to all such Settling Parties (in accordance with the specific terms of each such Settlement Agreement) and certification that such payment was received by each Settling Party is made by the Republic of Argentina to this Court with simultaneous notice to the Settling Party.

February 19, 2016

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

By 

Daniel Slifkin
Michael A. Paskin
John D. Buretta
Damaris Hernández
Members of the Firm

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
mpaskin@cravath.com

Attorneys for Defendant The Republic of Argentina