UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NML CAPITAL, LTD.,	:	
	:	08 Civ. 6978 (TPG)
	:	
Plaintiff,	:	
-against-	:	
	:	
THE REPUBLIC OF ARGENTINA,	:	
	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF CLASSES MOTION TO INTERVENE (AND PROPOSED OPPOSITION TO ARGENTINA'S MOTION TO VACATE PARI PASSU INJUNCTIONS)

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The Plaintiff Classes in eight pending actions[1] (the "Class Intervenors") respectfully submit this Memorandum of Law in support of their Motion to Intervene.

PRELIMINARY STATEMENT

The Plaintiff Classes seek to intervene solely to oppose Argentina's motion to vacate all existing *pari passu* injunctions.[2] If the Court grants the motion to intervene, we ask that this memorandum also serve as the Plaintiff Classes' opposition to Argentina's Motion to Vacate the *Pari Passu* Injunctions.[3]

ARGUMENT

The Plaintiff Classes do not wish to repeat what NML and others already have said in opposition. We fully join in those oppositions. However, the Plaintiff Classes have additional, compelling interests that are not adequately represented by NML or other non-class plaintiffs. We will be brief and to the point.

The Plaintiff Classes are mostly families, retirees, and small investors. Many are Argentine citizens who did exactly what citizens are asked to do all the time: they invested in their country. Indeed, many invested before the default. Yet Argentina has done nothing but fight and demean them as "holdouts" ever since.

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[1] The eight pending class actions are cases numbered 04-cv-400, 04-cv-401, 04-cv-506, 04-cv-936, 04-cv-937, 04-cv-1085, 04-cv-2117, and 04-cv-2118. The Plaintiff Classes in these actions moved for *pari passu* relief in 2014 and renewed those motions on February 16, 2016 after when Argentina sought to vacate all *pari passu* injunction.

[2] *See*, *e.g.*, *North Shore-Long Island Jewish Hosp. Sys., Inc. v. MultiPlan, Inc.*, 2015 WL 777248, at *24 (E.D.N.Y. 2015 (granting motion for permissive intervention for limited purpose of discovery only).

[3] Alternatively, we request that the Court accept this brief on an *amicus curiae* basis.

As NML and others have argued, neither equity nor justice would be served by vacating the *pari passu* injunctions. The lack of equity is particularly clear with respect to the Plaintiff Classes.

It is, of course, welcome news that the new government has engaged in some discussions with some plaintiffs. But the only thing that has brought Argentina to the table is the commitment of the U.S. courts to the rule of law and to ensuring that all investors—large and small, U.S. and non-U.S. —can have faith that the terms of an investment contract (the *pari passu* clauses) will be honored. Settlement negotiations should take place only within the context of the rule of law: Argentina with its contractual rights and the Plaintiff Classes and other investors with theirs, with both sides working towards a fair and equitable resolution based on those rights. To vacate the *pari passu* injunctions is to take away the investors' rights.

To understand what would happen if the injunctions are vacated, one only need look at Argentina's current tender offer. Despite the fact that the Plaintiff Classes have the same *pari passu* rights as NML, Aurelius, and others and the Plaintiff Classes filed their complaints years before other holders, Argentina has refused to negotiate with the Plaintiff Classes or any other holders that do not yet have formal injunctions in place. Moreover, the tender offer has been presented, without prior consultation, as a wholly non-negotiable offer with only one option for the Plaintiff Classes—the "Base Offer" of 150% of principal.[4] That Base Offer ignores the years

[4] We note that Argentina's offer and follow on Instructions to Noteholders contravenes the well-settled rule that prohibits settlement overtures to individual members of a certified class represented by class counsel. *E.g., Bower v. Bunker Hill Company*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) ("Once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel."); *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 377 (N.D. Ill. 1982) ("After the class has been certified, defendants' counsel must treat the unnamed class members as ″represented by″ the class counsel for purposes of DR 7-104."); *Fulco v. Continental Cablevision, Inc.*, 789 F.Supp. 45 (D.Ma. 1992); *Gortat v. Capala Bros., Inc.*, 2010 U.S. Dist. LEXIS 45549 (E.D.N.Y. 2010); *Kleiner v.*

of past due bond interest and pre-judgment interest that accumulated because Argentina chose to fight the classes all these years. It imposes a "discount" of **50% or more** on the value of the Plaintiff Classes' claims, despite the fact that the Plaintiff Classes have the same *pari passu* rights as NML and others who have been offered the *Pari Passu* Offer solely because, as a matter of timing, not right, those holders have *pari passu* injunctions in place.

Worse yet, Argentina has materially misled the public about the terms of its tender offer. Argentina originally tried to make it look like the Base Offer was closer in value to the *Pari Passu* Offer because the *Pari Passu* Offer supposedly included only "contractual" interest and ignore pre-judgment interest.[5] Yet, according to yesterday's filing by NML (not Argentina), however, Argentina privately told NML that the *Pari Passu* Offer does include pre-judgment interest,[6] meaning that the non-negotiable Base Offer Argentina offers to the Plaintiff Classes is much worse than the 27.5% discount off total claim value that Argentina is offering to NML and others. Argentina is thus trying to unfairly drive investors into the Base Offer with a materially incomplete and misleading—or, at least, completely confusing—tender offer.[7] The Court should not be asked to facilitate such inequitable (and potentially unlawful) tactics.[8]

First Nat. Bank of Atlanta, 751 F.2d 1193, 1202 (11th Cir. 1985). The completely confusing and misleading nature of the tender offer that Argentina issued unilaterally only underscores the need for proper communication. We reserve the right to seek relief for Argentina's violations, if necessary.

[5] Mem. of Law in Support of the Rep. of Arg.'s Motion, By Order to Show Cause, to Vacate the Injunctions Issued on November 21, 2012 and October 30, 2015 at 10 (representing that the *Pari Passu* Offer for pre-judgment holders offers a discount off the "accrued value of the claims at their contractual rate).

[6] Mem. of Law in Opposition, dated Feb. 18, 2016, at 15.

[7] Argentina's "Base Offer" also is materially misleading (or at least totally confusing). The publicly announced terms on February 5 and 11 said the "all holders" could accept the Base Offer and get 150% of the principal amount of their bonds. Period. Paskin Decl., Exh. J (Proposal). Now it appears Argentina is claiming that the Base Offer is capped at the value of existing judgments. But, again, this is all coming through court filings and hearsay, not a

Finally, the existing injunction should not be vacated because Argentina has not cured its *Pari Passu* violations (or its contempt of prior orders). Has Argentina committed that it will stop treating the defaulted bonds as a "separate category from its regular debt"?[9] No. Has it committed that it will no longer "relegat[e] [the] bonds to a non-paying class" "while at the same time making payments currently due to holders of other unsecured and unsubordinated External Indebtedness"?[10] No. Is it Argentina's expressed intention to pay External Indebtedness other than the "holdout" bonds, such as those of the Plaintiff Classes, that do not accede to the terms of the current tender offer? Yes.

Again, the Plaintiff Classes—like all other litigating bondholders—have a clear interest in ensuring that the *pari passu* promises Argentina made to the markets when it issued its bonds are honored. They have been and are the beneficiaries of the current injunctions. But—because of their nature as small investors who largely bought bonds before the default and because Argentina has chosen to "divide" the bondholders into categories of its own choosing—the Plaintiff Classes' interests in maintaining the *pari passu* injunctions until a negotiated settlement is reached are not fully represented by NML and the other plaintiffs that currently have injunctions in place. As a practical matter, the Plaintiffs' Classes' interests in maintaining the

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properly disclosed tender offer with complete and accurate terms offered uniformly to all holders.

[8] Section 14(e) of the Securities Exchange Act of 1934 (the "Exchange Act") prohibits a tender offeror from making any untrue statement of a material fact, or omitting to state any material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as well as any fraudulent, deceptive or manipulative acts in connection with a tender offer. 15 U.S.C. § 78n(e). In addition to material misrepresentations and omissions concerning the terms of the tender offer, the tender offer may also violate Section 14(e) by failing to advise that the offer violates Argentine law, as well as by failing to provide additional information about the bonds and Argentina's finances and debt situation.

[9] *NML Capital, Ltd. v. Rep. of Arg.*, 699 F.3d 246, 260 (2d Cir. 2012).

[10] *NML Capital, Ltd. v. Rep. of Arg.*, 2011 WL 9522565 (S.D.N.Y. Dec. 11, 2011).

pari passu injunctions (until the Plaintiff Classes' motions are heard) cannot be adequately protected by NML and others. Accordingly, intervention under Fed. R. Civ. P. 24(a) or (b) should be granted.[11]

CONCLUSION

The Plaintiff Classes respectfully request that the Court grant their motion for leave to intervene and accept this memorandum as further opposition to Argentina's Motion to Vacate or, in the alternative, consider the arguments presented on an *amicus curiae* basis.

Dated: New York, New York
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By: /s/ Jennifer R. Scullion

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[11] *See, e.g., Rep. of Phillipines v. Abaya*, 2015 WL 6758088, at *5 (S.D.N.Y. 2015) (burden of demonstrating inadequacy of representation is minimal where proposed intervenors have interest in the action).

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