UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOHAMMAD LADJEVARDIAN, et al.,	:	06 CIV. 3276 (TPG)
Plaintiffs,	:	
vs.	:	
THE REPUBLIC OF ARGENTINA,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMOVE SPECIAL MASTER

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Plaintiffs, individual small bondholders of defaulted Argentine bonds (the "Plaintiffs"), through their undersigned counsel, respectfully submit this Memorandum of Law in support of their motion to remove the Special Master in these proceedings.

INTRODUCTION

The Plaintiffs are individual bondholders who have claims against the Republic of Argentina ("Argentina") for more than $27 million. They are similarly situated with other small-fund bondholders who hold, in total more than $832 million in claims against the Republic (the "Small Bondholders"). Like Plaintiffs, the vast majority of these Small Bondholders acquired their bonds at face value before Argentina's historic default - and many in amounts less than $100,000. Despite the fact that Plaintiffs and the Small Bondholders collectively represent nearly $1 billion in claims against Argentina, they have been purposefully frozen out of the ongoing settlement discussions between Argentina and certain other plaintiffs. The Special Master in these proceedings has orchestrated this systematic isolation of the Plaintiffs and other Small Bondholders, thereby ensuring that their interests are not adequately represented and that their due process rights are not protected.

Even though the Court appointed the Special Master for the "limited" purpose of overseeing settlement discussion between the plaintiffs in these cases and representatives of Argentina, the Special Master has recently taken complete control over the course and direction of the negotiations. First, he explicitly prohibited counsel for Plaintiffs and the other Small Bondholders from attending meetings with representatives from Argentina. Second, the Special Master publicly endorsed the unilateral settlement proposals published by Argentina the very same day they were released, heaping praise on Argentina's representatives and thereby shaping the public discourse surrounding the purportedly confidential settlement discussions.

The Special Master's conduct can only be described as pressure tactics designed to force the Plaintiffs (as well as the other Small Bondholders) to accept Argentina's unilateral settlement proposal. Not only did he effectively prevent the Plaintiffs (as well as the other Small Bondholders) from proposing their own settlement terms—as would be customary in any negotiation—he stymied Plaintiffs and the other Small Bondholders' attempts to interact with the representatives of Argentina in order to reach an amicable settlement of the their outstanding claims. In fact, when contacted by Plaintiffs regarding their exclusion from the negotiation process, the Special Master felt slighted by the language of the email and –in an unprecedented step – ***demanded an apology from Plaintiffs as a precondition to any further communications with the Special Master regarding the settlement negotiations.*** (Hart Dec. Ex. 19.) These pressure tactics exceed the scope of the Special Master's authority and warrant the removal of the Special Master. Moreover, these tactics violate the relevant standards of conduct applicable to special masters and settlement mediators, which is an independent basis for removing the Special Master.

The Special Master also suffers from several serious and unwaivable conflicts of interest, which provide an independent basis for his removal. His public endorsement of Argentina's settlement proposal and praise for its conduct create the appearance of bias and a lack of impartiality. Furthermore, he has demonstrated actual bias against the Plaintiffs and the other Small Bondholders by focusing exclusively on the larger, more noteworthy, plaintiffs. Moreover, the Special Master's deep ties to and extensive representation of financial institutions gives him and his clients a concrete interest in the swift settlement of all outstanding claims. As the Special Master himself stated, Argentina's "historic breakthrough" of an offer "will allow Argentina to return to the global financial markets to raise much needed capital"—something by all

indications, his clients are uniquely positioned to do. These conflicts of interest are exacerbated by the fact that the Special Master's order of appointment itself is unlawful; it specifically exempts him from the requirements of Federal Rule of Civil Procedure 53, which would have required him to file with the court a list of all potential conflicts of interest. Robbed of this routine procedural safeguard against the appearance of bias and partiality, Plaintiffs (as well as the other Small Bondholders) are forced to trust the Special Master and his intentions, to their detriment.

Finally, the Special Master's demonstrated support for Argentina and his exclusion of Plaintiffs and the other Small Bondholders from the settlement discussions undermines their due process rights because they are left with a Hobson's choice: accept Argentina's settlement proposal by its arbitrary deadline or risk losing their contractually guaranteed right to payment and the protection of this Court's orders. His direct, back-of-the-hand dismissiveness (via e-mail) to Plaintiffs only serves to highlight his approach. This Court has the inherent authority and responsibility to protect the Plaintiffs' (as well as the other Small Bondholders') due process rights, including the right not to be coerced into a settlement and should, to do so, remove the Special Master.

To be absolutely clear, Plaintiffs (and we assume the other Small Bondholders) remain steadfast in their commitment to good-faith negotiations and settling their outstanding claims with Argentina on terms beneficial to all parties. But the Special Master has prevented just that; he has rigged the system so that Argentina's unilateral settlement proposal is the only available option, and his public endorsement of Argentina's position has shaped the international discourse surrounding the ongoing settlement discussions and created the appearance of a lack of impartiality. While the Special Master initially may have been needed to bring a recalcitrant

debtor to the table, that situation is no longer at issue. The Special Master's exclusive focus on the large institutional investors has created a roadblock to settlement, and he has now become a serious impediment to the settlement of all plaintiffs' claims.

FACTUAL BACKGROUND

A. Argentina Defaults on its Debt and Breaches the Pari Passu Clause

In 1994, Argentina issued debt securities pursuant to a Fiscal Agency Agreement ("FAA"), which contained a provision that the bonds would "at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness." *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 251 (2d Cir. 2012) ("*NML I*"). In 2001, Argentina initiated the largest sovereign default in history, declaring a moratorium on the payment of its outstanding public debt. *Id.* Since defaulting on this debt in 2001, Argentina steadfastly has refused to honor its obligations, renewing the moratorium every year. *Id.*

After refusing for several years even to negotiate with the holders of its defaulted bonds, in 2005 and 2010, Argentina continued its trend of being a "uniquely recalcitrant debtor" and undertook a "unilateral and coercive" approach to restructuring its debt, pressuring many bondholders into accepting pennies on the dollar for their investments. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 247 & n.13 (2d Cir. 2013) ("*NML II*") (internal quotation marks omitted); *see also NML I*, 699 F.3d at 252-53. After these one-sided exchanges, the Kirchners continued to refuse to engage in good-faith negotiations with the Small Bondholders . Indeed, after the 2010 bond exchange Argentina codified in law its refusal to make payments to all the hold-out creditors. *NML I*, 699 F.3d at 252-53.

In order to protect the "contractual obligations" of the holders of defaulted bonds, this Court in February 2012 issued injunctions in favor of certain holders of Argentina's defaulted

debt. *NML I*, 699 F.3d at 263, 254-56. The injunctions required Argentina to make a ratable payment to holders of its defaulted debt whenever it made a payment to holders of the exchange bonds, and they prohibited Argentina from altering or amending the payment mechanism for the exchange bonds. *Id.* at 255. The court reasoned that injunctive relief was needed because otherwise the plaintiffs' bonds "'would remain debased of their contractually-guaranteed status, and [plaintiffs] would never be restored to the position [they were] promised that [they] would hold relative to other creditors in the event of default.'" *Id.* These injunctions were later extended to other holders of Argentina's debt, including the Small Bondholders .

B. The Court Appoints the Special Master to Oversee Settlement Discussions

In an attempt to "facilitate settlement of [the] litigation" (No. 08-cv-6978, D.E. 705 at 3 (S.D.N.Y. Nov. 3, 2014)), the Court appointed Daniel A. Pollack as Special Master on June 23, 2014 "to conduct and preside over settlement negotiations between and among the parties to this litigation." No. 08-cv-6978, D.E. 530 at 1 (June 23, 2014). The Court instructed the parties to "give [their] full cooperation to the Special Master in all respects in the negotiations." *Id.* at 2. The Special Master's order of appointment was highly irregular, however. Citing the "limited scope of this appointment," it explicitly exempted the Special Master from the provisions of Rule 53, including the condition precedent of providing the court and parties with a sworn statement identifying any potential conflicts of interest. *Id.* The initial order of appointment was limited to certain plaintiffs, however, so the Court, in order to "further facilitate settlement of [the] litigation," authorized the Special Master "to add to those cases some or all of such additional cases as are pending before [the Court]." No. 08-cv-6978, D.E. 705 (S.D.N.Y. Nov. 3, 2014).

Despite the Court's attempts to assist the parties in reaching a settlement, the Kirchner administration continued its refusals to negotiate in good faith. On June 1, 2015, for example, in

a letter to the Special Master, counsel for the Republic stated that they had been "informed" by their client that "engagement at this time is not possible" and that Argentina was refusing the plaintiffs' "invitation to engage in negotiations." Ex. 1 at 1. Argentina cited a "lack of confidence in a negotiation process under [the Special Master's] supervision" as a reason for declining to participate. *Id.* Indeed, Argentina stated that it did not "believe that engagement will occur under the current Special Master framework" and accused the Special Master of bias, stating that it "had no confidence in [his] supervision of any negotiation process." *Id.* at 2. The Kirchner administration thus continued its attacks on the U.S. judicial process and demonstrated its obstinate refusal to engage in any productive dialogue.

On December 10, 2015, however, a new administration was sworn into power in Argentina. Headed by President Mauricio Macri, the Republic and members of Macri's cabinet have repeatedly and publicly announced that settling with the hold-out creditors is a high priority.[1] Indeed, shortly after being elected, the Macri administration confirmed to the Special Master that it intended to resume settlement talks with holders of its defaulted debt "promptly." Ex. 2 (Nate Raymond, *Incoming Argentina official will begin debt talks 'promptly': mediator*, Reuters (Dec. 9, 2015)). President Macri recently reaffirmed his intention of participating in negotiations with the hold-out creditors: "I want to insist that after so many years of conflict, we are ready to reach a settlement agreement in fair conditions." Ex. 3 (Alexandra Stevenson, *After 14 Years at Odds, Argentina Aims to Settle Debt With Hedge Funds*, N.Y. Times (Feb. 2, 2016)). The Small Bondholders remain willing to engage in negotiations and are hopeful that Argentina will make good on its promises.

[1] Indeed, over the past few weeks Argentina has reached agreements in principle with a number of holders of its defaulted debt.

C. The Special Master Attempts to Coerce the Parties to Settle

Argentina's efforts to settle its disputes with Plaintiffs and, we assume, the other similarly situated Small Bondholders, however, have so far been lacking. Even worse, Argentina's new attempts to force Plaintiffs and other Small Bondholders to forego their contractual rights to payment and accept a one-sided settlement proposal have been supported by the Special Master from the start.

On January 13, 2016, counsel for the other Small Bondholders were barred by the Special Master from joining the first meeting with Argentina's representative, finance secretary Luis Caputo. Instead, only representatives from several hedge funds that held the largest amount of Argentina's defaulted debt reportedly met with Mr. Caputo and the Special Master for approximately one hour and thirty minutes, focusing on the process for future negotiations and provisions of a non-disclosure agreement proposed by the hedge funds. Hart Dec. ¶ 4.

On February 1, 2016, the Special Master scheduled a meeting between representatives of Argentina and a committee representing the largest hedge fund plaintiffs. *Id.* ¶ 5. No one representing plaintiffs or the other Small Bondholders was invited to attend the meeting. *Id.*

On February 4, 2016, representatives of the same plaintiffs (excluding two fund plaintiffs who had already reached an agreement in principle with Argentina) apparently met with three or four representatives from Argentina for 20 minutes as the Argentines were leaving for the airport. Hart Decl. ¶ 6. During this meeting those plaintiffs apparently showed the Argentine representatives a term sheet for a settlement of their claims. *Id.* Apparently no negotiations occurred. *Id.* ¶ 6.

No representative of the Plaintiffs or, we understand, the other Small Bondholders attended any other meeting or phone conference with representatives of Argentina to negotiate

possible settlement terms. *Id.* The Special Master's focus apparently remained solely on the large institutional investors, to the detriment of the individual and small-fund holders of Argentina's defaulted debt. Indeed, in his most recent press release, the Special Master made clear that settlement discussions with only "major" holders of Argentine debt were continuing. *See* Ex. 4 (*Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation, Feb. 26, 2016*, PR Newswire (Feb. 26, 2016)).

On February 5, 2016, without ever meeting with a representative for Plaintiffs to discuss the substance of any offer, Argentina publicly announced its own proposals to settle outstanding claims. Ex. 5 (Julie Wernau & Taos Turner, *Argentina Debt Deal Faces Hurdles Despite Bond Offer*, Wall St. J. (Feb. 7, 2016)); *see also* Ex. 6 (Katia Porzecanski et al., *Argentina Reaches Partial Deal on Debt, But Holdouts Remain*, Bloomberg (Feb. 5, 2016)). Argentina's unilateral offer sought to "divide" its creditors into competing groups and imposed an artificial deadline for acceptance of February 19, 2016. *See* Ex. 7 (Carlos Burgueño, *The vultures will try to get Judge Griesa to lift the injunction today*, Ambito Financiero (Feb. 8, 2016)).

The Special Master, unfortunately, has propped up and facilitated Argentina's attempts to force its "cram-down" proposal on Plaintiffs (as well as the other Small Bondholders). Ex. 8 at 13:17-18 (2/24/2016 2d Cir. Hearing Tr.). He heaped praise on Argentina and its unilateral offer the moment it was made public, calling it "an historic breakthrough" which "will allow Argentina to return to the global financial markets to raise much needed capital." Ex. 9 (*Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation, Feb. 5, 2016*, PR Newswire (Feb. 5, 2016)). He also lauded Argentina's conduct with regard to the negotiations, stating that it had "shown courage and flexibility" with its now-public offer. *Id.* The Special Master continued to praise Argentina publicly in the coming days and weeks, and in doing so

repeatedly emphasized his own involvement in and control over the negotiations. *See, e.g.*, Ex. 10 (*Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation, Feb. 12, 2016*, PR Newswire (Feb. 12, 2016)) ("I will continue to do everything in my power to see that [settlement] happens."); Ex. 11 (*Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation, Feb. 16, 2016*, PR Newswire (Feb. 16, 2016)) ("As Special Master, I am continuing to try to bring about settlements with other Bondholders, and am hopeful that there will be more settlements to come."); Ex. 4 (*Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation, Feb. 26, 2016*, PR Newswire (Feb. 26, 2016)) (highlighting that settlement discussions with "major 'holdout' Bondholders" were proceeding "under my supervision"). The Special Master also emphasized in his many public statements[2] that the agreements between Argentina and various bondholders "are all within the framework" of Argentina's public settlement offer, and stressed that this proposal was "available to all Bondholders." Ex. 12 (*Statement of Daniel A. Pollack, Special Master in Argentina Debt Litigation, Feb. 22, 2016*, PR Newswire (Feb. 22, 2016)).

In stark contrast, his dismissiveness to Plaintiffs plea for assistance demonstrates clearly his bias in the negotiations. Hart Dec. ¶ 9, Ex. 19. That he chose to make reference to a personal domestic issue regarding one of the Plaintiffs (without even knowing the facts) as justification for ignoring his concerns was, to put it simply, astonishing.

D. Argentina Seeks Relief from the Pari Passu Injunction

Less than a week after publicly announcing its settlement proposals, Argentina proceeded by *ex parte* order to show cause to vacate the injunctions subject to two conditions precedent: (1)

[2] Indeed, the Special Master has issued twelve separate "press releases" since the swearing in of President Macri, with nine "press releases" just this month.

the repeal of certain laws barring renegotiation of its debt, and (2) payment to plaintiffs that reached a settlement with Argentina "on or before February 29, 2016." No. 08-cv-6978, D.E. 863 at 3 (S.D.N.Y. Feb. 11, 2016). The Order to Show Cause set the date for plaintiffs' response as noon on the very next business day, although this deadline was later extended. On February 19, just hours after briefing closed on the Order to Show Cause, the Court issued a 23-page Indicative Ruling explaining that it intended to lift the injunctions upon remand of the matter by the Second Circuit according to the conditions precedent identified by Argentina.[3] The Court, buttressed by the Special Master's public blessing of Argentina's settlement proposal, therefore blessed Argentina's artificial deadline for the acceptance of its public offer.

Despite receiving the demanded written apology from Plaintiffs for slighting him in an email, the Special Master took not a single step to help the plight of Plaintiffs.

ARGUMENT

E. The Special Master Has Exceeded the Scope of His Authority by Using Pressure Tactics to Force Plaintiffs to Accept Argentina's Settlement Proposal

The Special Master has blatantly overstepped his authority by improperly giving his blessing and support to Argentina's one-sided and unilateral settlement proposal. The Special Master's attempts to force the Plaintiffs (and the other Small Bondholders) to accept this offer, both by flatly denying them access to the negotiations and by pressuring the remaining non-settling plaintiffs with his many public statements, contravenes the mandate of his position and requires his removal.

[3] Although the Indicative Ruling technically apples only to the "me too" injunctions, the Court has indicated that, if it "lifts the injunctions, it will do so in all cases." No. 11-cv-4908, D.E. 47 at 19 (S.D.N.Y. Feb. 19, 2016).

1. The Special Master's Conduct Requires His Removal

The scope of authority of a special master is limited not only by the order of appointment, but also by the power of the court itself. *See Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 319 (3d Cir. 1944). That is, a special master's authority is limited to "operat[ing] as an arm of the court," and he "has no wider scope of activity than the court itself. If the court is limited in its judicial duties, . . . the master's function can go no further than to aid in the court's discharge of its duties." *Id.*; *see also Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (noting that absent express consent by all parties to the contrary, "the district court must confine itself (and its agents) to its accustomed judicial role").

The law in this district is clear: courts and, by extension, special masters cannot force parties to settle, nor can they pressure a party to accept any particular settlement proposal. Indeed, the Court has recognized this principle on many occasions, most recently in its Indicative Ruling: "Of course, the court does not have the power to force plaintiffs to accept a settlement." No. 11-cv-4908, D.E. 47 (S.D.N.Y. Feb. 19, 2016); *see also* Ex. 13 at 25:10-13, 29:3 (10/28/2015 Hearing Tr.) (noting that "[t]here are limitations" on the court's authority and that it cannot "coerc[e]" or "order a settlement").

Yet, forcing Plaintiffs (and the other Small Bondholders) to accept Argentina's settlement proposal is exactly what the Special Master's denial of access to the negotiations and calculated public statements are intended to accomplish.

It is well-settled that courts "cannot force a party to settle, nor may it invoke 'pressure tactics' designed to coerce a settlement." *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 382 (S.D.N.Y. 2011); *see also Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985). The law "disfavor[s] all pressure tactics whether directly or obliquely, to coerce settlement by litigants

and their counsel." *Kothe*, 771 F.2d at 669 (quoting *Wolff v. Laverne, Inc.*, 17 A.D.2d 213, 233 (N.Y. 1962)). Indeed, "pressure tactics to coerce settlement simply are not permissible," and courts "must not compel agreement by arbitrary use of his power." *Id.* (internal quotation marks omitted). Parties to litigation must be free to exercise their own volition in deciding whether or not to accept a settlement proposal; they should not be pushed to accept an offer, whether directly or indirectly, "simply because the court wanted him to [accept]." *Id.*

Despite the clear prohibition on using "pressure tactics" to coerce a party to accept a settlement proposal, the Special Master has done just that. First, he effectively froze Plaintiffs (and the other Small Bondholders) out of the settlement process altogether by refusing to allow them to participate in negotiations. As the Court recognized in its Indicative Ruling, it cannot "force plaintiffs to accept a settlement." No. 11-cv-4908, D.E. 47 (S.D.N.Y. Feb. 19, 2016). The court defended its actions—*i.e.*, that it was not forcing a settlement on the plaintiffs—by noting that Argentina had met and discussed its proposal with representatives of certain plaintiffs and the Special Master. *Id.* But Plaintiffs (and other Small Bondholders) were purposefully and explicitly excluded from these negotiations, thereby ensuring that there was no opportunity for them to represent their interests and leaving them with a coercive take-it-or-leave it offer as enforced by the Court and the Special Master. Second, the Special Master has continuously exerted pressure on the remaining plaintiffs to accept Argentina's settlement proposals through his many public statements and endorsement of Argentina's position. These pressure tactics run counter to well-settled law and warrant the Special Master's removal.

2. The Special Master Has Violated the Governing Codes of Conduct

Special masters are subject to several codes of conduct and limits on their authority. First, the Code of Conduct for United States Judges ("Judicial Code") ***explicitly*** applies to

special masters. *See* Judicial Code, Introduction; *see also United States v. Apple Inc.*, 787 F.3d 131 (2d Cir. 2015) (noting that the "ethical limitations" of the Judicial code applied to monitor appointed pursuant to Rule 53). Second, the ABA's Model Standards of Conduct for Mediators ("Mediator Standards") apply to "persons mediating in all practice contexts" (Mediator Standards, Preamble)—the role in which this Special Master currently serves—and the Southern District of New York has expressly adopted the Mediator Standards for its mediation program. *See* SDNY, Procedures of the Mediation Program § 13. Finally, the Federal Rules provide that the rules governing the impartiality of federal judges also apply to special masters. Fed. R. Civ. P. 53(a)(2).

The relevant codes of conduct require the same outcome as the case law in this district: special masters cannot force or coerce the parties into a settlement. *See* Judicial Code, Commentary, Canon 3(A)(4) (special master "should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts"); Mediator Standards § I.A (mediator should conduct proceedings "based on the principle of party self-determination"). Indeed, parties to settlement negotiations must be able to "exercise self-determination at any stage" over issues such as "process design" and "outcomes." Mediator Standards § I.B. Special masters are also required to conduct proceedings in a manner that will "dispose of [them] promptly, efficiently, and fairly" and "without unnecessary cost or delay," Judicial Code, Commentary, Canon 3A(5), and they must "promote[] … [the] *presence of the appropriate participants, party participation*, [and]procedural fairness," Model Standards § VI.A (emphasis added).

The Special Master's refusal to include Plaintiffs (and other Small Bondholders) in the settlement process and his public support for Argentina's position violate these codes of conduct.

By shutting these parites out of the negotiations altogether, the Special Master has completely undermined the Plaintiffs' (and the other Small Bondholders') rights to self-determination (not to mention party participation), and his public endorsement of Argentina's position is a coercive attempt to force Plaintiffs (and the other Small Bondholders) to accept Argentina's unilateral settlement proposal. Finally, the Special Master's demand for a written apology from Plaintiffs as a precondition even to acknowledging their existence is, frankly put, among the most arbitrary and capricious acts that a Special Master could take, especially under these extraordinary circumstances.

These are clear violations of the Judicial Code and Model Mediator Standards, which justify the Special Master's removal. *See CEATS, Inc. v. Cont'l Airlines, Inc.*, 755 F.3d 1356, 1362 (Fed. Cir. 2014); *Jenkins v. Sterlacci*, 849 F.2d 627, 630 (D.C. Cir. 1988).

F. The Order Appointing the Special Master Is Unlawful

District courts unquestionably have the authority to appoint special masters when the circumstances of a case call for it, but, like any judicial act, they must do so in compliance with the relevant rules. Federal Rule of Civil Procedure 53 authorizes and governs the appointment of a special master by a district court, and if such an appointment is made then "the limitations which Rule 53 places upon such references must be observed." *Piper v. Hauck*, 532 F.2d 1016, 1019 (5th Cir. 1976); *see also Bullard Co. v. Gen. Elec. Co.*, 348 F.2d 985, 990 (4th Cir. 1965) (holding that "[i]f it is a genuine reference" of a case to a special master, then Rule 53 "should be strictly followed"). The order appointing a special master must comply with the requirements of Rule 53; not even "substantial[] compli[ance]" is enough. *Glover v. Udren*, No. 08-cv-990, 2011 WL 5445232, at *2 (W.D. Pa. Nov. 9, 2011) ("[A]lthough the referral order substantially

complies with Rule 53, it should be amended to include the more detailed requirements set forth in Rule 53(b).").

The order appointing the Special Master expressly disclaims the requirements of Rule 53 and states that "compliance therewith shall not be required." No. 08-cv-6978, D.E. 530 at 1 (June 23, 2014). In an attempt to justify this wholesale disregard of the Federal Rules of Civil Procedure, the Court noted that compliance with Rule 53 was not needed "in view of the limited scope of this appointment." *Id.* at 2. But Rule 53 nowhere contains a carve-out for "limited" roles, and the law requires that the Rule's requirements be "strictly followed." *Bullard*, 348 F.2d at 990. In fact, the Rule states that "[t]he court may issue the order *only after*" the special master has filed an affidavit disclosing any potential conflicts of interest under 28 U.S.C. § 455. Fed. R. Civ. P. 53(b)(3) (emphasis added). This requirement for the issuance of the order of appointment was not met—and, in fact, explicitly disregarded by the Court—and so an express condition precedent to the order was never satisfied.

The order appointing the Special Master, therefore, is unlawful and invalid.

G. The Special Master's Conduct Requires His Disqualification

Special masters are subject to the same statutory rules that govern the disqualification of federal judges. The United States Code provides that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455(b) enumerates additional circumstances in which a judge "shall also disqualify himself"—for example, if "he has a personal bias or prejudice concerning a party" or has an "interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b). Federal Rule of Civil Procedure 53(a)(2), in turn, provides that Section 455 applies to special masters. Fed. R. Civ. P. 53(a)(2).

1. The Special Master's Conduct Has Created the Appearance of Partiality

Section 455(a) requires disqualification when there is "an appearance of partiality, even though actual partiality has not been shown." *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir. 2003). Indeed, "what matters is not the reality of bias or prejudice but its *appearance*." *Liteky v. United States*, 510 U.S. 540, 548 (1994). This "appearance" or partiality is judged from the perspective of a "reasonable person," so disqualification is required if a "reasonable person, knowing all the circumstances" would have questioned the judicial officer's partiality. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988).

Public statements regarding an ongoing case, including statements regarding settlement discussions and offers, can create such an appearance of partiality. *See United States v. Pfizer Inc.*, 560 F.2d 319, 322 (8th Cir. 1977). Indeed, comments touching on the merits of a case, including in the context of settlement negotiations, "may well leave an impression of prejudgment and bias." *Id.* This is especially true where the judge or judicial official "play[s] an active and aggressive role in settlement negotiations." *Id.*; *see also First Wisconsin Nat'l Bank of Rice Lake v. Klapmeier*, 526 F.2d 77, 80 n.6 (8th Cir. 1975) (noting that judicial official "should avoid recommending an actual settlement figure before or during trial"). This circuit has counseled that court-appointed judicial officers should not take sides or advocate in any way for one side in a case. *See Apple*, 787 F.3d at 138 (noting that it was "certainly remarkable that an arm of the court would litigate on the side of a party").

There is no question that the Special Master's public statements and endorsements of Argentina's settlement proposals have created an objective appearance of a lack of impartiality. Even if he is not actually biased against Plaintiffs (or the other Small Bondholders), describing Argentina's unilateral and one-sided settlement proposal as "an historic breakthrough" and

praising Argentina for showing "courage and flexibility" reasonably calls into question his impartiality; an objective reader of these statements could conclude that the Special Master has pre-judged the issue in favor of Argentina and is subtly trying to force Plaintiffs (or the other Small Bondholders) to accept the settlement proposal. This is especially true since the Special Master has actively prevented Plaintiffs (and the other Small Bondholders) from participating in the settlement discussions, such that the only settlement proposal available to them is the one publicly announced by Argentina and endorsed by the Special Master the same day. (Perhaps this is the reason he took personal umbrage at the email from Plaintiffs seeking his assistance). In the end, it is ultimately immaterial whether the Special Master actually is biased against Plaintiffs or whether Plaintiffs claims were adversely affected by his conduct; it is the mere existence of the appearance of partiality that warrants disqualification under the law. *See Liteky*, 510 U.S. at 548.[4]

In any event, it is beyond question that the Special Master's conduct has surpassed the threshold of creating an "appearance" of partiality; he has demonstrated *actual* partiality against Plaintiffs. The Special Master's cavalier and indifferent attitude in his response to Plaintiffs' March 9, 2016 email, Hart Dec. Ex. 19 (written by a frustrated investor who speaks English as a second language) speaks volumes. The Special Master has completely ignored Plaintiffs needs in order to cater to the large institutional investors. But every plaintiff, no matter how big or small, deserves to have its claims adjudicated fairly and promptly. The Special Master has

[4] Disqualification based on the Special Master's appearance of partiality is also grounds for disqualification under the relevant codes of conduct. *See Jenkins*, 849 F.2d at 631. The Judicial Code, for example, is "designed to achieve" the "prophylactic protection against bias on the part of '[a]ny one . . . performing judicial functions,' expressly including special masters." *Id.* "The court's interest in the administration of justice, and the public's confidence in the fairness of our judicial system," require that special masters be held to the same standard as judges and that their disqualification be required where there is an appearance of partiality. *Id.*

effectively created a sub-class of plaintiffs, apparently assuming that they would all fall in line and accept Argentina's unilateral settlement proposal after he has overseen the negotiations with the larger institutional investors.

This conduct demonstrates actual bias against the Small Bondholders and is a basis for the Special Master's disqualification.

2. The Special Master's Interests Will Be Substantially Affected by a Quick Settlement

Section 455(b) requires recusal when the judge has "any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Courts have held that a "remote, contingent benefit . . . is not a 'financial interest' within the meaning of the statute. It is an 'other interest,' requiring disqualification under a 'substantially affected' test." *In re New Mexico Nat. Gas Antitrust Litig.*, 620 F.2d 794, 796 (10th Cir. 1980); *accord In re Virginia Elec. & Power Co.*, 539 F.2d 357, 367-68 (4th Cir. 1976). "Whether such an interest is disqualifying depends upon 'the remoteness of the interest and its extent or degree.'" *In re Beard*, 811 F.2d 818, 831 (4th Cir. 1987) (quoting Virginia Elect., 539 F.2d at 368); *accord In re Moody*, 755 F.3d 891, 897 (11th Cir. 2014).

In this context, courts have held that a firm's receipt of revenue as a result of the outcome of a case can be a sufficient interest to trigger the disqualification requirement Section 455(b)(4). *See Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1113-14 (5th Cir. 1980). In *Potashnick*, the court held that disqualification was required because the firm of the judge's relative represented a party to the case; it reasoned that the outcome of the case might have a tangible financial impact, and that "a win or loss in any lawsuit could affect a partner's *interest in his firm's reputation, its relationship with its clients, and its ability to attract new clients*." *Id.* (emphasis added); *see also* Wright et al., Fed. Prac. & Proc. § 3547 ("If a judge, or a corporation

in which the judge owns stock, has a business relation with a party to a case, disqualification [under 455(b)] will turn on whether that business relation will be affected by the case." (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968)).

The Special Master stands to gain much if all the plaintiffs in these cases accept Argentina's settlement proposal on its accelerated timeline. He has spent much of his legal career working for major financial institutions that would be among the biggest beneficiaries of a swift resolution of the debt dispute. A search of federal court dockets indicates that the Special Master's most important clients are prominent investment funds with extensive international investments, including in Argentina. For example, the Special Master has represented T. Rowe Price in federal court on at least eleven occasions, Franklin Templeton on at least 20 occasions, and was the attorney of record for Invesco and AIM in twenty-four cases between 1996 and 2007.[5] Similarly, the Special Master's firm biography boasts of his representation of many of the largest hedge funds and institutional investors, including Goldman Sachs, J.W. Seligman, and Wells Fargo. *See* Ex. 14 (Biography of Daniel A. Pollack).

The Special Master's clients have a long history of operations in Argentina, and reports from both the media and the funds themselves indicate that they are preparing to initiate a major increase in Argentine investments following the debt settlement over which the Special Master has been exercising control. For example, it was publicly reported that clients of the Special Master are leading a charge by major money managers back into Argentine debt, an asset whose value will spike almost immediately after the finalization of a deal with plaintiffs. *See* Ex. 15

[5] *See, e.g.*, *Parthasarathy v. T. Rowe Price Int'l Funds, Inc.*, No. 06-cv-943 (S.D. Ill.) (T. Rowe Price); *In re Marsh & McLennan Cos., Inc., Secs. Litig.*, No. 06-md-1744 (S.D.N.Y.) (Marsh & McLennan); *Kwiatkowski v. Templeton Growth Fund Inc.*, No. 05-cv-299 (S.D. Ill.) (Franklin Templeton); *Boyce v. AIM Mgmt. Grp. Inc.*, No. 04-cv-989 (D. Colo.) (AIM Management Group).

(Katia Porzecanski, *Hedge Funds Suddenly Find Real Money Is Back in Argentina's Debt*, Bloomberg (Aug. 25, 2015)).

Moreover, clients of the Special Master have already demonstrated their willingness and intent to take advantage of Argentina's re-entry into the international financial system. HSBC and Deutsche Bank, for example, joined several other large financial institutions and agreed to provide Argentina with approximately $5 billion in loans shortly after President Macri's election. *See* Ex. 16 (The Business Times, *Argentina agrees to borrow US$5 billion from Wall Street Banks* (Jan. 30, 2016)). Similarly, Deutsche Bank assisted Argentina with its issuing of about $1.4 billion in bonds in April 2015. *See* Ex. 17 (Bob Van Boris, *Deutsche Bank Claims NML 'Harassment' Over Argentine Bonds* (July 6, 2015)).

There can be no question that the interests of the Special Master and his clients in this case are both direct and substantial. He and his firm are in a unique position to gain substantial new business, generating substantial fees, if the injunctions are dissolved and Argentina reenters the global capital markets. Indeed, the Special Master's public comment that a quick settlement will "allow Argentina to return to the global financial markets" and "raise much needed capital"—are services his firms biggest clients stand ready to provide. In short, the Special Master's financial interest and legal career remain inseparable from his financial institution clients, and all involved appear to stand to reap the benefits, both reputational and financial, of a quick settlement of Argentina's defaulted debt on the terms it publicly announced.

H. The Special Master Is Violating Plaintiffs' Due Process Rights

District courts have the "inherent authority" to manage the appointment of special masters and mediators, *United States v. Apple Inc.*, 992 F. Supp. 2d 263, 281 (S.D.N.Y. 2014), *aff'd*, 787 F.3d 131 (2d Cir. 2015), and therefore the inherent authority to remove a special

master. *Cf. Burnap v. United States*, 252 U.S. 512, 515 (1920) ("The power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint."). The court must exercise this authority consistent with its duty to ensure the impartiality of the Special Master and the ongoing settlement discussions, and to avoid the appearance that any party is being forced to accept Argentina's settlement proposal.

"[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities," *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), and that directive "is no different when . . . adjudicative functions" are "delegate[d]" to a third party, *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993). This is so because claims of personal bias or a lack of impartiality, or even the mere appearance of bias or partiality, "strike[] at the integrity of the judicial process." *Int'l Business Machines Corp. v. United States*, 618 F.2d 923, 927 (2d Cir. 1980). This concern with appearances emanates from the purpose of Section 455(a), which is to "promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 860.

The Special Master's exclusive control over the course of settlement discussions, coupled with Argentina's take-it-or-leave-it proposal and the impending vacatur of the Court's injunctions, undermines the Plaintiffs' (and the other Small Bondholders') due process rights because they have not been "given a meaningful opportunity to be heard" in the settlement process. *Little v. Streater*, 452 U.S. 1, 5-6 (1981). The Special Master has fundamentally altered the playing field by endorsing the merits of Argentina's settlement proposal while simultaneously ensuring that the Plaintiffs cannot meaningfully contribute to the discourse. This course of action uses pressure tactics to "forc[e] a settlement . . . which is not in that party's best

interest, thereby violating that party's due process rights." *Judicial Authority in the Settlement of Federal Cases*, 42 Wash. & Lee L. Rev. 171, 182 (1985).

CONCLUSION

The Special Master has exceeded the scope of his authority and demonstrated bias in favor of Argentina in the current debt negotiations, and in any event the order appointing him to his position is unlawful because it explicitly exempts him from the requirements of Rule 53. Therefore, the Plaintiffs respectfully request that the Court grant the motion and remove the Special Master from further involvement with these proceedings.

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Respectfully submitted,

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