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## United States Court of Appeals

*for the*

## Second Circuit

AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR PLAINTIFF-APPELLANT ANDRAREX, LTD.**

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## PRELIMINARY STATEMENT

Plaintiff-Appellant Andrarex Ltd. (hereinafter "Andrarex" or "Appellant"), by his attorney, Andrea Boggio, submits this reply brief in response to the brief submitted by the Defendant-Appellee the Republic of Argentina (hereinafter "Appellee" or "Argentina"), and in further support of its appeal.[1]

This appeal involves a large number of parties, many of which have filed well-developed briefs with numerous arguments. In the interest of brevity, this brief focuses narrowly on a single issue—whether Argentina's conduct of the past few weeks as "[s]ignificantly changed" and "have rendered the injunctions inequitable and detrimental to the public interest", SPA-59. The argument is presented from the point of view of Appellant, who, along with other non-settling small bondholders, purchased its bonds at face value and before the default took place.

While it is true that the new Macri administration has been open to negotiations and settlement of bondholders' claims, such negotiations have only involved *some* bondholders. These negotiations have not involved Andrarex, and, as a result, Appellant has not settled.

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[1] Andrarex, Ltd. is the appellant in No. 16-694.

Settlement is certainly a very attractive proposition. After almost eight years of fruitless litigation, with associated costs, fees and expenses, Appellant is interested in pursuing good faith settlements talks, and has, to the extent that Argentina permitted, tried to engage in these talks. If the Injunctions were vacate, whoever, Appellant would be under extreme pressure to unilateral "public offer" terms, which are unfair and, most importantly, less favorable than the terms of the settlement with Lead Plaintiffs.

With regard to Appellant, the conditions that have led the district court to issue the Injunction have *not significantly changed*. No real negotiations have occurred with the Appellant's representatives. In the absence of some real discussions, the district court erred in concluding that the circumstances have changed and that the Injunctions are no longer needed. Appellant is in immediate, ongoing, and direct need for continued protection of the Equal Treatment Injunctions.

**A. Appellant is a Good Faith Investor**

Appellant is small bondholder that purchased Argentine bonds issued under the 1994 Fiscal Agency Agreement, at face value, before Argentina's default. The value of Andrarex's claim, including principal and interest, as of October 1, 2018, was $5,276,390. Post-judgment interests must be added

since then. As a good faith small investor, Appellant did not speculate on Argentina's default but purchased Argentina bonds in the hope of earning the proper return on investment that stable and reliable financial markets ordinarily generate.

### B. Appellant Obtains a Judgment but Argentina's Refusal to Pay

In 2008, Appellant obtained a judgment that Argentina consented to and never appealed. This judgment created a vested right in the creditor. Even though it consented to the judgment, Argentina has refused to pay Appellant and has resisted enforcement efforts. Because those legal remedies were unavailing, Appellant was forced to engage in almost 8 years of post-judgment litigation with additional costs and legal fees as well as it missed the opportunity to reinvest the money and earn proper market returns for the amounts liquidated in the judgment. As part of litigation efforts, Appellant obtained Equal Treatment Injunctions in 2012 and 2015.

### C. Argentina's "Public" Offer

On February 5, Argentina unilaterally released a non-negotiated public offer on its finance ministry website. A645-649; *see also* A1617-1636 (subscription materials). A "standard" offer, available to all defaulted bondholders, would pay 150% of the original principal (face) amount of the bonds. A "pari passu" offer, only available to bondholders who had obtained

Equal Treatment Injunctions, would pay 70% of the money judgment amount (for judgment holders) or 70% of the accrued value of the claims (for pre-judgment claims) (the latter offers were at 72.5% for bondholders who accepted by February 19). This public offer was also conditioned on repeal of the Lock Law and Sovereign Payment Law and approval of Congress, and on vacatur of the Injunctions. The offer provided assurances of actual payment several months later, if the conditions were satisfied, for bondholders who accepted by February 29. The structure and financial terms of the offer were defined unilaterally by Argentina and did not represent any negotiations with anyone.

Upon Argentina's request, Argentina Br. at 13, Judge Griesa issued a Rule 62.1 Indicative Ruling on Friday, February 19, without hearing argument. The Order indicates the district court would vacate the Equal Treatment Injunctions in certain actions once they were remanded from a pending appeal, and planned to do the same in "all cases." A2329 at A2359; SPA35.

**D. Argentina Negotiated Settlements with Other Bondholders**

At the same time the litigation process was unfolding, Argentina conducted extensive negotiations with other bondholders. Negotiations have led to various settlements.

The most prominent settlement is the one reached with "Lead Plaintiffs." On February 29, 2016, under the supervision of the Special Master, the Republic reached an agreement in principle with the largest bondholders and primary proponents of this longstanding litigation, including NML, Aurelius, Olifant and Blue Angel, to resolve their claims for approximately $4.653 billion (the "NML Agreement"). (No. 08 Civ. 6978 (TPG), Doc. 913.) The NML Agreement represents "about 65% of the claims at issue in this litigation." (Aurelius Br. at 1.) That agreement followed weeks of intense negotiations, including extensive communication between the Special Master and the Chairman of NML, Paul Singer. (A-1920-21.)

In the following days, Argentina reached settlements with more plaintiffs for consideration of approximately $6.2 billion. (A-1939.) Those settlements "resolv[e] over 85% of the claims of those with 'pari passu' and 'me-too' Injunctions." (A-1921; see also A-2327.) Some of these settlements were also reached at terms that are more beneficial to settling bondholders than the terms of the public offer.

### E. Settlements with Other Bondholders are at Terms More Beneficial to Bondholders than the Public Offer

The agreement in principle with Lead Plaintiffs and some of the other settlements present terms that are *more beneficial* to settling bondholders

than the terms offered in the public offer. Settling bondholders were in fact able to negotiate better terms that 30% "haircut" offered to judgment holders. For instance, some settlement agreements have smaller "haircuts," some include legal fees.

This is now clearly admitted by Argentina in its brief where it states that "those agreements and related settlements have not been identical." Argentina Br. at 55. Argentina further admits that:

> Parties are free to negotiate whatever settlement terms they find acceptable and one party's acceptance of specific terms does not prejudice other FAA bondholders. Every FAA bondholder is free to accept the general proposal or separately negotiate with the Republic, which has been authorized by Congress to continue negotiating without the limits imposed by the Lock Law. Argentina Br. at 55-56.

**F. The absence of real negotiations between Appellant and Argentina**

While some bondholders were able to negotiate with Argentina and reach agreements that are more beneficial than the public offer, while Argentina claims that any bondholder is "free to negotiate whatever settlement terms they find acceptable," Argentina Br. at 55, Appellant has not been able to engage in such negotiations. Appellant had limited exchanges with Argentina's officials but these exchanges never amounted a "negotiation" talks. All communications with Argentina in the aftermath of

the February 5 public offer were on a "take it or leave it" basis. Appellant was expected to fill out the form attached to the public offer with the amount expressed in the offer itself. This is the "negotiation" that Argentina engaged in and that now is expecting this Court to find "substantial."

Rather than "accepting" the terms of the public offer, Appellant made three counter-offers for higher amounts in consideration of the fact that it was becoming clear that some bondholders were able to obtain more favorable settlements.

Argentina rejected two on the basis that Argentina could not treat bondholders differently. The third court-offer, communicated on March 18, in the course of this appeal, has not even been acknowledged.

## ARGUMENT

As argued in the opening brief, the District Court abused its discretion, made clearly erroneous factual findings, and committed legal error in vacating the Equal Treatment Injunctions as to the Individual Bondholders. There is no factual basis for the statements by the District Court that Argentina has negotiated in good faith with bondholders. The factual record, including Argentina's statements in its reply brief, demonstrates the opposite that Argentina has negotiated with *some* bondholders but not *all* bondholder. Appellant is one of the excluded bondholders despite

Appellant's attempts to engage in negotiations. Contrary to the factual finding of the district court, Argentina has refused to negotiate in good faith with Appellant. As a result, the District Court should not and cannot properly base its decision to vacate the Injunctions on a factual supposition about negotiations that is unsupported and untrue. The fact that settlements were reached in many cases does not support depriving Appellant of its Injunction. The settlements only accentuate that the present situation is inequitable. If the injunctions are vacate, inequity will become permanent.

### A. The District Court Committed Clear Error In Concluding That "Changed Circumstances" Support Vacating The Injunctions

As Appellant established in its Opening Brief, the District Court made significant factual errors in determining that circumstances have changed so "dramatically" that the permanent Injunctions it fashioned are no longer necessary. See App. Br. at 21-23. In its response, Argentina points specially to the "factual" findings in the March 2 Order that Argentina has shown a "good-faith willingness" to negotiate with bondholders. Argentina Br. at 32-38. This "finding" find no support in the record and, in any event, given the original bases for the issuance of the Injunctions, it does not rise to the "exceptional circumstances" required for the "extraordinary judicial relief" of dissolving a permanent injunction under F.R.C.P. 60(b). See App. Br. at

32 (citing *Motorola Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009); *Sierra Club v. U.S. Army Corps of Eng'rs*, 732 F.2d 253, 256 (2d Cir. 1984)).

The Indicative Ruling stated:

> The Republic's high-level officials met with the Special Master and a group of plaintiffs in January 2016 to establish a framework for substantive talks. And, through the first week of February, the Special Master convened a series of meetings in New York. As the Special Master continually informed the court, he communicated intensively with the Republic's officials and the plaintiffs' lead principals on a virtually daily basis. The Republic's senior officials met with a substantial number of plaintiffs as a group, and also spoke separately with a number of those plaintiffs who sought private dialogue with the Republic.

Op. 14, A-2354. The District Court also stated:

> The court notes … that the Republic and the Special Master worked diligently to give plaintiffs the opportunity to negotiate and settle their claims.

Op. 22, A2362.

This account, however, only pertains to the Lead Plaintiffs. They were the only one who could engage in meaningful negotiations with Argentina, and indeed reach a settlement. Argentina may have well "good-faith willingness to negotiate with the holdouts" (Op. 13, A2353). But this was only directed to *certain* bondholders. Appellant is not among them. Counsel for numerous plaintiffs made that same point at the hurried, March 1, 2016

hearing before the District Court. Not one shred of evidence was offered to refute such claims.

Argentina failed to meaningfully negotiate with many bondholders (including Appellant) at any time prior to its arbitrary February 29, 2016 cut-off. *See* A-5873. Argentina's only real response is the assertion that it was impractical to negotiate "with every single plaintiff one-on-one." Argentina Br. at 34. It does not argue why denying an opportunity for meaningful settlement negotiations with some bondholders is fair. To the contrary, it seems very arbitrary and unfair, especially considering that Appellant is a good faith that secure a non-contested judgment in 2008 and was offered, on a "take it or leave it" basis an amount substantially lower that what Appellant is entitled to recover.

Argentina's *admission* that it failed to negotiate with all bondholders shines an equally troubling spotlight on the District Court's "finding" that multiple plaintiffs' claims regarding their lack of meaningful settlement negotiations were "exaggerated." *See* SPA-82. As discussed above, such finding had absolutely no support in the record and was contrary to the representations of multiple counsel at the March 1, 2016 hearing. *Compare* SPA-82 *with* A-2264- 2268 and A-2300-2301 (3/1/16 Hr'g Tr.) (Paskin). Argentina's explanation for the "finding" of "exaggera[tion]" is the

remarkable assertion that the District Court received *ex parte* "reports by the Special Master" that Appellants have never had the opportunity to either hear, see, or refute (and we do not understand Argentina's apparent access to them if they, in fact, occurred). Argentina Br. at 34.

The Court's factual assertions about the negotiations, and the statement that "the Republic has shown a good-faith willingness to negotiate with the holdouts," (Op. 13, A2353), are clearly erroneous with respect to Appellant. Those findings were so integral to the District Court's thinking that they infected the entire vacatur decision as to these bondholders.

### B. The District Court Committed Clear Error in Concluding That The Public Interest Weights In Favor of Lifting The Pari PAssu Injunctions

As Appellant has also demonstrated, App. Br. at 25-26, the March 2 Order contravenes the public interest, and the District Court erred in concluding to the litigation who already have received *billions of dollars* in payments in violation of the *pari passu* clause, after they accepted the Exchange Bonds while well aware of the risks – outweigh the interests of Appellant and other bondholders who have not been afforded equitable treatment by Argentina. Argentina's claim that the Exchange Bondholders have "not been able to receive payment for nearly two years as a result of the Injunctions" (Argentina Br. at 14) is a blatant misstatement: contrary by

focusing on the interests of Argentina and third parties to the exclusion of the interests of plaintiffs. The District Court also erred by failing to consider the "critical" public interest of New York, as a world financial center, in requiring debtors such as Argentina to meet their contractual obligations. *See NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013) (*NML II*).

The Injunctions were the driving force behind Argentina's willingness to engage in settlement negotiations with certain FAA bondholders. App. Br. at 23. And, by prematurely vacating the Injunctions, the public interest will be *undermined* by eliminating Argentina's incentive to negotiate settlements, to treat similarly situated bondholders equally, to honor its settlement agreements, and to respect the judgments of the U.S. courts to whose jurisdiction Argentina consented in the FAA. Thus, reversing the March 2 Order will serve the public interest by holding Argentina to the contractual terms that it freely bargained for and will facilitate a just resolution of this dispute.

Argentina argues, however, that vacating the Injunctions serves the public interest by removing the negative effects they have on third parties, including, "most notably[,] . . . the Exchange Bondholders." Argentina Br. at 46; *see also* U.S. *Amicus* Br. at 14. But, Argentina and its *amici* (like the

District Court) have not explained why the interests of other creditors – including non-parties to this  nothing prevented Argentina from paying the Exchange Bondholders as long as it made ratable payments on the FAA bonds. Argentina just was unwilling to do so. That is certainly not a posture that should make it welcome in a court of equity. Argentina also claims that the "Injunctions are . . . no longer needed to bring [it] to the bargaining table." Argentina Br. at 39. However, elsewhere in its brief, Argentina repeatedly cops to its all-too-familiar history of "extraordinary intransigence" in refusing to even engage with bondholders, let alone pay them the interest and principal amounts they are owed or to respect money judgments entered by American courts. *Id.* at 26, 33, 39. Argentina's conduct after the Indicative Ruling and the March 2 Order show that court orders are exactly what is necessary to bring it to the table and to behave equitable, and that when such orders are vacated, Argentina's good faith vacates as well. Argentina's behavior shows that vacating the Injunctions would chill, if not freeze, any future settlement negotiations and leave Appellants with either enforceable settlements (the acceptances tendered on or prior to February 29, 2016) or ultimate money judgments, all of which Argentina will ignore. Thus, affirming the March 2 Order would unjustly elevate the interests of Argentina and the Exchange Bondholders over the

interests of Appellants and other FAA bondholders. The public interest cannot support such a result. Argentina and the U.S. also argue that the District Court correctly found that the public interest favors lifting the Injunctions to help Argentina "stimulate its economy and thus benefit its people." Argentina Br. at 46; *see also* U.S. *Amicus* Br. At 14-16 (same). While Appellant recognizes that Argentina wants to return to the global capital markets and begin restoring its economy, Argentina has not shown that the March 2 Order is the missing piece that will solve this complex puzzle – especially given the substantial political opposition within Argentina that even Argentina is forced to acknowledge. Argentina Br. at 43. Further, Argentina completely ignores the interests of New York (a jurisdiction to which Argentina voluntarily submitted in the FAA, and, according to published reports, seeks to use for future capital raises) in requiring debtors to meet their contractual obligations, which is "essential to the integrity of the capital markets." *NML II*, 727 F.3d at 248; App. Br. at 23-25.

Argentina also argues that the March 2 Order serves the public interest because it will encourage the settlement of this litigation. Arg. Br. at 46-47. While there is no dispute that the public interest generally favors settlements, it cannot and does not favor vacating the Injunctions given the

circumstances here because of Argentina's failure to engage with many plaintiffs and its outrageous efforts to renege on acceptances of its Unilateral Settlement Offer. Given those facts, affirming the March 2 Order would impede, rather than facilitate, a full and fair resolution of this dispute.

## CONCLUSION

For all the foregoing reasons, as well as those set forth in Appellant's opening brief, this Court should vacate the March 2 Order is its entirety and should remand the cases to the district court with instructions that the Injunctions not be lifted until (i) disputes concerning Argentina's compliance with the conditions precedent have been fully adjudicated, including providing Appellant with an opportunity to establish that Argentina must pay them under their respective settlements, and (ii) any non-settling plaintiff has had a full and fair opportunity to engage in settlement discussions with Argentina, and should provide that any subsequent order of the district court be stayed pending further appeals.

New York, New York
March 25, 2016

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I hereby certify that this brief contains 3,105 words, in compliance with the type-volume limitations of Rule 32(a)(7)(B). This brief uses a proportionally spaced typeface, Times New Roman, and the size of the typeface is 14 points, in compliance with Rules 32(a)(5)(A) and (a)(6).

/s/ *Andrea Boggio*
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