16-0628-cv(L),

16-0674-cv(CON), 16-0677-cv(CON), 16-0681-cv(CON), 16-0682-cv(CON), 16-0683-cv(CON), 16-0684-cv(CON), 16-0686-cv(CON), 16-0687-cv(CON), 16-0688-cv(CON), 16-0690-cv(CON), 16-0691-cv(CON), 16-0695-cv(CON), 16-0696-cv(CON), 16-0697-cv(CON), 16-0698-cv(CON)

United States Court of Appeals
for the
Second Circuit

AURELIUS CAPITAL MASTER, LTD., *et al.*,

Plaintiffs-Appellants,

– against –

REPUBLIC OF ARGENTINA,

Defendant-Appellee.

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

JOINT REPLY BRIEF FOR PLAINTIFFS-APPELLANTS ARAG-A LIMITED, ARAG-O LIMITED, ARAG-T LIMITED,

(Parties Continued on Inside of Cover)

DUANE MORRIS LLP
Attorneys for the following Plaintiffs-Appellants: ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, Claridae Ltd., Maria Del Pilar De We Ferrer, MCHA Holdings, LLC, Stonehill Institutional Partners, L.P., Stonehill Master Fund Ltd., Trinity Investments Limited, and White Hawthorne, LLC, as well as Interested Plaintiffs Honero Fund I, LLC, White Hawthorne II, LLC, and Yellow Crane Holdings, LLC
1540 Broadway
New York, New York 10036
(212) 692-1000

WEIL, GOTSHAL & MANGES LLP
Attorneys for Plaintiffs-Appellants ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, MCHA Holdings, LLC, Trinity Investments Limited, and White Hawthorne, LLC, as well as Interested Plaintiffs Honero Fund I, LLC, White Hawthorne II, LLC, and Yellow Crane Holdings, LLC
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

ARAG-V LIMITED, ATTESTOR VALUE MASTER FUND, BYBROOK CAPITAL HAZELTON MASTER FUND LP, BYBROOK CAPITAL MASTER FUND LP, CLARIDAE LTD., MARIA DEL PILAR DE WE FERRER, MCHA HOLDINGS, LLC, STONEHILL INSTITUTIONAL PARTNERS, LP, STONEHILL MASTER FUND LTD., TRINITY INVESTMENTS LIMITED AND WHITE HAWTHORNE, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. THE MARCH 2 ORDER SHOULD BE REVERSED 4

A. The District Court Committed Clear Error Because Lifting The Injunctions Would Violate The *Pari Passu* Clause And Deprive Appellants Of Any Remedy 4

1. Equitable Relief Remains Necessary Because Argentina's Inequitable Conduct Has Not Ceased 6

2. Equitable Relief Remains Necessary Because Argentina Will Resume Violating The *Pari Passu* Clause In The Absence Of The Injunctions 9

B. The District Court Committed Clear Error In Concluding That "Changed Circumstances" Support Vacating The Injunctions 12

1. Argentina Has Not Meaningfully Negotiated With Appellants 14

2. Argentina Has Not Removed The Legislative Obstacles To Settlement 17

3. Argentina Has Not Honored Its Settlement Agreements With All Bondholders 19

C. Argentina Does Not Dispute That The Unilateral Settlement Offer Was Coercive And Materially Misleading In Violation Of The Antifraud Provisions Of The Federal Securities Laws 23

II. THE DISTRICT COURT COMMITTED CLEAR ERROR IN CONCLUDING THAT THE PUBLIC INTEREST WEIGHS IN FAVOR OF LIFTING THE *PARI PASSU* INJUNCTIONS 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Educ. v. Oklahoma Pub. Sch. v. Dowell,
498 U.S. 237 (1991).....18

Hanson Trust PLC v. SCM Corp.,
774 F.2d 47 (2d Cir. 1985) 24

Motorola Corp. v. Uzan,
561 F.3d 123 (2d Cir. 2009) 13

NML Capital, Ltd. v. Republic of Argentina,
699 F.3d 246 (2d Cir. 2012) .....*passim*

NML Capital, Ltd. v. Republic of Argentina,
727 F.3d 230 (2d Cir. 2013) .....*passim*

Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.,
324 U.S. 806 (1945).....25

Sierra Club v. U.S. Army Corps of Eng'rs,
732 F.2d 253 (2d Cir. 1984) 13, 18

Statutes

15 U.S.C. § 78j(b) 24

Other Authorities

17 C.F.R. § 240.10b-5.....24

Fed. R. Civ. P. 60(b) 13, 18

PRELIMINARY STATEMENT

The more things change,
the more they remain the same.

Jean-Baptiste Alphonse Karr, 1849

The adage, true over 165 years ago, is certainly applicable to the instant appeal. While Argentina asks this Court to accept, on faith, as did the District Court, that the circumstances that led to the issuance of the Injunctions have changed entirely with the inauguration of President Macri, the record establishes that Argentina is continuing to act as if it has impunity, both in its behavior towards Appellants[1] and in the proceedings before the District Court.

Indeed, among other things, (i) as Judge Raggi has noted, Argentina's penchant for having a "change of heart" is nothing new, as most recently shown by Argentina's efforts to renege, following entry of the Indicative Ruling and the March 2 Order, on settlement offers accepted by Appellants and others; (ii) Argentina seeks to pay some FAA bondholders on differing terms, while stiff-arming others holding the exact same bonds, in direct violation of the FAA's *pari passu* clause that this Court twice has held to be a binding contractual provision; and (iii) the legislation recently passed by one of the two houses of the Argentine

[1] Capitalized terms have the meanings ascribed to them in Appellants' Opening Brief, filed March 14, 2016 ("App. Br."). Since that time, Appellants in the specific action *Adami, et al. v. The Republic of Argentina* have withdrawn their appeal. *See* 16-675-cv, Dkt. 91, Dkt. 106. The withdrawal of the *Adami* appeal does not affect any other Appellant.

Congress is, essentially, "Lock Law II," as it apparently precludes payment to any remaining bondholder other than pursuant to the limiting terms of the Unilateral Settlement Offer. This is not "changed circumstances." This is not a reformation of Argentina's ways. This is more of the same.

Moreover, the manner in which this matter is before this Court carries the taint of railroading and a cram down. *See* App. Br. at 16-27. Despite the Mandate from this Court for a motion to be made to the District Court for entry of its February 19, 2016 Indicative Ruling and for the District Court to provide an "opportunity to be heard" to all objecting parties, one day later Argentina filed a four-sentence letter "motion" in the District Court asking for entry of the Indicative Ruling. Within hours, the District Court set a hearing, not on the standard motion schedule, but for just three business days later, with opposition briefs to be filed by noon one business day before that. Then, at the March 1, 2016 hearing, the parties were rushed through argument, while Argentina presented no new evidence to support the motion other than the Second Supplemental Declaration of Santiago Bausili (A-1922-2025), which Argentina now claims, but apparently has never informed the District Court, was fraught with "mistakes."

At that March 1 hearing, multiple counsel made unrefuted statements that Argentina had negotiated with only a few chosen plaintiffs and had disregarded their respective clients. Indeed, Appellants, holders of over $1.4 billion of valid

claims, were denied a meaningful dialogue. Nevertheless, in its Order issued the following day adopting the Indicative Ruling, the District Court determined, without any record support, that all of these counsel had "exaggerated" Argentina's failure to engage. SPA-82. Even the United States, in its *amicus* brief filed in this Court at Argentina's behest, declined to endorse the procedural aspects that led to the March 2 Order, or Argentina's efforts to walk away from binding settlements. *See* Brief for the United States as *Amicus Curiae* ("U.S. *Amicus* Br."), at 4 n.2 ("Certain of the plaintiffs-appellants have raised various procedural arguments regarding the [March 2] Order. The United States takes no position on those issues").

At bottom, Appellants' position is that the playing field must remain level. For this Court to adopt the clearly erroneous factual findings of the District Court and affirm the March 2 Order is to provide Argentina with the sword it has always sought: the blessing of the U.S. courts to avoid paying its outstanding indebtedness. Argentina's subsequent denouncements of valid settlement agreements suggests what the real effect of vacating the Injunctions would be.

Contrary to the arguments of Argentina and its *amici*, the Injunctions remain firmly in the public interest. They do not impede the payment of the settlement amounts or even payments on the Exchange Bonds; they merely require ratable payments to FAA bondholders consistent with Argentina's contractual obligations

and New York law. Indeed, the Injunctions continue to protect the critical legal principle that "borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, *but they will be held to those terms*." *See NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 248 (2d Cir. 2013) ("*NML II*") (emphasis supplied).

In sum, Argentina has failed to establish any basis for lifting the Injunctions now, and this Court should not be taken in by the "shell game" that is being played; rather, it should adhere to the "law of the case" and reject empty gestures. At a minimum, should this Court affirm, it should be with specific directions that the District Court must hold an evidentiary hearing on any claimed compliance by Argentina with the conditions precedent under the March 2 Order. The District Court will need to address Appellants' assertion that they have binding settlement agreements with Argentina, that Argentina is now disavowing, that must be paid by Argentina.

ARGUMENT

I. THE MARCH 2 ORDER SHOULD BE REVERSED

A. The District Court Committed Clear Error Because Lifting The Injunctions Would Violate The *Pari Passu* Clause And Deprive Appellants Of Any Remedy

Appellants' Opening Brief demonstrated that both the District Court and this Court repeatedly have held that the FAA's *pari passu* clause "bars Argentina from discriminating against plaintiffs' bonds in favor of bonds issued in connection with

the [Exchange Offers] and that Argentina violated that provision by ranking its payment obligations on the defaulted debt below its obligations to the holders of its restructured debt." App. Br. at 13-14 (citing *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 250 (2d Cir. 2012) ("*NML I*")). In addition, the *pari passu* clause requires equal treatment among the FAA bondholders. *See NML II*, 727 F.3d at 241 (the "district court's decision does no more than hold Argentina to its contractual obligation of equal treatment"). As the FAA requires, "the Securities . . . shall at all times rank *pari passu and without any preference among themselves.*" A-482 at § l(c) (emphasis supplied).

Argentina nevertheless still seeks to discriminate among similarly-situated bondholders by offering differing payments based solely on distinctions that have no basis under the FAA and refuses to recognize its settlements with Appellants, likely leaving them, if the injunctions are lifted, with either confirmed settlements following litigation in the District Court or money judgments – in either case, binding court rulings – that Argentina will *never* honor. Argentina almost certainly will resume making payments on the Exchange Bonds and on newly-issued debt, while not paying Appellants, in a renewed violation of the *pari passu* clause, but as to which Appellants will be left with no remedy.

In response, Argentina admits that the reason that the District Court and this Court fashioned and affirmed the Injunctions was because Argentina "engaged in

an 'unprecedented, systematic scheme of making payments on other external indebtedness, after repudiating its payment obligations to Plaintiffs.'" *See* Brief for Defendant-Appellee ("Arg. Br.") at 53 (quoting *NML I*, 699 F.3d at 255-56). Nonetheless, and despite the law of the case, Argentina posits that the Injunctions no longer are necessary for two reasons. *Id.* at 53-56. First, Argentina contends that, *in its own view*, its "extraordinary behavior" has ceased and an injunctive remedy for its "past behavior" is no longer necessary (the "You Should Trust Us Argument"). *Id.* at 54-55. Second, Argentina claims that the Unilateral Settlement Offer did not run afoul of the FAA's *pari passu* clause in the same way that the Exchange Offers did because the Unilateral Settlement Offer does not "subordinate the FAA bonds or relegate them to an inferior class" (the "You Misunderstand Us Argument"). *Id.* at 55. Each of these arguments fails.

1. Equitable Relief Remains Necessary Because Argentina's Inequitable Conduct Has Not Ceased

With respect to Argentina's first point, Appellants already have shown that the record flatly contradicts Argentina's self-serving assessment that it has abandoned its miscreant ways of the past. *See* App. Br. at 36-41. In fact, Argentina's inequitable conduct continues unabated, including through its coercive efforts to steamroll Appellants and other bondholders into cram down settlements on "take-it-or-leave-it" terms and then seeking to renege on the resulting settlements. *Id.* at 16-19. Argentina does not dispute that it has *not* meaningfully

negotiated with all of its bondholders, *id.* at 19, 30, 37, notwithstanding the District Court's own "expect[ation]" that Argentina will "continue to negotiate with the remaining non-settling plaintiffs." SPA-82.

Argentina offers no meaningful response to Appellants' showing that the cram down Unilateral Settlement Offer was *itself inequitable* because it ranked the FAA bondholders into three tiers, to which Argentina would pay differing consideration, rather than treat them all equally, as the FAA requires. *Id.* at 17-19. The Unilateral Settlement Offer – which Argentina's brief fails to reference even once (as discussed below) – sliced and diced bondholders into separate categories based on arbitrary distinctions, such as whether they had obtained injunctive relief by February 1, 2016, or "only" fully briefed motions for such relief that remain pending before the District Court, or had money judgments. *Id.*

Far from showing that Argentina's "behavior requiring a remedy has been ceased" (Arg. Br. at 54), the coercive and rushed process by which Argentina has carried out its Unilateral Settlement Offer and obtained relief from the District Court shows that it has doubled-down on its prior misbehavior. Indeed, the Unilateral Settlement Offer shares much in common with the coercive features of the Exchange Offers – including the forced application of varying discounts; the threat of not otherwise being paid anything by Argentina; the use of extreme time-pressure; and a refusal to individually negotiate. Moreover, the legislation passed

by Argentina's lower house on March 15, 2016, provides that Argentina will apparently make payments to creditors only pursuant to the onerous terms of the Unilateral Settlement Offer and not any others; it also does not address Argentina's refusal to honor money judgments entered by U.S. courts.[2] These are the same circumstances that led the District Court to grant the Injunctions and this Court to affirm them in the first place. *See* App. Br. at 35 (citing *NML I*, 699 F.3d at 259-60; *NML II*, 727 F.3d at 237).

Contrary to Argentina's professed "dramatic" change in attitude, circumstances remain the same as they ever were:

2005 and 2010 Exchange Offers	2016 Unilateral Settlement Offer
Offered creditors fraction of value of bonds on a take-it-or-leave-it basis. Arg. Br. at 5.	**Offered creditors (somewhat higher) fraction of value of bonds/claims on a take-it-or-leave-it basis.** A-645-649.
Violated *Pari Passu* clause. Created unequal treatment between Exchange Bondholders and FAA bondholders. *See NML I*, 699 F.3d at 261.	**Violated *Pari Passu* clause.** Created unequal treatment between bondholders based on artificial factors (*e.g.*, injunction/non-injunction status); will continue unequal treatment with the Exchange Bondholders for FAA bondholders who did not accept, or where Argentina reneges. A-645-649.

[2] *See* http://www.senado.gov.ar/bundles/senadoportal/noticias/PE_01_2016.pdf.

Employed threat of non-payment. Both 2005 and 2010 Prospectuses threatened bondholders with not receiving future payments if they did not tender their bonds. *NML I*, 699 F.3d at 252-53.	**Employed threat of non-payment.** Threatened that protections of the Injunctions and assurance of payment available only to bondholders with whom Argentina reached an agreement in principle. SPA-84.
Coercive use of time pressure. Lock Law passed in the same year as the 2005 exchange, which closed in June 2005. Lock Law only temporarily suspended during the 2010 exchange. *NML I*, 699 F.3d at 252-53.	**Coercive use of time pressure.** Higher settlement amount offered to bondholders who accepted by February 17, 2016. A-646. Protections of the Injunctions and assurance of payment available only to bondholders with whom Argentina reached an agreement in principle by February 29, 2016. SPA-84.
Argentina refuses to meaningfully negotiate apart from offer. Lock Law prohibited any other type of settlement. *NMI I*, 699 F.3d at 252-53.	**Argentina refuses to meaningfully negotiate apart from offer.** Argentina refuses to respond to counter-proposals, fails to meaningfully negotiate with all bondholders, and reneges on counter-signed acceptances. *See* App. Br. at 3, 19.

2. Equitable Relief Remains Necessary Because Argentina Will Resume Violating The *Pari Passu* Clause In The Absence Of The Injunctions

Argentina next essentially argues that the law of the case interpreting the *pari passu* clause should be disregarded because its Unilateral Settlement Offer does not "subordinate the FAA bonds or relegate them to an inferior class," in supposed contrast to the Exchange Bonds, "which constituted a new class of debt functionally senior to the FAA Bonds." Arg. Br. at 54-56. Subordinating the FAA

bonds, however, is *exactly* what Argentina now seeks to do. As the District Court itself recognized, Argentina wants the Injunctions lifted precisely so that it may resume paying Exchange Bondholders in renewed violation of the *pari passu* clause. *See* SPA-115 ("If the Court vacates the injunctions, [Argentina] may once again pay the exchange bondholders").

While Argentina attempts to narrowly frame the lifting of the Injunctions as an "intra-creditor" settlement matter (*see* Arg. Br. at 55), it does not dispute that, if the Injunctions are lifted, it will: (i) continue to "simply refuse to pay any judgments," *see NML I*, 699 F.3d at 262; and (ii) *resume violating* the *pari passu* clause by paying the Exchange Bondholders (who have already received billions of dollars in payments in violation of the *pari passu* clause) and new bondholders without paying the remaining FAA bondholders. Vacating the Injunctions would return any non-settling party to square one – without any remedy. As this Court has recognized, in that event, Appellants "would suffer irreparable harm because [Argentina's] payment obligations to [Appellants] would remain debased of their contractually-guaranteed status, and [Appellants] would never be restored to the position [they were] promised . . . relative to other creditors in the event of default." *Id.* at 255.

Argentina also is incorrect that its "Unilateral Proposal" – as later formalized and superseded by the Unilateral Settlement Offer – should be inoculated from

compliance with the *pari passu* clause solely because it "is an offer to settle claims and judgments." *See* Arg. Br. at 56 n.18. To the contrary, because the Unilateral Settlement Offer facially discriminates among similarly-situated bondholders by offering differing payments based solely on distinctions that have no basis under the FAA and contains terms that were highly coercive (*see* App. Br. at 40-41), it violates the *pari passu* clause as it has been consistently construed throughout this case. By treating similarly situated holders of the *exact same bonds* differently (*i.e.*, by agreeing to pay certain bondholders more than others for identical claims or accepting one claim for settlement while putatively rejecting the same claim by another holder), Argentina is breaching its obligation to treat the FAA bonds "without any preference among themselves" and is relegating certain bondholders (including certain Appellants) to an "inferior class." A-482 at § l(c); *see* App. Br. at 34. That a majority, or even a super-majority, of other bondholders has accepted the coercive terms of the Unilateral Settlement Offer is of no moment: "Argentina has no right to force [the bondholders] to accept a restructuring, even one approved by a super-majority." *NML I*, 699 F.3d at 263 n.15.

Moreover, Argentina distorts the factual record to support its argument that it is "not seeking to subordinate the FAA bonds." Arg. Br. at 55. Argentina claims that: (i) it is "seeking to settle and make payments with respect to all outstanding claims under the FAA bonds"; (ii) it has "been actively negotiating with" all

bondholders; and (iii) that "[e]very FAA bondholder is free to accept the [Unilateral Settlement Offer] or separately negotiate" with Argentina. *Id.*

The record supports none of these three claims. *First*, Argentina is not seeking to "settle and make payments . . . to all outstanding" FAA claimants. Rather, as set forth in detail below, Argentina has declared its intention to *renege* on signed Agreements in Principle with Appellants by introducing a hotly contested statute of limitations defense that was not a condition to its Unilateral Settlement Offer. *Second*, Argentina is not "actively negotiating" with Appellants, despite Appellants' repeated requests that Argentina come to the table. *See* Letter from Appellants' Counsel to the District Court, Civ. No. 16-991 (Mar. 18, 2016) (disputing Argentina's representation that "the parties are also actively engaged in settlement discussions," and clarifying that "Argentina cut-off such discussions" following one "preliminary discussion"). *Third*, Argentina's own brief belies its assertion that "[e]very FAA bondholder is free to . . . separately negotiate with" Argentina. Arg. Br. at 34 ("it was hardly necessary for [Argentina] to meet with every single plaintiff one-on-one"). In sum, Argentina's claim of a conversion to a good-faith obligor is contrary to the record.

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

As Appellants established in their Opening Brief, far from being "firmly supported by the record" (*see* Arg. Br. at 32), as the record is devoid of support,

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 36-42.[3]

In its response, Argentina points to three "factual" findings in the March 2 Order: (i) Argentina has shown a "good-faith willingness" to negotiate with bondholders; (ii) Argentina has "taken meaningful steps" toward repealing the Lock Law and other "legislative obstacles"; and (iii) Argentina has "entered into settlement agreements in principle with the vast majority of plaintiffs." Arg. Br. at 32-38. None of these "findings" finds support in the record. In any event, given the original bases for the issuance of the Injunctions, they do 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)).

[3] While the United States argues that vacatur of the Injunctions is appropriate, its position has not changed from the *last time* the issue was before this Court. Indeed, its brief reiterates the various discredited reasons why it believes the Injunctions "were deeply problematic" in the first place. *See* U.S. *Amicus* Br. at 2-3 n.1.

1. Argentina Has Not Meaningfully Negotiated With Appellants

Not only does Argentina dramatically overstate its efforts to engage in good-faith negotiations with the FAA bondholders, it remarkably contends that there is "no serious dispute" in this regard. Arg. Br. at 23, 33, 35. Appellants' Opening Brief and the record citations therein debunk any such claim. *See, e.g.*, App. Br. at 3 ("[O]nly certain plaintiff bondholders were invited to negotiate meaningfully with Argentina and the District Court's appointed Special Master"); *id.* at 17 ("Argentina did not engage in good-faith negotiations with the vast majority of holders of defaulted FAA bonds"); *id.* at 37 ("Appellants and other bondholders have *not* been the beneficiaries of any such change in behavior"). In fact, counsel for numerous plaintiffs made that same point at the hurried, March 1, 2016 hearing before the District Court.[4] Not one shred of evidence was offered to refute such claims.

Thus, Argentina's reliance on the general platitude that "President Macri's election changed everything" and its focus on its "around-the-clock" negotiations with lead plaintiffs (Arg. Br. at 33) is no answer for Appellants' detailed factual showing that Argentina failed to meaningfully negotiate with many other

[4] *See* A-2272-2308 at 21:6-22:13, 23:8-22, 27:10-28:4, 31:12-24, 34:25-35:25, 38:17-39:23, 41:25-43:5, 44:18-45:18, 52:16-24, 53:10-14, 54:2-18, 54:24-55:6, 55:19-56:24, and 57:6-8.

bondholders (including Appellants) at any time prior to its arbitrary February 29, 2016 cut-off. *See* A-5873 (Costantini Decl. ¶¶ 9-12).[5] Argentina's only real response is the assertion that it was impractical to negotiate "with every single plaintiff one-on-one." Arg. Br. at 34. Perhaps that is so, but Argentina's admission that it failed to negotiate with all bondholders during the truncated "negotiation" period *it devised* only underscores the reckless and inequitable haste at which this process has proceeded. And, even if Argentina was overwhelmed with the prospect of addressing all bondholders, it would seem only practical to discuss settlement with Appellants, the second-largest grouping of claimholders, at $1.4 billion.

Argentina next contends that, even if it failed to negotiate with all bondholders, that failure is of no consequence because: (i) its "global settlement proposal . . . can be accepted by anyone with a valid claim;" (ii) it "applies to all plaintiffs," and (iii) it still "remains open." Arg. Br. at 33, 35.

As an initial matter, in focusing exclusively on its settlement "proposal," it is notable that Argentina conspicuously ignores the documents that comprise its formal Unilateral Settlement Offer – not mentioning the Master Settlement

[5] While Argentina may dispute that "some individual bondholders . . . lacked an opportunity to negotiate," Arg. Br. at 34 and n.14 (detailing settlement communications with certain *other* appellants), it is silent regarding Appellants' specific showing that they were left out of the settlement process in every meaningful respect.

Agreement, the Agreement Schedule, or the Instructions (all of which Argentina drafted) *a single time anywhere in its brief*. But, even more troubling, Argentina's emboldened misbehavior following the February 19, 2016 Indicative Ruling and the March 2 Order confirms that it will renege on Appellants' acceptances of its Unilateral Settlement Offer, asserting instead the power to revise its offer after acceptance by inserting a vigorously disputed "statute of limitations" provision that is absent from the documents, for certain claims for defaulted interest and principal payments (even as to interest on bonds that have not yet matured). At a minimum, disputes regarding Appellants' acceptances of the Unilateral Settlement Offer will need to be fully adjudicated in the District Court *before* the second condition precedent can be determined to have been fulfilled.[6]

Moreover, 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-

[6] Certain Appellants are filing in the District Court a complaint seeking a declaration that they have reached Agreements in Principle that Argentina must pay in full, and an injunction against Argentina claiming compliance with the second condition precedent under the March 2 Order – if it survives this appeal – until Appellants receive their settlement payments.

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). Arg. Br. at 34.[7]

2. Argentina Has Not Removed The Legislative Obstacles To Settlement

As for the contention that Argentina has "taken meaningful steps toward repealing legislative obstacles to settlement," such as the Lock Law and the Sovereign Payment Law, that legislation is still pending before the Argentine Congress and, therefore, such efforts do not by themselves constitute a "dramatic and undeniable" change in circumstances sufficient to lift the permanent injunctions. *See* Arg. Br. at 35. Indeed, Argentina expressly concedes that ultimate legislative approval is not a *fait accompli*: per Argentina, "there is no way" to know "whether the Argentine Congress will actually enact the proposed

[7] *Ex parte* communications may also explain the provenance of a recent Order by the District Court. *See NML Capital, Ltd. v. The Republic of Argentina*, 1:08-cv-06978-TPG, Dkt. No. 922 (Mar. 15, 2016). This rather irregular Order – entered below without notice, motion, or briefing – purports to "so order" the "settlement payment mechanism" agreed-upon in Argentina's Agreement in Principle with lead plaintiffs, while also stating in *dicta* that "[a]ny attempt to attach, restrain, or otherwise encumber funds intended for settlement of any action would be contrary to the public interest." *Id*. at 1. Appellants find it extraordinary that the District Court would so opine without having given interested parties an opportunity to be heard – but, unfortunately, that seems to be the practice in recent months.

legislation." *See* Arg. Br. at 36 (citing App. Br. at 45); *see also id.* at 21 (noting that passage in the House was opposed by 86 dissenters).

At a minimum, the March 2 Order was premature in making this factual finding, as there can be no "change in circumstances" based on the *mere possibility* that legislative efforts will be passed. And, even assuming the ultimate passage of the legislation, that alone will not constitute a change in circumstances for purposes of F.R.C.P. 60(b)(5) absent a further finding that "it [is] unlikely that the [defendant] would return to its former ways." *Bd. of Educ. v. Oklahoma Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991). As Judge Raggi already has observed, "[w]hile [Argentina] professes to have a new view of all of this, those of us who've been involved in the supervision of the ligation for 14 years know that there've been changes of heart over time." A-1836.

As long as Argentina refuses to pay bondholders what they are owed, refuses to respect the *pari passu* clause of the FAA, refuses to negotiate with all plaintiffs, refuses to honor money judgments, and refuses to honor settlements resulting from its offer and acceptances by bondholders, the requirements for lifting the permanent Injunctions have not been satisfied. *See Sierra Club*, 732 F.2d at 256 (permanent injunctions "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*") (emphasis supplied).

3. Argentina Has Not Honored Its Settlement Agreements With All Bondholders

As for the claim that circumstances have changed because Argentina has purportedly "returned to the bargaining table" and has now "reached voluntary resolutions" with certain bondholders (including NML and other lead plaintiffs that continue to press this appeal because they firmly believe that circumstances have *not* changed), *see* Arg. Br. at 2, 36-38, Argentina is only telling part of the story.

Argentina now even *admits* that the District Court relied on a clear error in the record because the evidence *submitted by Argentina* in support of its "motion" to lift the Injunctions was, according to Argentina itself, "mistaken." That is, Argentina has now disavowed at least one of the settlement agreements that *it* submitted to the District Court as proof of its claim of changed circumstances, and that two other settlements it submitted to the District Court for that purpose were inadvertently agreed-to. While Argentina apparently will pay those two settling bondholders, it will *not* honor acceptances of its Unilateral Settlement Offer by bondholders with claims on the exact same bonds, such as Appellants. *See* Arg. Br. at 13 n. 3.

The details are important. Argentina attached its "agreement in principle with Red Pines LLC" to the sworn declaration of Argentina's Undersecretary of Finance Santiago Bausili submitted to the District Court and expressly described such agreement in principle as among the "numerous settlements" it had reached

with the bondholders – as (supposed) proof of the allegedly changed circumstances. *See* A-1879 and A-2016-2025 (the "Red Pines Agreement"). Argentina now contends, however, that such submission to the Court was "mistaken[]" because the Red Pines Agreement provided for payment on claims that Argentina suddenly considers to be "time-barred" (even though it was only amounts that were contractually prescribed – something that does not apply to Appellants' claims – that were excluded from the Unilateral Settlement Offer). *See* Arg. Br. at 13 n.3.[8]

Argentina also submitted Agreements in Principle to the District Court that it reached on February 19, 2016, with VR Global Partners, L.P. ("VR") and Procella Holdings, L.P. ("Procella") that it also *now* considers to cover "certain claims that are time-barred."[9] *Id.* While these Agreements in Principle cover bonds with maturities as old as 2002 and 2003 and various interest payments first owed more than six years prior to the filing of the complaints, Argentina agreed to a Rider in such contracts expressly stating that it "will not assert that the Holder's claims to

[8] Argentina argues that it "did not countersign the agreement." A signature was not necessary, but in any event, Argentina fails to mention that it was *pre-signed* with an "/s/" with the following printed below: "By: Luis A. Caputo, Secretary of Finance," someone with clear authority to bind Argentina. *See* A-2016-2025 at A-2024.

[9] In contrast to its Agreement in Principle with Red Pines (and, apparently, with Appellants), Argentina appears amenable to paying VR and Procella the full amount reflected in their Agreements in Principle. *See* Arg. Br. at 13 n.3.

any Bonds listed thereon are untimely or otherwise time-barred." *See* A-2005 (VR); A-2012 (Procella). Thus, Argentina entered into these two agreements with eyes wide open. Had Argentina intended its Unilateral Settlement Offer to exclude interest or principal payments that it now contends are barred by a purported statute of limitations defense, it never would have agreed to that Rider.[10] Instead, after parading these agreements to the District Court as evidence of changed circumstances, Argentina now asserts (after obtaining the very relief that it was seeking) that it will not accept for settlement *those very same bonds* in connection with Appellants' acceptance of the Unilateral Settlement Offer.[11] Notably, though, Argentina (to Appellants' knowledge) has failed to notify the District Court of this or sought a remand from this Court to re-open proceedings below on a corrected record. In short, little has changed in terms of Argentina's continuing inequitable conduct, and it has simply not "returned to the bargaining table" when it comes to many bondholders.

---

[10] While another proposed *amicus* bluntly contends that Appellants seek to "pressure Argentina to pay on . . . time-barred claims," such *amicus* offers no legal support for the assertion that Appellants' claims are time-barred (in fact, they are not, nor has Argentina litigated the issue in the many years these lawsuits have been pending, which itself speaks volumes). The proposed *amicus* also fails to recognize that Argentina could simply pay Appellants what they are owed under the Unilateral Settlement Offer, obviating the issue entirely. *See* Brief of Settling Plaintiffs in Support of Appellee and Affirmance, at 23 and n.62.

[11] *See* App. Br. at 39 (highlighting identical bonds identified in both Procella Settlement and Appellants' complaints).

Third, Argentina's self-proclaimed settlement "progress" must be weighed against its efforts to re-trade, or renege, on its settlement agreements with various plaintiffs, including Appellants. While Argentina euphemistically refers to "disagreements" regarding an "increasingly small fraction of bonds" that this Court need not "wade into," *see* Arg. Br. at 38 and 48 n.17, Argentina's actions have, at a minimum, shown why the Injunctions must remain in place, at least for the foreseeable future (including through the additional, hopefully expedited, litigation that will be necessary to address Argentina's disavowal of settlement agreements before the Injunctions can be lifted under the terms of the March 2 Order (if affirmed) or the entry of judgments on Appellants' claims if the settlements are not enforced).[12]

Although Appellants agree that this Court cannot resolve such "disagreements" on this record, Argentina's inequitable conduct in strong-arming Appellants into accepting a coercive settlement offer that it now refuses to honor should be considered by this Court in determining whether circumstances have truly "changed." At a minimum, Argentina should be prohibited from unilaterally pronouncing that it has "fulfilled" the second condition precedent under the March 2 Order after making payments on only those Agreements in Principle that it

[12] Argentina has not indicated that it will pay Appellants under their settlements for defaulted interest and principal payments that not even Argentina contends are time-barred.

unilaterally decides to honor.[13] In this regard, Appellants contend that the District Court further erred by abdicating judicial supervision of Argentina's compliance with the conditions precedent beyond a mere unilateral notification from Argentina, and have urged this Court to mandate such supervision with specific instructions, if the March 2 Order is not vacated in its entirety. *See* App. Br. at 8, 21, 45.[14]

C. Argentina Does Not Dispute That The Unilateral Settlement Offer Was Coercive And Materially Misleading In Violation Of The Antifraud Provisions Of The Federal Securities Laws

Appellants established in their Opening Brief that the District Court erred in relying on the Unilateral Settlement Offer as grounds for lifting the Injunctions because its coercive terms and omission of material facts likely violated the anti-fraud provisions of the federal securities laws. *See* App. Br. at 42-46. Indeed, the

[13] Appellants do not insist on "a 100% settlement rate as the threshold for finding changed circumstances," Arg. Br. at 37, but rather that, after years of arrogance and obstinacy, something more is necessary than a few weeks of negotiations with a favored-few bondholders. *See* App. Br. at 3. Nor are Appellants seeking to "exploit the Injunctions as leverage." Arg. Br. at 23. Rather, they seek only to protect themselves from being left with confirmed settlement agreements, contractual rights, or money judgments that, absent continued equitable relief, Argentina will not respect. *See NML I*, 699 F.3d at 262 (finding that "monetary damages are an ineffective remedy for the harm plaintiffs have suffered as a result of Argentina's breach").

[14] Contrary to Argentina's vague arguments about "forfeiture," Appellants made and preserved these arguments below. *See* A-2283-2284 (3/1/16 Hr'g Tr.) (Costantini).

Unilateral Settlement Offer bears the hallmarks of a tender offer, including an active and widespread solicitation of bondholders, firm (rather than negotiable) terms, and pressure on offerees to tender. *See Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 56-57 (2d Cir. 1985).

Specifically, Appellants showed that: (i) Argentina is not exempt from the antifraud provision of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder;[15] (ii) the Unilateral Settlement Offer – which seeks to purchase debt securities for cash – is subject to Section 10(b) and Rule 10b-5; (iii) the Unilateral Settlement Offer coercively elevated both the amount of consideration and the certainty of payment to bondholders who quickly agreed to its terms over those who might have decided to participate at a later date; and (iv) Argentina failed to disclose material information that was necessary for the bondholders to make an informed decision on whether to tender into and thereby accept the Unilateral Settlement Offer. For example, Argentina omitted critical information from the Unilateral Settlement Offer pertaining to the likelihood that it would satisfy the conditions precedent (both of which were wholly within Argentina's own control), and whether Argentina has (or will have) the funds necessary to pay the bondholders on their binding agreements in principle. Moreover, Argentina never disclosed that it would inconsistently and

[15] 17 C.F.R. § 240.10b-5.

unilaterally try to disavow certain tenders (acceptances) based on an undefined and unreserved putative statute of limitations defense to certain defaulted principal and interest payments.

Remarkably, ***Argentina's brief completely fails to address any of these points***. Argentina thus concedes them or, in the words of its own brief, has "forfeited" any opposition. Arg. Br. at 24, 48.

In sum, Appellants have made a *wholly unrebutted showing* that the Unilateral Settlement Offer was a fraudulent and deceptive device or contrivance in violation of Section 10(b) and Rule 10b-5 because of its coercive terms and failure to disclose to bondholders the information necessary for them to decide whether to tender their securities, whether to sell them in the active trading market, or whether to continue to hold them. As the Supreme Court recognized in a case cited by Argentina, "the doors of a court of equity [are closed] to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

II. THE DISTRICT COURT COMMITTED CLEAR ERROR IN CONCLUDING THAT THE PUBLIC INTEREST WEIGHS IN FAVOR OF LIFTING THE *PARI PASSU* INJUNCTIONS

As Appellants have also demonstrated, App. Br. at 46-48, the March 2 Order contravenes the public interest, and the District Court erred in concluding to the

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 II*, 727 F.3d at 248.

As Appellants also established in their Opening Brief, the Injunctions were the driving force behind Argentina's willingness to engage in settlement negotiations with certain FAA bondholders. App. Br. at 31, 47. 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." Arg. 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

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 Appellants 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" (Arg. Br. at 14) is a blatant misstatement: 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." Arg. 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." Arg. Br. at 46; *see also* U.S. *Amicus* Br. at 14-16 (same). While Appellants recognize 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. Arg. 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 14, 46-47.

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 Appellants' Opening Brief, this Court should vacate the March 2 Order in 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 Appellants with an opportunity to establish that Argentina must pay them under their respective settlements, and (ii) any non-settling plaintiffs have had a full and fair opportunity to engage in settlement discussions with Argentina, and should provide that any subsequent order of the District Court lifting the Injunctions be stayed pending further appeals to this Court.

Dated: New York, New York
March 25, 2016

Respectfully submitted,

Duane Morris LLP

By: /s/ Anthony J. Costantini

Anthony J. Costantini
Suzan Jo
Kevin P. Potere

1540 Broadway
New York, New York 10036-4086
Telephone: (212) 692 1000
Fax: (212) 692 1020

Attorneys for the following Plaintiffs-Appellants: ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, Claridae Ltd., Maria Del Pilar De We Ferrer, MCHA Holdings, LLC, Stonehill Institutional Partners, L.P., Stonehill Master Fund Ltd., Trinity Investments Limited, and White Hawthorne, LLC, as well as Interested Plaintiffs Honero Fund I, LLC, White Hawthorne II, LLC, and Yellow Crane Holdings, LLC

Weil, Gotshal & Manges LLP

By: /s/ Brian S. Rosen

Brian S. Rosen
Richard L. Levine
David Yolkut

767 Fifth Avenue
New York, New York 10153
Tel: (212) 310-8000
Fax: (212) 310-8007

Attorneys for the following Plaintiffs-Appellants only: ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, MCHA Holdings, LLC, Trinity Investments Limited, White Hawthorne, LLC, as well as Interested Plaintiffs Honero Fund I, LLC, White Hawthorne II, LLC, and Yellow Crane Holdings, LLC

PROOF OF SERVICE

I certify that on this day, March 25, 2016, I caused the Republic of Argentina to be served with the foregoing reply brief via the Court's CM/ECF system.

Dated: New York, New York
March 25, 2016

By: /s/ Anthony J. Costantini

Anthony J. Costantini
Duane Morris LLP
1540 Broadway
New York, New York 10036-4086
Telephone: (212) 692 1000
Fax: (212) 692 1020
ajcostantini@duanemorris.com

Attorneys for the following Plaintiffs-Appellants: ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, Claridae Ltd., Maria Del Pilar De We Ferrer, MCHA Holdings, LLC, Stonehill Institutional Partners, L.P., Stonehill Master Fund Ltd., Trinity Investments Limited, and White Hawthorne, LLC, as well as Interested Plaintiffs Honero Fund I, LLC, White Hawthorne II, LLC, and Yellow Crane Holdings, LLC

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,977 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, version 2010, in 14-point Times New Roman font.

Dated: New York, New York
March 25, 2016

By: /s/ Anthony J. Costantini

Anthony J. Costantini
Duane Morris LLP
1540 Broadway
New York, New York 10036-4086
Telephone: (212) 692 1000
Fax: (212) 692 1020
ajcostantini@duanemorris.com

Attorneys for the following Plaintiffs-Appellants: ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, Claridae Ltd., Maria Del Pilar De We Ferrer, MCHA Holdings, LLC, Stonehill Institutional Partners, L.P., Stonehill Master Fund Ltd., Trinity Investments Limited, and White Hawthorne, LLC, as well as Interested Plaintiffs Honero Fund I, LLC, White Hawthorne II, LLC, and Yellow Crane Holdings, LLC