UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ARAG-A Limited, ARAG-O Limited, ARAG-T Limited, ARAG-V Limited, Attestor Value Master Fund LP, Bybrook Capital Hazelton Master Fund LP, Bybrook Capital Master Fund LP, MCHA Holdings, LLC, Trinity Investments Limited, White Hawthorne, LLC, White Hawthorne II, LLC and Yellow Crane Holdings, L.L.C., Plaintiffs, v. The Republic of Argentina, Defendant.	16 Civ. 2238 (TPG)

REPLY MEMORANDUM IN FURTHER SUPPORT OF ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Reduced to essentials, Argentina's position is that the March 2 Order allows it to pick and choose which bondholders that accepted its Unilateral Settlement Offer to settle with. Before, Argentina told the Court the opposite—that it was willing to settle with ***all*** bondholders who accepted its offer—and that is exactly why injunctive relief is warranted. It is one thing to say that a dispute has arisen in the calculation of settlement amounts. Under the proposed injunction, both parties will have their day in Court on that question. But it is another for Argentina now to say that such a dispute eliminates its offer altogether. The argument is reminiscent of the old Argentina, not the touted new one. Argentina's Opposition also rests on a fundamentally flawed argument: that Argentina had to manually countersign any acceptance by bondholders of its settlement offer before a contract was formed. Argentina concedes that, to satisfy the merits prong of the preliminary injunction test, Plaintiffs must show only a "sufficiently serious question[] going to the merits." Opposition ("Opp.") at 6. That standard is easily met here:

- The Instructions[1] expressly, and repeatedly, stated that bondholders could ***"accept"*** the Unilateral Settlement Offer by returning a completed Agreement Schedule. Argentina's invitation to "accept" its offer contradicts its assertion that it had the right to pick and choose which bondholders could obtain settlements.

- The Instructions state that bondholders who "execute and deliver" an Agreement Schedule ***"will have"*** the settlement amounts contained in the offer. Argentina also offered additional consideration to bondholders that accepted quickly (by February 19, 2016). The words chosen by Argentina—"***will have***"—neither contemplate nor allow for a manual countersignature before a contract is formed. If Argentina had the right to determine whether there was a contract by withholding a manual countersignature, the extra consideration offer would have been Argentina's sole option and thus illusory.

- Argentina told the Second Circuit that "[e]very FAA bondholder is free to ***accept*** the general proposal," Scotch-Marmo Decl. Ex. 12 at 55-56, and proffered to this Court a ***non-manually signed*** settlement agreement with Red Pines as a "true and

[1] Capitalized terms have the meanings ascribed to them in the Moving Brief, filed April 7, 2016 ("Mot."). Unless otherwise stated, all emphasis is added.

> correct . . . Agreement in Principle." *Id*. Ex. 8. Given these representations (which Argentina used to obtain judicial relief), Argentina is now judicially estopped from contending that binding contracts required an additional, manual countersignature.

In context, the language cited by Argentina discussing a countersignature can be reconciled with the language cited above as either (a) referring to the ***post-contract formation*** process of reconciliation; or (b) having been satisfied by the electronic /s/ signature of Argentina's representative already affixed to each Agreement Schedule. In either case, there is at least a "sufficiently serious question" raised that warrants granting Plaintiffs injunctive relief.

Argentina's response to Plaintiffs' showing of irreparable harm and balance of the equities amounts to nothing more than "trust us." As Circuit Judge Raggi recently noted, though, "[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." Scotch-Marmo Decl. Ex. 13 at 32:16-19. Arguing that there is "compelling evidence that it intends to respect the Court's decisions," Opp. at 23, Argentina ignores that, ***even now***, it stands in default of numerous judgments requiring it to pay bondholders – the precise reason injunctive relief is necessary. By requiring Argentina to pay "all" settling bondholders as a condition precedent to vacatur of the Injunctions, this Court recognized that Argentina cannot be trusted to abide by this Court's orders absent injunctive relief.

Contrary to Argentina's hyperbole, Plaintiffs do not seek to disrupt—let alone "blow up"—any other party's settlement or Argentina's access to the global financial markets. Quite the contrary: Plaintiffs simply seek to be able to ***participate in*** the settlement process and be paid what they are owed before the Injunctions are lifted. Alternatively, Argentina can place into escrow, or post a bond guaranteeing payment of, the full amount of each Plaintiff's respective Settlement Agreement pending a final judgment in this action. Plaintiffs are prepared to move

forward through discovery and trial expeditiously such that any relief granted here would be temporary and provisional.

ARGUMENT

I. PLAINTIFFS HAVE AT LEAST SHOWN A "SUFFICIENTLY SERIOUS QUESTION" THAT THEY HAVE BINDING SETTLEMENT AGREEMENTS

A. Argentina's Countersignature Argument Fails

Resting entirely on Argentina's own documents and conduct, Plaintiffs have made out a "sufficiently serious question" going to the merits. Mot. at 11 (citing cases). The Unilateral Settlement Offer was made to ***all*** bondholders, was open for a specified period of time (*i.e.*, until February 29), set forth instructions for how bondholders could accept the offer (*i.e.*, by signing and returning a completed Agreement Schedule), and the Agreement Schedule was pre-signed by Argentina to allow bondholders to "accept." Contracts were formed when Plaintiffs executed and delivered completed and unmodified Agreement Schedules that included lists of their bond holdings. *Id.* Argentina made an irrevocable option offer, which gave rise to a binding contract when Plaintiffs accepted. *Id.*

Argentina's Opposition primarily argues that its Unilateral Settlement Offer required a "counter-signature" by Argentina, citing language stating that the "Agreement Schedule, when countersigned by the Republic shall constitute a binding agreement between the parties to settle all claims in respect of the bonds . . . ." Opp. at 9-12. Plaintiffs' opposition to Argentina's motion to dismiss (the "MTD Opp. Br.," Dkt. 46, incorporated herein by reference) shows that the phrase is wrenched out of context, and that Argentina's argument is undercut by other language in the Instructions, Argentina's representations to the Court, and the law of offer and acceptance. Key points, more fully developed in the MTD Opp. Br., include the following:

First, Argentina consistently has stated that its irrevocable offer would be open to "***all***

holders of its government bonds that did not take part in the" 2005 and 2010 exchange offers. Scotch-Marmo Ex. 6. A countersignature requirement in an offer "open to all," however, makes that offer ***not*** open to all, but rather, a mere invitation to bid, and "turns an otherwise straightforward offer into an illusion." *See*, *e.g.*, *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 563 (7th Cir. 2012); Mot. at 13-14 (citing cases).[2]

Second, the Instructions ***also*** stated that bondholders accepting the Unilateral Settlement Offer by "execut[ing] and deliver[ing]" a completed Agreement Schedule by a specific time and date "will have" a higher settlement than those who delayed until February 29. *Compare* Opp. at 8 *with* Scotch-Marmo Decl. Ex. 6 ¶ 5. Argentina's theory that it could unilaterally determine which settlement agreements to honor by withholding a countersignature is contrary to this provision and would make the offer of additional payment for those who promptly accepted meaningless (as Argentina could easily circumvent its own deadline by declining to countersign).

Third, Argentina ignores that, because it drafted the settlement documents, under *contra proferentem*, any ambiguity must be construed against it. *See* Mot. at 18-19 (citing cases).

Fourth, Argentina's conduct shows that no manual counter-signature was required for contract formation. Mot. at 13-15. The Bausili Declaration, filed on February 29, 2016, averred that Argentina "has entered into agreements in principle to settle claims made by numerous bondholders." Scotch-Marmo Decl. Ex. 8. Mr. Bausili swore that Argentina had "entered"—in the ***past tense***—into a settlement agreement with Red Pines that was not manually signed, and with no reservation for further signature. *Id.* The Red Pines Agreement, like the VR and Procella Agreements, covered the same bonds for which certain of the current Plaintiffs had also

[2] Argentina argues that *Wigod* supports its position, *see* Opp. at 7-8 n.4, but *Wigod* does nothing of the sort. Similar to Argentina here, defendant Wells Fargo argued that language stating that certain documents "will not be modified unless and until . . . [plaintiff] receive[s] a fully executed copy of the Modification Agreement" meant there was no enforceable offer to permanently modify plaintiff's mortgage because it was conditioned on Wells Fargo's subsequent execution. 673 F.3d at 563. The Seventh Circuit rejected that argument. *Id.*

submitted acceptances, including bonds with maturity dates from 2002 and 2003 and interest from early periods – dates that are evident on the face of the Declaration.

Argentina now claims that all of this was a "mistake" – apparently, a unilateral misunderstanding of its own offer. Opp. at 19 n.11. This tactic is unsurprising, as anything else would demolish the two central bases of the Opposition: (i) that a manual counter-signature is a prerequisite to contract formation; and (ii) that the Unilateral Settlement Offer contained a "statute of limitations" exclusion. But, there is no evidence in the record—no sworn declaration from Mr. Bausili or from any other witness with knowledge—that Argentina's actions and statements were a "mistake," nor an explanation for how such a fundamental "mistake" occurred. Discovery and a trial or hearing is needed to test the veracity of Argentina's "mistake" claim. At a minimum, the submission of the Red Pines Agreement raises a "serious question going to the merits" and highlights the need to preserve the *status quo.*

Lastly, Argentina argues that the electronic "/s/" signature ***already affixed*** to the Agreement Schedule simply indicated where bondholders should sign, but this *ipse dixit* argument only underscores the sharp factual dispute regarding Argentina's intent in proffering the Unilateral Settlement Offer, and similarly raises a "serious question going to the merits." In sum, the only interpretation that harmonizes the language in the Instructions is that Argentina made a unilateral offer that could be "accepted" by bondholders. That offer was electronically pre-signed by Mr. Caputo. The parties retained the right, after contract formation, to perform a mechanical reconciliation to identify which bonds were within the settlement formula so that Argentina would have to pay only what it promised to pay in its offer.

B. Plaintiffs Properly Accepted The Unilateral Settlement Offer

Plaintiffs have demonstrated through sworn declarations that each Plaintiff timely executed and returned the Agreement Schedules pursuant to the Instructions, thus creating

binding Settlement Agreements. Mot. at 6-7, 11-15 & n.8. In response, Argentina argues that Plaintiffs "failed to accept" the Unilateral Settlement Offer because, in Argentina's view, certain Plaintiffs "incorrectly" sought an "Injunction Offer," whereas Argentina believes they are owed a "Standard Offer." Opp. at 14. At the outset, this technical argument about purported "errors in Plaintiffs' submissions" does not even apply to certain Plaintiffs (*e.g.*, Attestor, Trinity, MCHA, 50 of Yellow Crane's 61 Agreement Schedules and each of the Agreement Schedules relating to the ARAG entities' foreign-law bonds), and, yet, Argentina has still failed to confirm that it will honor such Settlement Agreements on the basis of either offer. *Id.* at 4-5. In any event, this type of dispute merely concerns the correct settlement amounts, which is part of the post-contract formation reconciliation process. If Argentina is right, that process will protect it.

Where "it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain." *Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991). This can be accomplished where an agreement includes a methodology for determining the missing term. *Id.* at 91-92. Argentina's argument is thus a non-sequitur, as Argentina itself recognizes: "The motion before this Court concerns whether the parties reached enforceable agreements in the first place, not how much is owed under bonds held by Plaintiffs." Opp. at 16.

Here, Plaintiffs accepted the Unilateral Settlement Offer containing a proposed methodology for determining the Settlement Amount. That certain Plaintiffs maintain that they should be entitled to an "Injunction Offer" because they, too, have motions for partial summary judgment and injunctive relief pending before this Court—a discrete issue that can be quickly resolved one way or the other—does not change the fact that they each accepted Argentina's

irrevocable offer, which provides an objective method for calculating the price term. *See Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989) ("a price term is not necessarily indefinite because the agreement fails to specify a dollar figure, or leaves fixing the amount for the future, or contains no computational formula").

C. The Offer Did Not Contain A Statute Of Limitations Exclusion

Argentina now concedes that it reversed field on Plaintiffs' Settlement Agreements because of a belated contention that certain claims included by Plaintiffs—Argentina *still* does not say which ones—are purportedly "time-barred." Opp. at 15-16; Mem. at 15-18. Argentina's Opposition twice confirms that Argentina reached Settlement Agreements with bondholders VR and Procella that it submitted to this Court as evidence of its settlement momentum, which, only "***in retrospect***," it "determined included time-barred claims." *See* Opp. at 18-19. This issue, however, was not concealed from Argentina; to the contrary, those two Settlement Agreements contained a rider that Argentina "will not assert that the Holder's claims to any Bonds listed thereon are untimely or otherwise time-barred," and the Red Pines Agreement, which had no rider, listed the same bonds. Scotch-Marmo Decl. Ex. 8 (Bausili Decl. Exs. 7-9). This was no "mistake," but rather fully confirms what Plaintiffs have argued all along: ***Argentina never intended its Unilateral Settlement Offer to exclude any claims on the basis of any Statute of Limitations***. Had Argentina so intended, it never would have settled with either VR or Procella, which hold bonds identical to those held by Plaintiffs, including those with maturity dates dating back to 2002 and 2003. *See* Mot. at 18 & n.20.

Against this backdrop, Argentina's assertion that the earlier Spanish language Unilateral Proposal—which included no acceptance instructions—incorporated a statute of limitations exclusion is, at best, a factual argument lacking any factual support. *First*, the Unilateral Proposal never referred to the "statute of limitations," but rather, to a contractual prescription

limitation. Even the translation proffered by Argentina states that payment on bonds "that have been *prescribed* according to the contractual terms and the applicable laws will not be acknowledged." *See* Scotch-Marmo Decl. Ex. 4 (emphasis added). This translation does not refer to "statutes of limitations"; further, the use of the word "***and***"—and not "***or***"—makes clear that it refers to bonds prescribed "***contractually***" according to the laws governing each instrument.[3] Tellingly, Argentina does not rebut Plaintiffs' showing that ***none*** of Plaintiffs' bonds are precluded by contractual prescription. Mot. at 16-17. *Second*, the record contains another translation of the Unilateral Proposal ***provided by Argentina*** that many Plaintiffs reviewed and relied on, and that translation does not refer to "applicable laws" or the "statute of limitations." *See* Scotch-Marmo Decl. Ex. 5 at 8.[4] *Third,* Argentina's argument that the MSA "incorporated the terms that had been set forth in the . . . [Unilateral] Proposal," Opp. at 17, is a non-starter. Even if the Unilateral Proposal's reference to "applicable laws" in one translation (but not the other) was a veiled allusion to the statute of limitations, Argentina's specific and express definition of "Prescribed Claims" in Section 1 of the MSA leaves no doubt that the ***only*** excluded bonds were those "as to which the ***contractual prescription period*** set out in the relevant instrument evidencing those bonds has expired." Scotch-Marmo Decl. Ex. 7 (defining "Prescribed Claims"). The Unilateral Proposal was thus superseded by, and integrated within, the MSA, including the latter's definition of "Prescribed Claims." *Fourth*, Argentina never disputes that it repeatedly told Plaintiffs and others that the Unilateral Proposal did *not* contain a statute of limitations exclusion. *See* Mot. at 9-10. *Finally*, Argentina's submission of a new

[3] Argentina submits that claims "that have been prescribed according to the contractual terms ***and*** the applicable laws will not be acknowledged." *See* Opp. at 2 (emphasis supplied). On its face, the translated language Argentina quotes is conjunctive ("***and***"), and not disjunctive ("***or***"), so only bonds that are ***both*** prescribed by contract and by applicable law are excluded. *See Sasson v. TLG Acquisition LLC*, 127 A.D.3d 480, 481 (1st Dep't 2015).

[4] The existence of another translation raises fact issues creating serious questions on the merits. *Tornheim v. Blue & White Food Prods. Corp.*, 73 A.D.3d 747, 748 (2d Dep't 2010) (competing translations created triable issue of fact).

MSA on April 5, 2016, to certain former Plaintiffs, which for the first time included an express reference to a "statute of limitations" exclusion, confirms that when Argentina intends to exclude bonds based on the statute of limitations, it well knows how to do so. *See* Am. Compl. ¶ 116**.**

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM

Plaintiffs have shown that they will suffer irreparable harm if the Injunctions are lifted based upon a notification from Argentina that it has paid "all" bondholders who settled before February 29, 2016, without paying Plaintiffs under their Settlement Agreements. Mot. at 21-23. Given Argentina's status as a sovereign and its history of ignoring money judgments (to this day, Argentina ignores judgments requiring it to pay full principal and interest on its defaulted bonds), any confirmed settlement agreement or monetary judgment entered after the Injunctions are lifted will likely be futile. *Id.* at 21. Argentina cites no law at all in attempting to refute Plaintiffs' showing of irreparable harm. Instead, it goes to great length to detail its (latest) supposed "change of heart," and criticizes Plaintiffs for relying on "stale" evidence of recalcitrance. Opp. at 21.

But, this "trust us" approach—which finds no support in any case law and conveniently ignores Argentina's behavior over the 15 years of this litigation—is insufficient. This Court has made clear that it will lift the Injunctions ***only after*** Argentina pays settling bondholders—a clear recognition that, absent injunctive relief, "trust us" is not enough. Moreover, Argentina carefully avoids making any representation that it will start respecting any money judgments (past, present, or future). The best that Argentina can muster is that it will respect "properly agreed-to settlements" and pay claims that "are consistent with the terms of the Proposal and that comply with the other requirements, as confirmed by the reconciliation process described in the Instructions[.]" Opp. at 22. This is hardly evidence that Argentina will pay any money judgments entered, or settlements confirmed by, this Court.

III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR GRANTING THE MOTION

The balance of hardships tilts decidedly in Plaintiffs' favor. Mot. at 23. If Argentina were permitted to renege on its Settlement Agreements with Plaintiffs and yet still claim compliance with the second condition precedent, Plaintiffs likely will never recover what they are rightfully owed. To ensure that any burden on Argentina would be temporary and minimal, Plaintiffs are prepared to move expeditiously to resolve this matter (so that any injunction could last only a matter of weeks). We also propose, as an alternative, that Argentina can post a bond or place into escrow the amounts covered by each Settlement Agreement. It is thus simply not the case that Plaintiffs "threaten the extensive progress" that Argentina has made to resolve this matter (Opp. at 24); Plaintiffs merely seek to be *included* in the resolution.

Both sides recognize that the public interest favors "promoting the settlement of lawsuits." Mot. at 24; Opp. at 24. Yet, Argentina makes the circular argument that this principle does not apply because "there are no binding contracts to honor" in this case. *Id.* The flip side, however, is that, if the Court were to find a serious question on the merits of contract formation, it should *also* find that the public interest lies in ensuring that Argentina abides by any such settlements. Arguments that the public interest would be served because of the interests of the "exchange bondholders" and other settling bondholders are not supported by law, *see* Opp. at 25, and Argentina fails to explain why the interests of third parties—some of whom received billions of dollars in violation of Plaintiffs' contractual rights—outweigh the interests of Plaintiffs.

CONCLUSION

Plaintiffs respectfully request that the Court grant temporary and preliminary injunctive relief, or alternatively require Argentina to place in escrow, or bond, the full amount of each Plaintiffs' Settlement Agreement with Argentina pending expedited discovery and a trial.

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April 11, 2016

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