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United States Court of Appeals

for the

Second Circuit

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

(For Continuation of Caption See Inside Cover)

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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS ARMANDO RUBEN FAZZOLARI AND JULIO ROBERTO PEREZ

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INTERNATIONAL FUND LTD., SCOGGIN WORLDWIDE FUND LTD., TITO SIENA, MCHA HOLDINGS, LLC, ATTESTOR MASTER VALUE FUND LP, ARMANDO RUBEN FAZZOLARI, JULIO ROBERTO PEREZ, WHITE HAWTHORNE, LLC, JOSE PEDRO ANGULO, PEDRO TIMOTEO ANGULO, FERNANDO CROSTELLI, JUAN CARLOS CROSTELLI, MARTINA CROSTELLI, VIVIANA CROSTELLI, PATRICIO HANSEN, CLAREN CORPORATION, BYBROOK CAPITAL MASTER FUND LP, BYBROOK CAPITAL HAZELTON MASTER, FUND LP, ANDRAREX, LTD., CLARIDAE LTD, MARIA DEL PILAR DE WE FERRER, STONEHILL INSTITUTIONAL PARTNERS, LP, STONEHILL MASTER FUND LTD.,

Plaintiffs-Appellants,

GIOVANNI BOTTI, CLAUDIO MORI, SILVIA REGOLI,

Plaintiffs,

– v. –

REPUBLIC OF ARGENTINA,

Defendant-Appellee,

BANK OF AMERICA, N.A.,

Respondent,

BANCO BILBAO VIZCAYA ARGENTARIA, S.A., BBVA COMPASS BANCSHARES, INC., BBVA SECURITIES INC.,

Third-Party-Defendants,

ADMINISTRACION NACIONAL DE SEGURIDAD SOCIAL, UNION DE ADMINISTRADORAS DE FONDOS DE JUBILACIONS Y PENSIONES, CONSOLIDAR AFJP S.A., ARAUCA BIT AFJP S.A., FUTURA AFJP S.A., MAXIMA AFJP S.A., MET AFJP S.A., ORIGENES AFJP S.A., PROFESION+AUGE AFJP S.A., UNIDOS S.A. AFJP,

Defendants.

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PRELIMINARY STATEMENT

Plaintiffs Armando Ruben Fazzolari ("Fazzolari") and Julio Roberto Perez ("Perez"), who are among hundreds of individual and small-fund holders of defaulted Argentine bonds, (the "The Individual Bondholders")[1] reply to the Brief of Defendant-Appellee Argentina.

Argentina assures the Court that its election of Mauricio Macri, who "campaigned on an agenda of economic reform", ushers in a new age that will see bondholders paid and Argentina re-admitted to capital markets.

In its opening brief, Fazzolari and Perez addressed the new Macri administration and its claim it is open to negotiations and settlement of bondholders' claims. But no such negotiations with the Individual Bondholders in fact have occurred. Those bondholders have not settled. For the Individual Bondholders, the practical effect of vacating the Injunctions will be to apply extreme pressure: Argentina tries to enforce its unilateral "public offer" terms, or worse, on the remaining bondholders, without real negotiations.

[1] This is the largest group within the 15% of bondholders whose claims remain non-settled. The value of the Individual Bondholders' claims, including principal and interest, is about $686 million. The Individual Bondholders are the appellants in Nos. 16-658, 16-660, 16-666, 16-667, 16-668, 16-672, 16-673, 16-678, 16-689 and 16-685. Counsel learned after the present appeals were filed that Tortus Capital Master Fund LP, the plaintiff-appellant in Nos. 16-662 and 16-670, had accepted Argentina's "public" settlement offer shortly beforehand. Accordingly, those appeals should be dismissed, and Tortus is no longer included in the "Individual Bondholders" group.

As discussed in the opening brief, none of the "changed circumstances" identified by the District Court as justifying vacatur of the Injunctions applies to the Individual Bondholders.

The government's claimed willingness to negotiations has been empty rhetoric as far as these bondholders are concerned. The undisputed facts in the record before the District Court showed that no negotiations had occurred with the Individual Bondholders' representatives. This is not to say that Argentina was required to negotiate with them. But in the absence of some real discussions, mere pre-negotiation statements by the government cannot qualify as a real changed circumstance for the Individual Bondholders.

The settlements with other bondholders that were announced do not represent a changed circumstance for the Individual Bondholders either. Almost all the Individual Bondholders, including Fazzolari and Perez, bought their bonds at full face value prior to the default. Unlike investment funds that bought their bonds post-default at 20 cents on the dollar, the Individual Bondholders are in for 100 cents on the dollar, and will never be made whole with "haircut" settlements -- yet in ordering vacatur, the only settlements the District Court focused on were by hedge funds that were multiplying their original investments almost regardless of the settlement

level. Again, that does not mean those settlements were wrong. But the District Court was not acting equitably when the investors with the strongest equitable claims were, and are, the ones being left behind.

While there may be circumstances in which a district court would be justified in vacating an injunction so that last-stand holdouts cannot exploit extraordinary leverage, this is nowhere near one of those situations. The Individual Bondholders were not even able to start negotiations, and are "holdouts" only in the sense that they have refused Argentina's unilateral settlement edicts since 2005. No matter how fervently the District Court wanted to bring this 14-year-long litigation to a close, its hasty vacatur of the Injunctions necessary to enforce the Individual Bondholders' Equal Treatment rights was legally improper and an abuse of discretion It should be reversed.

A. Description of the Individual Bondholders[2]

The vast majority of the Individual Bondholders, including Fazzolari and Perez, are individual investors who bought their bonds prior to default, at full face value. By no stretch could they be called speculators. They would never have bought these bonds had they known what lay ahead.

[2] The facts referred to in this section are from the Declaration of Michael C. Spencer, dated Feb. 29, 2016, A5115.

The face value of their bonds is about $258 million. The current value of their claims (including 14 years of interest) is about $686 million.

Many of these investors acquired the bonds in amounts under $100,000, in preparation for their retirement, or for their children's education, or for other long-term investment goals. Some of these investors have died, or lived in near penury, while waiting to collect on their bonds.

Many of them are Argentines, like Fazzolari and Perez, who bought their bonds as a patriotic response to entreaties to support their government.

Some of the Individual Bondholders are investment funds. One large group, in Europe, is composed of public mutual funds that invest retirement and payroll-savings contributions of thousands of employees and small individual investors.

The Individual Bondholders declined Argentina's swap offers in 2005 and 2010. The holders found the offers inadequate because they were unilateral edicts by the government, not preceded by any negotiations with any creditor groups. These holders were able to resist the swaps in the hope that more equitable terms would be forthcoming. Of course, many other bondholders had no choice but to accept, due to their economic circumstances.

The holdout bondholders, especially those who are Argentines, like Fazzolari and Perez, were subject to vilification by the former Kirchner administration. They held their ground.

Many bondholders obtained money judgments for principal and interest on their defaulted bonds over the years. Argentina would not pay the judgments and resisted enforcement efforts. Because those legal remedies were unavailing, many bondholders who bought bonds issued under the 1994 Fiscal Agency Agreement obtained Equal Treatment Injunctions in 2012 and 2015, as described above.

The bondholders' hopes skyrocketed in November 2015, when Mauricio Macri was elected president. Macri had campaigned on his promise to resolve defaulted bondholders' claims so as to clear the way for Argentina's return to international markets. It seemed that 14 years of refusal and rejection by the government were coming to an end.

B. 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.

The Special Master hailed the public offer as a "historic breakthrough" and noted that settlements would allow Argentina to return to global financial markets to raise "much needed" capital. He effusively praised Argentine officials for their "courage and flexibility in stepping up to and dealing with this long-festering problem which was not of their making." A642.

C. The District Court's Indicative Ruling on Vacatur of the Equal Treatment Injunctions

Argentina implies that the injunctions happened by chance ("The Republic did not ask the district court to vacate the Injunctions immediately") (Brief, p. 13).

The argument is disingenuous. Argentina submitted an ex parte application for an order to show cause seeking vacatur of the Equal Treatment Injunctions, to occur automatically upon (a) repeal of internal Argentine laws (the "Lock Law" and "Sovereign Payment Law") prohibiting bond settlements and (b) actual payment by Argentina of amounts owed to bondholders who settled on or before February 29. A450. Without hearing argument, Judge Griesa issued a Rule 62.1 Indicative Ruling on Friday, February 19, indicating he 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.

The court immediately justified vacatur believing that Argentina was negotiating, the bondholders could now seek settlements, and "[u]ntil February 29, 2016, *all* FAA bondholders have the right to accept the terms of the Republic's [public] Proposal, and they are certainly free to make counteroffers." A2362.

Judge Griesa's ruling fails to take into account the Individual Bondholders who had no opportunity to negotiate with Argentina. And who have every right to reject an offer to be paid less than face value of the bonds plus interest. The Republic's argument that it merely requested vacatur upon the occurrence to two events is a distinction without a difference. Indeed,

Argentina bolsters its argument using the support of "several plaintiffs, as well as a large group of Exchange Bondholders who had not been able to receive payment for nearly two years as a result of the Injunctions." (Brief, p. 14). Argentina uses the Exchange Bondholders interests as justification for vacatur of the Injunctions. "The Exchange Bondholders…previous 'substantial financial sacrifices' – exchanging their FAA bonds for a fraction of face value – are 'the very reason why the Republic's considerably more lucrative settlement offer to the [holdout FAA bondholders] is even possible' and asked that their undisputed right to be paid not be further delayed by plaintiffs' 'disproportionate negotiating leverage'" (Id., p.14).

This legerdemain should be rejected. That some bondholders chose to accept Argentina's unilateral offer provides no justification to vacate the Injunctions. Nor does it take into account the "undisputed right" of the Individual Bondholders to be paid.

D. The NML Group Settlement

On Monday, February 29, the Special Master announced that a settlement had been reached with the NML group of holdout funds, whose claims amounted to about 65% of the holdouts with Injunctions. The settlement provides for payment of 75% of the $5.89 billion in claim value asserted by those plaintiffs, plus $235 million attributed to legal fees and

other claims -- an actual settlement percentage of 79% of claim value. A1920.

The Special Master's press release stated:

> It gives me greatest pleasure to announce that the 15-year pitched battle between the Republic of Argentina and Elliott Management, led by Paul E. Singer, is now well on its way to being resolved. The parties last night signed an Agreement in Principle after three months of intense, around-the-clock negotiations under my supervision. ***
>
> There are many people who have devoted untold hours or special talents, or both, to making this settlement possible. Foremost among them is Hon. Thomas P. Griesa, the Federal Judge who presided over all cases in re Argentina Debt Litigation for 15 years. Others entitled to greatest credit are President Mauricio Macri of Argentina, who immediately upon his election in November, set about to change the negative course that the Republic had steered in this litigation, and his Secretary of Finance Luis Caputo, who led the delegation that met with me in my capacity as Special Master and with the "holdout" Bondholders for countless hours, with patience, good will and intelligence. He was ably assisted by Santiago Bausili, Under Secretary of Finance. Also involved as important decision-makers for Argentina were: Alfonso Prat-Gay, Minister of the Economy, and Marcos Pena and Mario Quintana, the Chief and Vice Chief of the Cabinet. Their course-correction for Argentina was nothing short of heroic. On the "holdout" hedge fund side, Paul E. Singer was the central figure who involved himself intensely with me over the past several weeks on behalf of the "holdout" Bondholders. He was a tough but fair negotiator. His second-in-command, Jon Pollock, also made a key contribution to the success of the negotiations. All of the senior principals of the "holdout" hedge funds demonstrated vast talent. No party to a settlement gets everything it seeks. A settlement is, by definition, a compromise and, fortunately, both sides to this epic dispute finally saw the need to compromise, and have done so.

A1920-1921.

Some other bondholders, mostly investment funds, reportedly also reached settlements on or before February 29, apparently within the "public" offer parameters. A1938-1939. No negotiations with movants' counsel had occurred.

E. Vacatur of the Equal Treatment Injunctions

The District Court heard argument on the vacatur motion on the afternoon of Tuesday, March 1. Non-settling bondholders, and even the NML funds that had just settled, opposed vacatur, and asked at least for a 30-day extension while excluded bondholders could try to negotiate settlements to stabilize the situation. Nevertheless, the District Court confirmed its prior Indicative Ruling and issued its Opinion and Order the next day, vacating the Equal Treatment Injunctions automatically once the two conditions were satisfied. A2314, SPA70.

The excluded bondholders comprise about 15% by claim value of the aggregate Equal Treatment Injunction holders, or a total of about $1.4 billion.

But the changed circumstances on which Judge Griesa relied for vacatur are illusory. He found that "the Republic has shown a good-faith willingness to negotiate with the holdouts". Not so. Neither Fazzolari nor

Perez have had access to the Special Master; nor have they ever engaged in "extensive and productive talks before the court-appointed Special Master" (SPA-59-62). Judge Griesa found that "President Macri's election changed everything". But Mr. Macri's election has helped neither Fazzolari nor Perez.

The second condition is likewise flawed. Judge Griesa deemed Argentina's "self-imposed conditions" constituted a "dramatic shift in policy" such that the Injunctions should be vacated. But the conditions, which require action by Argentina's separate and independent legislature (to repeal two statutes enacted by the same legislature), are in no way guaranteed to occur.

The third factor Judge Griesa relied on is yet another boot-strap argument. Since some bondholders settled, that, in and of itself, the court believed is a changed condition. But, the court failed to examine the reasons other bondholders settled. And, why should those reasons (whatever they be) amount to a changed circumstance?

Argentina's basic argument of changed circumstances, which Judge Griesa accepted seemingly without reflection, is that some bondholders accepted our take-it-or-leave it offer, which our government now offers (and didn't before).

SUMMARY OF ARGUMENT

As argued in the opening brief of Fazzolari and Perez, 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.

Argentina downplays that the trial court entered the Equal Treatment Injunctions in order to enforce defaulted bondholders' contractual rights under the Equal Treatment provision of the bonds. The court acknowledges that vacatur will allow Argentina to resume paying the Exchange Bondholders without making ratable payments on the defaulted bonds, and goes so far as to say that change is in the public interest. But for the Individual Bondholders, this would simply be a reversion to the days of Unequal Treatment and non-payment on their bonds, and the purpose of the Injunctions would be wholly thwarted.

There is no factual basis for the emphatic statements by the District Court that Argentina has negotiated in good faith with bondholders, at least as concerns the Individual Bondholders, the largest group of individual and small claimants (this is apparently true for other non-settling holders as well). The record facts show that no such negotiations occurred. Only the large investment funds have had that privilege. While Argentina is free to

negotiate or not negotiate with whomever it chooses, 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 many large fund bondholders have now reached settlements, no matter how large, does not provide any lawful reason to deprive the Individual Bondholders of their Injunctions. The settlements only accentuate that the present situation is inequitable.

Nor is there any basis for the District Court's concern that remaining individual bondholders will derive undue "leverage" if their Injunctions are not vacated, or that "some plaintiffs [will] hold other plaintiffs hostage." A 2361. There is no evidence that that is happening, and in any event, the Injunctions restrict payments to Exchange Bondholders, not other settlements or financings. If anything, vacatur would allow Argentina to hold the remaining bondholders hostage, not the other way around.

The obvious effect of vacatur of the Injunctions would be to try to coerce the Individual Bondholders into taking Argentina's unilateral 70% public offer (if it even remains open), or to resort again to probably futile judgment enforcement efforts. That is essentially where the Individual Bondholders were before the Injunctions were issued: accept unilateral compensation offers, or try (vainly) to enforce their judgments. A court

should not try to exert pressure toward particular settlement outcomes in this way. Vacatur would be particularly inequitable here because the parties being excluded are those who should receive the greatest protection in law and equity: individual investors who paid full face value for their bonds, and deserve an offer at least comparable to that enjoyed by the large investment funds that have received most of the District Court's solicitude.

ARGUMENT

I. THE DISTRICT COURT LACKED ANY PROPER BASIS FOR VACATING THE INJUNCTIONS AS TO THE INDIVIDUAL BONDHOLDERS

A. Vacatur of the Individual Bondholders' Injunctions Was Legally Impermissible Because Their Purpose Has Not Been Achieved

Argentina does not dispute that an injunction "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." *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 256 (2d Cir. 1984). The purpose of the Injunctions is to "hold Argentina to its contractual obligation of equal treatment" of bondholders. *NML II*, 727 F.3d at 241. Because Individual Bondholders' bonds remain relegated to a non-paying class, that purpose remains unfulfilled. The District Court acknowledges that vacatur will in fact lead to Argentina's breach of the Equal Treatment provision when it

pays Exchange Bondholders without making ratable payments to defaulted bondholders holding Injunctions. That result makes vacatur either legally impermissible or outside the District Court's range of permissible decisions. *See In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013).

The District Court held that it could vacate the Injunctions "even though the purpose of the decree has not been achieved," (Op. 12, A2352), but that holding does not reflect the law. Federal Rule of Civil Procedure 60(b) bars vacatur of a permanent injunction absent "exceptional circumstances." *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009). No such circumstances were present, at least as regards the Individual Bondholders. Even if limited *modification* of an injunction is sometimes permissible before that injunction's purpose is *fully* achieved, the wholesale vacatur of an injunction -- leaving no alternative remedy in place -- is inappropriate where the "conduct . . . sought to be prevented will recur absent the injunction." *Bldg. & Constr. Trades Council of Phila. & Vicinity, AFL-CIO v. N.L.R.B.*, 64 F.3d 880, 888 (3d Cir. 1995); *cf. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 247 (1991) (injunction has served its purpose when it is "unlikely that the [defendant] would return to its former ways"). Any "modification must not create or perpetuate [the]

violation" that the injunction was intended to remedy. *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992).

Argentina has openly acknowledged that, upon vacatur, it intends to resume violations of the Individual Bondholders' Equal Treatment rights by making payments on Exchange Bonds without making ratable payments to the Individual Bondholders. The District Court's Indicative Ruling touted this as a *virtue* of vacatur. (Op. 19, A2359). Since the District Court already determined, in entering the Injunctions, that the Individual Bondholders have no "adequate remedy at law" to collect on their defaulted bonds, vacatur would thus turn the rules of equity upside-down, removing the Individual Bondholders' only effective means of enforcing their contractual rights while pretending that equity is being served. In fact, the Individual Bondholders' contract rights will be grievously harmed if vacatur is allowed.

While the Injunctions may be a "discretionary remedy," the contract rights they secure are a "legal entitlement." Op. 21, A2361. The District Court's invocation of discretion to justify depleting these contract rights undermines the central premise -- "essential to the integrity of the capital markets" -- that "borrowers and lenders" who "negotiate mutually agreeable terms for their transactions. . . will be held to those terms." *NML II*, 727 F.3d at 248. The Injunctions are necessary to achieve that purpose.

B. The District Court Based Vacatur of the Individual Bondholders' Injunctions on the Clearly Erroneous Factual Finding That Argentina Engaged in Settlement Negotiations With Them

According to the District Court, "Put simply, President Macri's election changed everything." Op. 13, A2353. The District Court was so relieved at the election results, and the new administration's promises to negotiate, that he concluded that circumstances were so changed that the Injunctions were rendered "inequitable and detrimental to the public interest." *Id.*

Review of the Indicative Ruling reveals clear factual errors in the District Court's account of negotiations, at least as applied to the Individual Bondholders. 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.

Absent from that account is the fact that these meetings and communications really involved only the large investment funds. The "framework" meeting in January with "a group of plaintiffs" involved the NML Group of funds. The "series of meetings" in the first week of February excluded individual bondholder representatives. When the Special Master "communicated intensively" with "the plaintiffs' lead principals on a virtually daily basis," this again involved only the large funds. The meetings and "spoke separately" encounters that Argentine senior officials had "with a substantial number of plaintiffs as a group" and "a number of … plaintiffs who sought private dialogue" at most involved, for the Individual Bondholders, two brief meetings at which no negotiations occurred.

The Individual Bondholders are by far the largest group of individual claimants and Injunction holders, with $686 million in claims. The sworn declarations from both the Argentine and the Individual Bondholders' representatives, described earlier in this brief, confirm that no negotiations occurred.

The Individual Bondholders do not make these observations in order to complain about the negotiations or the Argentine representatives or the Special Master (or the settling funds). Rather, the point is that the District

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 the Individual Bondholders. Those findings were so integral to the District Court's thinking that they infected the entire vacatur decision as to these bondholders.

C. Coercing Individual Bondholders to Accept a Settlement They Had No Opportunity to Negotiate Is Not Permissible

Although the District Court acknowledged that it "does not have the power to force plaintiffs to accept a settlement," (Op. 22, A2362), vacatur of the Injunctions will have that result. The judicial power does not exist to impose "'pressure tactics' designed to coerce a settlement." *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 382 (S.D.N.Y. 2011) (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985)). Adhering to that black-letter law, the Second Circuit already has ruled in affirming the Injunctions that bondholders are "completely within [their] rights to reject" Argentina's take-it-or-leave-it swap offers, and that such rejection does not constitute a basis for denying equitable relief. *NML I*, 699 F.3d at 263 n.15.

Argentina's February 5 public offer to bondholders thus cannot provide the "exceptional circumstances" necessary to deprive the Individual Bondholders of a remedy. *Uzan*, 561 F.3d at 126. To conclude otherwise

would permit precisely the "pressure tactics" that *A.T. Reynolds* and *Kothe* forbid.

The District Court professed not to be "tak[ing] [a] position on the reasonableness of the Republic's Proposal," (Op. 16, A2356), but in fact it was doing exactly that -- both by relying on the proposal as an exceptional changed circumstance, and by proceeding with vacatur on that basis. Depriving remaining bondholders of their Injunctions, which were entered because legal remedies were inadequate, would have the inevitable effect of leaving bondholders with no practical alternative but to accept the proposal. Undoubtedly this is the result Argentina seeks. And because there is nothing to prevent the government from withdrawing the public proposal as an offer at any time, the situation is time-coercive as well as content-coercive for bondholders.

Whether maintaining an injunction is equitable "depends on each suit's facts." *Rogers v. 66-36 Yellowstone Blvd. Co-op. Owners, Inc.*, 599 F. Supp. 79, 82 (E.D.N.Y. 1984). At a minimum, the new administration's announcement of its intention to negotiate cannot be used as a reason to vacate the Individual Bondholders' Injunctions until real negotiations actually occur. Otherwise, Argentina is just continuing its former approach of making unilateral "offers," like the exchange offers in 2005 and 2010. It

was that situation that gave rise to the Injunctions; the same approach cannot also justify vacatur.

Vacatur of the Injunctions would be particularly inequitable for plaintiffs like the Individual Bondholders. They have the same Injunctions as everyone else in this category, and for the reasons previously described, they have *greater* equitable entitlement to the courts' solicitude than do funds that bought their bonds at steep discounts. Under these circumstances, it is particularly inequitable for the Special Master to countenance a negotiation program, and for the District Court then to use the court's power to enter a vacatur, that coerces these bondholders into accepting the public offer.

D. Injunctive Relief Is Appropriate in Certain Breach of Contract Matters

Argentina's citation of the Faively case, in support of its claim that injunctive relief is verboten for breach of contract, is misplaced. The Second Circuit held that it agreed "with the District Court that the 1993 Agreement did not bar the plaintiffs application for a preliminary injunction. *See Faiveley I*, 522 F.Supp.2d at 641. Paragraph 27.1 of the 1993 Agreement provides that disputes arising under the agreement are to be 'finally settled' in arbitration, but it does not prohibit resort to appropriate forums for preliminary relief in aid of arbitration."

Faively went on to say that: a showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (internal quotation marks omitted). We have explained that "[t]o satisfy the irreparable harm requirement, [plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (internal quotation marks omitted).

The Injunctions here were ordered not to aid a breach of contract claim but rather to prevent Argentina from injuring the Individual Bondholders by its specific violation of the *pari passu* clause of the bond agreements.

E. Argentina Stands Pari Passu on Its Head

Argentina argues that *pari passu* doesn't really mean what it says in the bond agreements. It means whatever Argentina wants it to mean. Argentina hasn't breached "its pari passu clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditors rights:" NML II, 727 F.3d at 247.

Argentina adds, as it must, that this court found that Argentina's "extraordinary behavior was a violation of the particular pari passu clause found the FAA".

It is clear that pari passu means the term refers to loans, bonds or classes of shares that have equal rights of payment, or equal seniority.

Pari-passu is a Latin phrase meaning "equal footing" that describes situations where two or more assets, securities, creditors or obligations are equally managed without any display of preference. An example of pari-passu occurs during bankruptcy proceedings when a verdict is reached, all creditors can be regarded equally, and will be repaid at the same time and at the same fractional amount as all other creditors. Treating all parties the same means they are pari-passu.

Each bondholder is entitled to pari passu treatment from Argentina.

F. Preserving the Injunctions Would Not Prevent Argentina From Implementing Its Settlements with Other Creditors

One of the key justifications given by the District Court for vacatur was that continuation of the Injunctions would allow non-settling injunction holders to "scupper" settlements reached by other defaulted bondholders, Op. 19, A2359 (using the EM Limited settlement as an example), and to "hold other plaintiffs hostage." (Op. 23, A2363).

That fear is without merit. The Injunctions require Argentina to make ratable payments to Injunction holders if (and only if) Argentina makes payments to *Exchange Bondholders*. That has nothing to do with the EM settlement (or the NML Group settlement, or any of the other recent settlements). Payments made by Argentina to effectuate those settlements are not engaged by the Injunctions.

The only link between the Injunctions and the settlements arises from Argentina's *self-imposed* condition that it will not pay the settlements until all Injunctions have been lifted. Op. 8, A2348. Neither Argentina nor the District Court can credibly argue that a self-imposed condition of the settlements that all Injunctions be lifted in turn provides a valid argument that the need to consummate settlements is a basis for lifting the Injunctions. The reasoning is circular. *Cf. NML II*, 727 F.3d at 246 (consequences that are "entirely of the Republic's own making" do not weigh against the Injunctions).

The District Court used that fallacious idea -- that *some bondholders' Injunctions* could impede *other bondholders' settlements* -- as its justification for concluding that "if the court lifts the injunctions, it will do so in all cases." (Op. 19, A2359). That effectively precluded the logical approach of vacating the Injunctions as to each settling bondholder once that

bondholder has been paid its settlement consideration. None of this justifies vacatur as to non-settling bondholders like the Individual Bondholders.

Because maintaining the Injunctions is irrelevant to Argentina's ability to implement its settlements with other bondholders, the District Court's consideration of this factor when weighing the equities was legal error.

CONCLUSION

The vacatur of the Injunctions in the Individual Bondholders' actions should be reversed and the cases remanded to the District Court.

Dated: March 24, 2016
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times Roman proportional font and contains 5,210 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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