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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

THE REPUBLIC OF ARGENTINA,

Defendant-Appellee.

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

BRIEF OF AMICI CURIAE
CERTIFIED CLASSES OF 1994 FAA BONDHOLDERS

(FULL LIST OF NAMES AND DOCKETS ON NEXT PAGE)

Counsel Listed on Next Page

March 31, 2016

AMICI CURIAE

1. Plaintiffs' Class in *Silvia Seijas, et al. v. Rep. of Arg.*, 04-cv-400 (S.D.N.Y.)
2. Plaintiffs' Class in *Silvia Seijas, et al. v. Rep. of Arg.*, 04-cv-401 (S.D.N.Y.)
3. Plaintiffs' Class in *Cesar Castro, et al. v. Rep. of Arg.*, 04-cv-506 (S.D.N.Y.)
4. Plaintiffs' Class in *Hickory Securities Ltd., et al. v. Rep. of Arg.*, 04-cv-936 (S.D.N.Y.)
5. Plaintiffs' Class in *Elizabeth Azza*, *et al. v. Rep. of Arg.*, 04-cv-937 (S.D.N.Y.)
6. Plaintiffs' Class in *Eduardo Puricelli, et al. v. Rep. of Arg.*, 04-cv-2117 (S.D.N.Y.)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, none of the amici has a corporate parent or has 10% or more of its stock owned by publicly held corporations.

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INTEREST OF AMICI

Amici are certified classes of bondholders in multiple actions.[1] [2]

The class members are mostly families, retirees, and small investors. Many are Argentine citizens who did exactly what citizens are asked to do all the time: they invested in their country. Indeed, many invested before the default. For years, they have asked Argentina to engage in meaningful settlement negotiations. Yet Argentina has done nothing but fight and demean these small, unpaid investors as "holdouts." As a result of Argentina's strategic choices, the class members are owed not only the principal on their bonds, but years of unpaid interest.

Like the Appellants, the class members have important contractual rights, including *pari passu* rights to equal treatment.[3] We submit this amicus brief for two main reasons.

First, although the classes have moved for *pari passu* injunctions, those motions have not been decided. (And, at Argentina's request, the classes' motions

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[1] The pending class actions are cases numbered 04-cv-400, 04-cv-401, 04-cv-506, 04-cv-936, 04-cv-937, and 04-cv-2117.

[2] Because Argentina has not consented at this time, amici seek leave of court to file this brief. No Appellant opposes the filing of this amicus brief. No counsel for a party has written this brief in whole or in part, and no person or entity, other than amici or their counsel, contributed money to fund preparing or submitting this brief. The certified classes of 1994 FAA bondholders in *Urban GmbH v. The Republic of Argentina*, 02-cv-5699 (S.D.N.Y.) join in this brief amicus curiae.

[3] Throughout this brief, we use the phrase "*pari passu*" to refer to both sentences of the *Pari Passu* Clause analyzed in *NML Capital, Ltd. v. Rep. of Arg.*, 699 F.3d 246, 259 (2d Cir. 2012).

to intervene to oppose the request for vacatur below were post-poned until April.) The classes, however, undeniably have an interest in being heard now. Although the vacatur order is not binding on the classes, it raises a risk that the classes' motions could be decided, effectively, before they are even fully briefed.

Second, the treatment of the classes belies the core of the District Court's reasoning. Argentina made no "good faith" effort to negotiate a settlement with the classes before the court vacated the *pari passu* injunction. And it has made clear that it will not do so if the vacatur is upheld. Instead, Argentina has consistently maintained that the only offer it will make to the classes is a "Standard Offer" that (a) Argentina unilaterally announced and (b) would impose a haircut of approximately 50-65% or more on the class bondholders, even though they hold some of the exact same bonds that Argentina has settled with others at 72.5-100% of claim value. And all of this in the face of the undisputed fact that Argentina intends, once again, to keep all non-settling holders in a separate, non-paying class, while paying its favored external creditors in full—i.e., to brazenly breach its *pari passu* and equal treatment obligations.

There is no "equity" in Argentina's efforts to misuse the U.S. courts to help it cram down a discriminatory deal by denying bondholders the right to enforce the terms of the bonds they paid for. To the contrary, the public interest (for issuers and investors alike) lies in ensuring that the U.S. courts remain a reliable forum that will uphold the rule of law and allow both sides—Argentina and the bondholders—to negotiate settlement with their respective contractual and other rights intact.

ARGUMENT

The relevant facts and legal conclusions are undisputed:

- Argentina has *pari passu* obligations with respect to all bonds issued under the 1994 Fiscal Agency Agreement ("1994 FAA"). *NML Capital, Ltd. v. Rep. of Arg.*, 699 F.3d 246, 258-59 (2d Cir. 2012). The amici classes hold bonds issued under the 1994 FAA.[4]
- Argentina breached its *pari passu* obligations under the 1994 FAA by placing the defaulted bonds, by law and practice, in a separate, non-paying class while paying its other external indebtedness in full. *Id.* at 260 (citing, among other things, 2010 SEC Form 18-K at 2, 11).[5] Argentina has not reclassified the 1994 FAA bonds to a paying class on par with its other external debt. Nor has it committed to do so. Any bondholders that do not settle on Argentina's terms will remain in a nonpaying class and Argentina

[4] Two additional, non-amici classes have moved for *pari passu* relief with respect to bonds issued under, respectively, a 1992 Floating Rate Bond Agreement and a 1993 Fiscal Agency Agreement. The arguments asserted here are without prejudice to the claims of those classes that they too are entitled to equal treatment and injunctive relief.

[5] https://www.sec.gov/Archives/edgar/data/914021/000090342311000486/roa-18k_0928.htm.

will not honor any U.S. judgments on those bonds. Argentina has offered no evidence to the contrary. Thus, the 1994 bonds are and will remain in a *de facto* separate, nonpaying class in violation of the *pari passu* provisions.

- In addition to its *de facto* classification of the bonds, Argentina's various legislative enactments constituted "legal subordination" of the bonds. *Id.* (judgments on 1994 FAA bonds not recognized to same extent as judgment on other external debt). Critically, the District Court's March 2 Order does not require Argentina to return the 1994 FAA bonds to a legal status equal to its other external debt. Instead, it requires Argentina only to remove legal obstacles to "settlement." SPA-70 at 5. And, indeed, it appears that the legislation Argentina has proposed provides only that the Republic may pay 1994 FAA bondholders specified settlement amounts.[6] Again, there is no evidence in the record that Argentina will recognize judgments on the 1994 FAA Bonds to the same extent that it would recognize judgments on other external debts. Thus, the 1994 FAA bonds will remain legally subordinated in violation of the *pari passu* provisions.

[6] That is exactly what Argentina did in 2005 and 2010—lifting the non-payment designation solely for bondholders who accepted Argentina's unilateral exchange offer. 699 F.3d at 252-53. Thus, no relevant change to Argentine law is even proposed.

- Argentina intends, once again, to pay its other external creditors (and, indeed, to issue new external debt on a paying basis), but not to pay any 1994 FAA holders, such as the amici classes, that have not settled with Argentina.

- It remains the case that there is no adequate remedy at law for Argentina's actual and threatened violations of its *pari passu* obligations. 699 F.3d at 262. Argentina does not contend otherwise and, indeed, has dismissed its most recent appeals contesting *pari passu* injunctions issued in 2015.

- As in 2012 and 2013, Argentina offers no competent evidence that maintaining the *pari passu* injunctions will lead to economic catastrophe. 699 F.3d at 263; *NML Capital, Ltd. v. Rep. of Arg.*, 727 F.3d 230, 246 (2d Cir. 2013). Instead, once again, it offers only the most conclusory assertions and speculations that it cannot pay the 1994 FAA holders and that it must issue new debt to pay its settlements. *E.g.*, A-652 (Decl. of Undersecretary Bausili), ¶ 11 ("without an order vacating the injunctions in each of the above captioned actions, it will be difficult for Argentina to raise funds with which to pay the settlements."). The IMF, however, confirms that Argentina has $30 billion in reserves, nearly $25 billion of which is in foreign currency.[7] Argentina anticipates needing far less than that to settle the

[7] https://www.imf.org/external/np/sta/ir/IRProcessWeb/data/arg/eng/curarg.pdf.

current claims. A-652, ¶¶ 5-7. Once again, Argentina's claims that it urgently needs the U.S. courts to wipe out its bondholders' rights cannot be credited. 699 F.3d at 263; 727 F.3d at 246.

In the face of all this, Argentina's sole argument is that the equities and public interest compel vacatur because Argentina allegedly is engaged in "good faith" settlement negotiations. What Argentina is saying is that, now that there has been a finding that it is violating the bondholders' rights, bondholders should be deprived of their only meaningful remedy and settlement should proceed from that debased position. That obviously makes no sense. When a party, such as Argentina, opts to litigate claims and loses, the parties negotiate settlement from their respective legal positions. The courts do not step in to effectively rewrite the debt contract to rebalance leverage.

Likewise, the public interest would be disserved if investors are told that they have no remedy for an undisputed violation of a fundamental provision of a debt agreement, such as the *pari passu* clauses here. That message to investors is all the more destructive if the U.S. courts tell investors that they may be deprived of any real remedy (and, therefore, deprived of their rights) simply because the debtor would prefer to negotiate as if those rights never existed.

The public interest in upholding the rule of law and contracts as written also serves issuers, such as Argentina. If investors lose confidence in the U.S. courts to uphold their investment terms, issuers will face a much more difficult and expensive market for their debt.

Nor, of course, is there any need to vacate the *pari passu* injunctions or otherwise deny bondholders their bargained for rights to allow Argentina to settle these disputes. Rather, keeping the injunctions in place and enforcing the *pari passu* rights will only require Argentina to offer better terms. As this Court already held in 2012, there is no merit in Argentina's repeated argument that actually enforcing *pari passu* rights is somehow inequitable simply because doing so may not allow Argentina (and certain creditors) to implement their chosen "plan" for restructuring the defaulted debt. 699 F.3d at 263-64.

Finally, Argentina cannot appeal to equity based on its supposed willingness to settle its debts in "good faith."

The fundamental premise of the District Court's decision to vacate the injunctions is that doing so would support true settlement negotiations. SPA-35 at 16. But the reality is that vacating the injunctions will support only a specific form of settlement that Argentina (and a hand-picked group of creditors) prefer. It is undisputed that Argentina's position with respect to the classes and other bondholders has been that it will not actually negotiate a settlement. *E.g.*, A-1861.

Rather, Argentina has repeatedly communicated that the only economic terms it is offering to the classes and other holders that do not have *pari passu* injunctions is the "Standard Offer" that Argentina unilaterally announced on February 5, 2016 with no prior discussion with the classes (and despite our requests to have such discussions).

To call what Argentina is doing "negotiation" is to deny reality. It is the same take-it-or-leave-it approach Argentina used twice before in its 2005 and 2010 Exchange Offers.

Moreover, the terms of the offer itself belie any façade of "good faith" and bespeak a classic "cram down."

First, despite the fact that Argentina purported to announce a public offer to all bondholders, the offer inexplicably offers different values to holders of the exact same bonds. 1994 FAA bondholders with pre-February 1, 2016 *pari passu* injunctions are offered 70-100% of their accrued claim value. But other holders of the exact same bonds with the exact same contractual pari passu rights are offered only the "Standard Offer" of principal plus 50%.

The Standard Offer simply ignores the years of past due bond interest and pre-judgment interest that accumulated because Argentina chose to fight the classes all these years. It also ignores that the bonds themselves have wildly varying interest rates and simply dictates a uniform "rate" of 50% above principal.

Even ignoring the pre-judgment interest that has accrued, the classes are owed bond interest **two to three times** the "50% of principal" (or more). All this despite the fact that the Plaintiff Classes have the same *pari passu* rights as NML and others who had *pari passu* injunctions in place prior to February 1, 2016 and with whom Argentina has been negotiating economic terms despite the public tender offer.

It is the epitome of bad faith to discriminate among holders of the exact same bonds based on the arbitrary date of an injunction, particularly where the existence of injunctions effectively protected all 1994 FAA bondholders.

Second, Argentina has materially misled investors about the terms of its tender offer.

Argentina originally tried to make it look like the Standard Offer was closer in value to the *Pari Passu* Offer because the *Pari Passu* Offer supposedly included only "contractual" interest and ignored pre-judgment interest.[8] Yet, a February 18 filing by NML revealed that Argentina privately told NML that the *Pari Passu* Offer does include pre-judgment interest,[9] meaning that the non-negotiable, uniform Standard Offer for the Plaintiff Classes is much worse than the 27.5%

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[8] *NML Capital, Ltd. v. Rep. of Arg.*, 08-cv-6978, Dkt. No. 863 (Mem. of Law in Support of the Motion, By Order to Show Cause, to Vacate the Injunctions) at 10 (representing that the *Pari Passu* Offer offers a discount off the accrued value of claims "at their contractual rate).

[9] *Id.*, Dkt. No. 874 (Mem. of Law in Opposition) at 15.

discount off total claim value that Argentina is offering to NML and others. Argentina is thus trying to unfairly drive investors into the Standard Offer with a materially incomplete and misleading—or, at least, completely confusing—tender offer.

Similarly, the terms publicly announced on February 5 and 11, 2016 said "all holders" could accept the Standard Offer and receive 150% of the principal amount of their bonds. Period. A-645. Later, however, Argentina claimed that the Standard Offer would be capped at the value of existing judgments. A-1617 (2/17/16 Instructions to Bondholders) at 4(i). Likewise, in the "Master Settlement Agreement" Argentina published to the markets on February 17, 2016, Argentina represented that its offer would exclude only claims that were "prescribed" by contractual terms. A-1620. But, after holders began tendering fully executed agreements, Argentina tried to change the terms (again, non-publicly) to exclude claims allegedly barred by <u>statutory</u> limitations periods as well. *E.g.*, A-5864 at ¶ 17.

Argentina also announced and worded its offer in such a way as to give the appearance of a February 29, 2016 deadline. *E.g.*, SPA-35 (Indicative Ruling) at 22 (reflecting even the District Court's understanding that "[u]ntil February 29, 2016, all FAA bondholders have the right to accept the terms of the Republic's Proposal . . . ."). Argentina "clarified" the issue only in a February 29 legal brief

(*NML Capital*, Dkt. No. 904) at 2)— *i.e.*, not in a public announcement like the misleading offer and only after holders would have been misled about the deadline.

None of this is the kind of reasonable, negotiated settlement process that could even possibly justify vacating the injunctions and, thereby, denying bondholders any real remedy for their undisputed *pari passu* rights.

Third, Argentina's tender offer (and its follow-on Instructions to Noteholders and tender of a Master Settlement Agreement) also (i) contravenes the well-settled rule that prohibits settlement overtures to individual members of a certified class represented by class counsel, (ii) seeks to circumvent the Rule 23 class settlement approval process, and (iii) would improperly allow individual class members to free-ride on the rest of the class (by tendering individually and without bearing any class legal fees, for example).[10] The completely confusing and misleading nature of the tender offer that Argentina issued unilaterally (discussed

[10] *E.g.*, *Bower v. Bunker Hill Company*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985) ("Once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel."); *Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 377 (N.D. Ill. 1982) ("After the class has been certified, defendants' counsel must treat the unnamed class members as ″represented by″ the class counsel for purposes of DR 7-104."); *Fulco v. Continental Cablevision, Inc.*, 789 F.Supp. 45 (D. Ma. 1992); *Gortat v. Capala Bros., Inc.*, 2010 U.S. Dist. LEXIS 45549 (E.D.N.Y. 2010); *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985).

above) only underscores the need for real settlement negotiations with class counsel.[11]

This Court should not facilitate such inequitable (and potentially unlawful) tactics.

CONCLUSION

The Amici Classes respectfully submit that the March 2, 2016 Order of the District Court (and the underlying Indicative Ruling) should be reversed and the *pari passu* injunctions should remain in place such that all parties—not just a select few—can engage in real settlement negotiations with Argentina based on their actual, non-debased contractual rights.

Dated: March 31, 2016

Respectfully submitted,

By: /s/ Jennifer R. Scullion

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[11] We reserve the right to seek relief for Argentina's violations, if necessary.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 2,312 words, excluding the part of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of March, 2016, a true and correct copy of the foregoing Brief of Amici Curiae Certified Classes of 1994 FAA Bondholders was served on all counsel of record in these consolidated appeals via CM/ECF pursuant to Local Rule 25.1 (h)(1) & (2).

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