UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ARAG-A LIMITED, ARAG-O LIMITED, ARAG-T LIMITED, ARAG-V LIMITED, HONERO FUND I, LLC, ATTESTOR VALUE MASTER FUND, BYBROOK CAPITAL HAZELTON MASTER FUND LP, BYBROOK CAPITAL MASTER FUND LP, MCHA HOLDINGS, LLC, RED PINES LLC, SPINNAKER GLOBAL EMERGING MARKETS FUND, LTD., SPINNAKER GLOBAL SPECIAL SITUATIONS FUND LP, TRINITY INVESTMENTS LIMITED, WHITE HAWTHORNE, LLC, WHITE HAWTHORNE II, LLC AND YELLOW CRANE HOLDINGS, L.L.C., Plaintiffs, -against- THE REPUBLIC OF ARGENTINA, Defendant.	16 Civ. 2238 (TPG)

MEMORANDUM OF LAW IN SUPPORT OF THE REPUBLIC OF ARGENTINA'S MOTION TO DISMISS

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Defendant, the Republic of Argentina (the "Republic"), respectfully submits this Memorandum of Law in support of its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Preliminary Statement

Plaintiffs—a group of holders of defaulted bonds issued by the Republic—have filed a Complaint asking for a declaration that they have reached binding Settlement Agreements with the Republic. Plaintiffs also argue that because they reached those purported Settlement Agreements with the Republic on or before February 29, 2016, this Court's March 2, 2016 Order vacating the injunctions may not take effect unless Plaintiffs are first paid the amounts due under their alleged Agreements. The Plaintiffs' claims, however, suffer a fatal flaw: the Republic never entered into Agreements with Plaintiffs. The Republic's public settlement materials expressly provided that no binding agreement would be established unless the parties countersigned and exchanged fully executed agreement documents. None of the Agreement Schedules submitted by the Plaintiffs, however, were countersigned by the Republic. The Complaint therefore fails to state a claim for a declaratory judgment that Plaintiffs have entered into Settlement Agreements with the Republic.

Legal Standard

On a motion to dismiss for failure to state a claim, this Court must "draw all reasonable inferences in Plaintiffs' favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief". *Faber v. Metropolitan Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotations omitted). The Court is "not, however, bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions". *Id*. at 104 (internal quotations

omitted). Furthermore, the Complaint is "deemed to include"—and the Court may therefore consider—"materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint". *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) (internal citations omitted).

The purported Settlement Agreements are governed by New York law. (Paskin Decl. Ex. 3 ¶ 8.) To state a breach of contract claim in New York, the Plaintiff must allege "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages". *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996). A breach of contract claim that "fails to allege facts sufficient to show that an enforceable contract existed between the parties is subject to dismissal". *Fuji Photo Film U.S.A., Inc. v. McNulty*, 669 F. Supp. 2d 405, 412 (S.D.N.Y. 2009).

Facts

On February 5, 2016, the Republic issued a proposal (the "Proposal") to settle the claims of all outstanding holders of defaulted Argentine debt, including holders of FAA Bonds. (Paskin Decl. Ex. 1.) On February 17, 2016, the Republic posted on its website instructions by which holders of defaulted bonds could participate in the settlement contemplated by the Proposal (the "Instructions"). (Compl. ¶ 65-66.) The Republic also posted on that date a template master settlement agreement ("Master Settlement Agreement") with an appended agreement schedule ("Agreement Schedule"). (Compl. ¶ 65-66.)[1]

[1] Each of the Proposal, Instructions, Master Settlement Agreement and Agreement Schedule is extensively relied upon by the Complaint and is therefore incorporated by reference into it or integral to it, and may be considered by the Court in full for the purpose of this Motion to Dismiss. *Sira*, 380 F.3d at 67.

The Instructions stated that "Holders may become a party to a Settlement Agreement by executing and exchanging with the Republic a completed Agreement Schedule". (Compl. ¶ 66; Paskin Decl. Ex. 2 at 1) (emphasis added).) The Instructions further provided 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 on the terms contained in the Master Settlement Agreement". (Paskin Decl. Ex. 2 at 2) (emphasis added).)

The Agreement Schedule also stated on the signature page that "[b]y executing counterparts of this Agreement Schedule in the space provided below and exchanging those counterparts, the parties agree to be bound by the terms of the Settlement Agreement, as completed by the information contained in this Agreement Schedule". (Paskin Decl. Ex. 4 at 3) (emphasis added). The Master Settlement Agreement further defined the "Agreement Schedule" as "the completed Agreement Schedule signed (and exchanged) by the Holder and the Republic in the form set out as Exhibit A to this Agreement". (Paskin Decl. Ex. 3 at 1) (emphasis added). Thus, the formation of a binding Settlement Agreement was expressly conditioned on the Republic countersigning and exchanging with each bondholder a fully executed Agreement Schedule.

The form Agreement Schedule published by the Republic contained spaces for each bondholder to list their bonds and to state the settlement amount as "reconciled between the Republic and the Holder". (Paskin Decl. Ex. 4 at 1-2.) The Republic, then, would review that information and determine whether it accurately

reflected the amounts due and was consistent with the terms of its Proposal.[2] After that review was complete, the Republic, if it agreed with the submitted materials, would countersign and return the fully executed Agreement Schedule to the bondholder.

On March 2, 2016, this Court entered an Order conditionally vacating the injunctions against the Republic in all cases. One of the conditions precedent to vacatur was that "[f]or all plaintiffs that entered into agreements in principle with the Republic on or before February 29, 2016, Argentina must make full payment in accordance with the specific terms of each such agreement." (Compl. ¶ 120.)

Argument

The Complaint does not adequately allege the existence of Settlement Agreements between Plaintiffs and the Republic. For decades, New York law has recognized the rule that "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck v. Francis*, 26 N.Y.2d 466, 469–70 (1970); *see also Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074, 1080 (2d Cir. 1990); *Berman v. Sugo*, 580 F. Supp. 2d 191, 203 (S.D.N.Y. 2008). Because the Republic never countersigned the Agreement Schedules submitted by the Plaintiffs, the Republic has no binding agreements with them.

[2] The Proposal, for example, excluded time-barred claims from the contemplated settlements. It stated, in Spanish, that "it is contemplated that the amounts of capital and/or interest of the bonds that have been prescribed according to the contractual terms and the applicable laws will not be acknowledged". (Paskin Decl. Ex. 1 at 2) ("[S]e contempla que los montos de capital y/o intereses de los bonos que hayan prescriptos conforme los términos contractuales y la normativa aplicable no serán reconocidos.") The Master Settlement Agreement, in turn, incorporated the terms that had been set forth in the Republic's Proposal, including the exclusion of time-barred claims, by stating that it is made "in accordance with the terms of the Proposal . . .". (Paskin Decl. Ex. 3 at 1).)

The Republic's intent to be bound only by fully executed Agreement Schedules is established, as a matter of law, by the same documents Plaintiffs reference and incorporate into their Complaint. *See Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 97 (2d Cir. 1994). In *Longo*, for example, a company's General Counsel sent an unexecuted employment agreement to an employee, who then signed and returned the agreement. *Id*. at 96. The attorney included a cover letter stating that the employee should return the signed agreement so it could be countersigned by the company. *Id*. The Court of Appeals held, as a matter of law, that the letter "evidenced an intent that the parties would not be bound to the terms of their negotiations until the agreement was signed"; because it had not been countersigned, there was no binding agreement. *Id*. at 97. Similarly, in *Scheck*, the New York Court of Appeals held that a cover letter which required both parties to sign "evidence[d] the intention of the parties not to be bound until the agreements were signed". 26 N.Y.2d at 470.

Here the Republic provided numerous, express indications that no binding settlement agreements would be reached before the Agreement Schedules were signed and exchanged by the bondholders and the Republic. Not only did the Agreement Schedule published by the Republic contain signature lines for a representative of the bondholder as well as of the Republic (Paskin Decl. Ex. 4 at 3), but the Instructions accompanying the form stated: "Holders may become a party to a Settlement Agreement by executing and exchanging with the Republic a completed Agreement Schedule". (Paskin Decl. Ex. 2 at 1.) The Instructions further provided 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 on the terms contained in

the Master Settlement Agreement". (Paskin Decl. Ex. 2 at 2.) The Agreement Schedule also stated on the signature page that "[b]y executing counterparts of this Agreement Schedule in the space provided below and exchanging those counterparts, the parties agree to be bound by the terms of the Settlement Agreement, as completed by the information contained in this Agreement Schedule". (Paskin Decl. Ex. 4 at 3) (emphasis added). Moreover, the Master Settlement Agreement defines the "Agreement Schedule" as "the completed Agreement Schedule signed (and exchanged) by the Holder and the Republic in the form set out as Exhibit A to this Agreement". (Paskin Decl. Ex. 3 at 1) (emphasis added).

Plaintiffs ignore this long-established principle of law and these express conditions. They instead allege that the Master Settlement Agreement and Agreement Schedule published by the Republic were an "offer"; they then describe their submitted Agreement Schedules as "acceptances" of that offer. (Compl. ¶¶ 1-2, 65, 77-78, 80, 82, 84, 86, 87, 89, 91, 93, 95, 97, 99, 101, 103, 107.) The labeling of these communications as offers and acceptances are no more than legal conclusions and need not be accepted as true by this Court on this motion to dismiss. *Kirch v. Liberty Media Corp*., 449 F.3d 388, 398 (2d Cir. 2006) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss"). They also are not supported by the Plaintiffs' factual allegations. For example, Plaintiffs allege that "the Agreement had a pre-signed acceptance as reflected by Argentina's signature line ('/s/')". (Compl. ¶ 67.) The "/s/" symbol, however, did not represent a signature by the Republic, but merely indicated where each party to the Agreement should sign. Indeed, the signature line designated for each bondholder's signature also included an "/s/", and

many of the bondholders placed their manual (*i.e.,* handwritten) signature next to that symbol. (Paskin Decl. Ex. 4 at 3; Exs. 5-9.)

The Agreement Schedule published by the Republic also could not have represented a "pre-signed acceptance" of every bondholders' submission because the form did not include significant, material terms of the alleged agreements, such as the amount each bondholder would be paid to settle. *See Express Indus. & Terminal Corp. v. N.Y. State DOT*, 93 N.Y.2d 584, 590 (N.Y. 1999) ("[D]efiniteness as to material matters is of the very essence of contract law."). It is for that reason that the Republic expressly conditioned the existence of a binding agreement on the Republic's ability to review and countersign each Agreement Schedule. The form Agreement Schedule contained spaces for each bondholder to fill in the settlement amount as "reconciled between the Republic and the Holder" and to attach a list of their bonds to be covered by the agreement. (Paskin Decl. Ex. 4 at 2.) Under the Plaintiffs' argument, by contrast, a bondholder could have entered *any* settlement amount—whether the amount accurately reflected the settlement amounts contemplated by the Republic's Proposal or not—and the Republic would be required to pay that amount with no questions asked. That is implausible and should be rejected.[3]

Plaintiffs also allege that the Republic acknowledged receipt of their Agreement Schedules and, in one case, acknowledged that riders proposed by some of the Plaintiffs "will be okay". (Compl. ¶ 105.) In another case, the Republic indicated that it "did not find any issues in the list of ISINs" a bondholder submitted as part of the

[3] Plaintiff Red Pines LLC also makes a separate argument that the Republic stated to this Court that it had a Settlement Agreement with Red Pines. (Compl. ¶ 115.) The Republic's statement, however, was erroneous because it had not, in fact, countersigned the Agreement Schedule submitted by Red Pines.

parties' preliminary discussions concerning the settlement proposal. (Compl. ¶ 104.) "If, however, either party communicates an intent not to be bound until an agreement is fully executed, no amount of negotiation or oral agreement to specific terms will result in the formation of a binding contract." *Berman*, 580 F. Supp. 2d at 203 (citing *Winston v. Mediafare Entm't Corp.*, 777 F.2d 78, 80 (2d Cir. 1985)) (internal quotations omitted).

Because Plaintiffs' Complaint "fails to allege facts sufficient to show that an enforceable contract existed between the parties", it should be dismissed. *Fuji Photo Film U.S.A., Inc.*, 669 F. Supp. 2d at 412; *see also Berman*, 580 F. Supp. 2d at 203 ("Under these circumstances, it can only be concluded that the parties intended not to be bound by the Operating Agreement until it was signed. Without the formation of a valid contract between Leven and Weinstein, Counter-Plaintiffs do not state claims for breach of contract.").

Plaintiffs also request the Court to determine that the Republic must pay them their requested settlement amounts as a condition precedent to vacatur of the injunctions pursuant to this Court's March 2, 2016 Order. However, the Order only requires the Republic to make payment to "plaintiffs that entered into agreements in principle with the Republic on or before February 29, 2016". (Compl. ¶ 5.) Plaintiffs have not entered into agreements with the Republic, and they are not entitled to any of the relief they seek.

Conclusion

For the foregoing reasons, the Motion to Dismiss should be granted.

April 6, 2016

Respectfully submitted,

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by

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