UNITED STATES DISTRICT COURT

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, -against- THE REPUBLIC OF ARGENTINA, Defendant.	16 Civ. 2238 (TPG)

DEFENDANT THE REPUBLIC OF ARGENTINA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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Plaintiffs do not and cannot dispute the fact that the Republic did not countersign the settlement documents they submitted. They also do not dispute that the documents they now say constitute binding settlement agreements indicated that no agreement would be reached unless the parties exchanged countersigned Agreement Schedules (the "Countersignature Condition")—they even quote some of that language on the first page of their Opposition ("Opp."). Those basic and undisputed facts demand the conclusion that Plaintiffs and the Republic have no enforceable agreements, and thus the Amended Complaint should be dismissed.

Plaintiffs seek to evade dismissal by raising vague suspicions concerning "Argentina's intentions and its representations". (Opp. at 2.) They also dismiss the express Countersignature Condition as "whimsical" (Opp. at 19) even though they also acknowledge that the Republic's countersignature was contemplated to follow a review and reconciliation process designed to confirm whether the settlement requested by each bondholder complied with the specific terms of the Proposal. (Opp. at 20.) Here, reconciliation was unsuccessful. Simply put, the Republic and Plaintiffs did not agree on whether Plaintiffs' submissions complied with the Proposal. Dismissal is therefore required.

ARGUMENT

Contrary to Plaintiffs' argument that "[q]uestions of contract formation are not suited to summary relief" (Opp. at 11), a breach of contract claim can be dismissed at the motion to dismiss stage where, as here, Plaintiffs have failed to allege the satisfaction of the express condition that the agreement had to be signed by both parties before they could be bound. (Mem. at 11-12.); *Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 203 (S.D.N.Y. 2008) ("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 . . . Plaintiffs do not state claims for breach of contract."). Plaintiffs' reliance on *Associated Credit Corp. v. Crossley Carpet Mills Ltd.* is misplaced because that case was decided under a more forgiving pleading standard, under which the complaint was sufficient unless "it appear[ed] beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". No. 97 Civ. 7405, 1998 WL 477719 at *2 (S.D.N.Y. Aug. 13, 1998). That "no-set-of-facts test" has since been "retired" by the Supreme Court, *Ashcroft v. Iqbal*, 556 U.S.662, 670, 678 (2009), and *Associated Credit* is no longer good law.[1]

Plaintiffs make a related argument that on a motion to dismiss, a "court should resolve any contractual ambiguities in favor of the plaintiff", including "ambiguities as to contract formation". (Opp. at 11.) None of the cited cases, however, concluded that an express countersignature condition was an ambiguity, but rather concerned ambiguities in the texts of undisputedly enforceable agreements.[2] Finally, Plaintiffs argue that allegations concerning "conduct, including partial performance and estoppel, that further support contract formation also preclude summary relief". (Opp. at 12.) As shown below (*see infra* Part III.D) and in the Republic's Opposition to Plaintiffs' Preliminary Injunction Motion at 18-20 (ECF No. 47) ("PI Opp."), however, those matters cannot overcome the express Countersignature Condition or

[1] In *Bazak Int'l Corp. v. Tarrant Apparel Grp.*, the court denied summary judgment because a jury could have found the existence of contract based upon an email in which the defendant stated "per our agreement", confirmed material terms of a previously-reached oral agreement and included his "typed signature". 378 F. Supp. 2d 377, 380, 389-90 (S.D.N.Y. 2005). Moreover, it is inapposite as there was no countersignature condition. Plaintiffs' state court cases do not apply federal procedure as to the sufficiency of a complaint, and in any event do not support their argument that failure to allege compliance with a countersignature condition cannot be the basis for a motion to dismiss.

[2] *Luitpold Pharm., Inc. v. Ed. Geistlich Sohne A.G. Fur Chemische Industrie*, 784 F.3d 78, 86 (2d Cir. 2015); *Paysys Int'l, Inc. v. Atos SE*, No. 14 Civ. 10105, 2015 WL 4533141, at *4 (S.D.N.Y. July 24, 2015); *Bank of N.Y. Trust, N.A. v. Franklin Advisors*, Inc, 522 F. Supp. 2d 632, 635-38 (S.D.N.Y. 2007).

plausibly state a claim that there was a meeting of the minds on all materials terms. *Berman*, 580 F. Supp. 2d at 203.

A. No Contract Was Formed Because the Countersignature Condition Was Not Satisfied.

The failure to allege satisfaction of the Countersignature Condition alone requires dismissal of Plaintiffs' Complaint. As an initial matter, Plaintiffs' are wrong to assert that the Republic relies upon "a single sentence in the Instructions" to establish the Countersignature Condition. (Opp. at 18-19.) Rather, the Republic's Memorandum quoted numerous statements that no enforceable agreement would be formed without countersignatures, from the Instructions, the Master Settlement Agreement and Agreement Schedule. (Mem. at 5-6.) The Countersignature Condition is not "whimsical", (Opp. at 19), but was a critical part of the settlement process because, as Plaintiffs acknowledge, it represented that the Republic had determined that the bondholder's requested settlement amounts complied with the terms of the Proposal. (Opp. at 20.) Plaintiffs acknowledge that the Republic only obligated itself to pay settlements that were calculated within the "contours" of its own Proposal; unless the Republic and bondholder agreed on what those "contours" were, there could be no enforceable agreement. (Opp. at 21.) That did not happen and accordingly there was no countersignature and no binding agreement.

Plaintiffs attempt to distinguish binding caselaw establishing that dismissal is required based on the failure to satisfy the Countersignature Condition by arguing that it applies only where "parties negotiate, drafts are circulated . . . . and a dispute later arises about whether . . . . the parties intend to be bound." (Opp. at 15.) But Plaintiffs cannot overcome the key feature of the cases cited by the Republic—that one party indicated that no binding agreement would be formed until the agreement was signed by both parties. *See Scheck v. Francis*, 26 N.Y.2d 466,

470 (1970) ("It appears quite clear, *from [the attorney's] letter alone*, that the agreements were to take effect only after both parties had signed them.") (emphasis added); *Longo v. Shore & Reich, Ltd.*, 25 F.3d 94, 97 (2d Cir. 1994) ("*Horowitz's letter* indicating that both [parties'] signatures would be required evidenced an intent that the parties would not be bound to the terms of their negotiations until the agreement was signed") (emphasis added); *Jim Bouton Corp. v. WM. Wrigley Jr. Co.*, 902 F.2d 1074, 1076 (2d Cir. 1990) (mailgram stating that one party "will be in touch [with the attorney] to draw up final papers next week" demonstrated that parties did not yet intended to be bound); *Berman v. Sugo LLC,* 580 F. Supp. 2d 191, 203 (S.D.N.Y. 2008) ("If, however, *either party communicates an intent not to be bound* until an agreement is fully executed . . .") (emphasis added).[3] That did not happen here.

In fact, Plaintiffs do not cite a single case indicating that parties may be bound without countersignature when one of the parties has expressed the intent not to be bound until both parties have signed; many of their cases do not discuss signature requirements at all.[4] *Haeffele v. Hercules Inc.*, which does not even apply New York law, concerned a form to enroll in an early retirement program that had a signature line for the employee and the retirement administrator. 839 F.2d 952, 955-56 (3d Cir. 1988). However, nothing in the paperwork indicated that the employee's retirement would not be effective until both parties had signed. *Id.* at 955.

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[3] In any event, Plaintiffs cannot purport to distinguish these cases on the basis that they involved negotiations while also relying on discussions concerning the bonds that would be covered by the settlements, whether Plaintiffs could receive the Republic's Injunction Offer for non-injunction bonds and whether the Republic would agree to include certain riders in the agreement that occurred before Plaintiffs submitted Agreement Schedules. (Opp. at 20, 23.)

[4] *See Rizkallah v. Forward Air, Inc.*, No. 02 Civ. 2448, 2009 WL 3029309 (S.D.N.Y. Sept. 22, 2009); *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88 (1991); *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475 (1989); *Blumberg v. Paul Revere Life Ins. Co.*, 677 N.Y.S.2d 412 (Sup. Ct., Erie Cty. 1998).

Plaintiffs offer several arguments in favor of disregarding the Countersignature Condition in favor of the "context and terms" of the Republic's proposed settlement. (Opp. at 17.) *First*, Plaintiffs point to appearances of the word "accept" in the documentation to argue that "if a manual counter-signature from the offeror was necessary to form a contract, then bondholders could not simply 'accept' Argentina's proposal". (*Id.*) That proposition is rejected by the caselaw. Without the required countersignatures, "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 (emphasis added). In any event, even if the Proposal could be considered an "offer"—and it should not—Plaintiffs' purported "acceptances" did not comply with the terms of the Proposal and are therefore invalid. (PI Opp. at 14-16.) At most, such "acceptances" were really counteroffers that would have to be accepted by the Republic in order to form a binding contract.

Second, Plaintiffs insist that the provision in the Instructions allowing bondholders to obtain a more favorable payment option if they "execute and deliver to the email address included here[in]" an Agreement Schedule by a certain date somehow overrides the clear language requiring the exchange of countersignatures. (Opp. at 18.) But there is no tension between this provision and the Countersignature Condition: if a bondholder "execute[d] and deliver[ed]" an Agreement Schedule by the specific time and the Republic was able to reconcile and thus countersign it, the bondholder obtained the more favorable treatment based on the date of its submission of the Agreement Schedule. However, if the Agreement Schedule was not reconciled and countersigned, there would be no agreement regardless of the date of submission. Plaintiffs also disingenuously wonder "how a manual signature was even possible on documents that the holders were directed to 'execute and deliver' to an email address by a specific hour".

(Opp.. at 18.) Plaintiffs know how to sign, scan and email a document—that is in fact how they submitted the Agreement Schedules they now claim are binding agreements—and so does the Republic. (*See, e.g.*, Korkmaz Decl. Ex. 5 at 4 (ECF No. 34).)

Third, Plaintiffs argue that no countersignature was required because the Instructions "do not say that the parties may reach agreement by first negotiating a list of covered bonds and then signing. They do not invite bondholders to make 'offers' that Argentina might then decide whether to accept by countersignature." (Opp. at 18.) But that reconciliation process is precisely what the Instructions mandated. The bondholder was to prepare a list of covered bonds, select a methodology to calculate the settlement amount (if the bondholder qualified for more than one such option) and calculate the final settlement amount. Argentina indeed would then review and reconcile that submission and then "decide whether to accept by countersignature" the Agreement Schedule.

Finally, Plaintiffs allege that the Republic did sign the Agreement Schedule, which allegedly "contains no obvious place for a further Argentina 'countersignature'" but does include an "/s/". (*Id.*) As discussed in the Republic's PI Opposition, the "/s/" was preprinted on the form before it was sent to bondholders and indicated where each party should sign, not that they both had already signed. (PI Opp. at 12.) That is obvious because many of Plaintiffs themselves entered manual signatures next to or in place of the "/s/" symbol appearing above their own names. (*See, e.g.*, Korkmaz Decl. Ex. 5 at 4 (ECF No. 34); Kolatch Decl. Ex. 7 at 5 (ECF No. 42).) Moreover, if the "/s/" itself could be viewed as a countersignature, it would render meaningless the language reflecting the Countersignature Condition that appears in the Instructions, the Master Settlement Agreement and the Agreement Schedule. *Cf.* 22 N.Y. Jur. 2d Contracts § 249 ("Since no provision of a contract should be left without force and effect, that

interpretation of a contract is favored which will make every part of it effective or which gives meaning to every provision.").

B. Even Ignoring the Countersignature Condition, Plaintiffs Have Not Adequately Alleged the Formation of a Contract.

Plaintiffs argue that they adequately alleged an "offer" and "acceptance". (Opp. at 12.) However, even if the Court were to ignore the express Countersignature Condition and the black letter law supporting its validity, and instead entertain Plaintiffs' characterization of the Proposal as an "irrevocable" "unilateral offer", the Complaint must still be dismissed because Plaintiffs fail to allege a valid acceptance. Even the precedent cited by Plaintiff makes clear that a valid acceptance must "comply with the terms of the offer". *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 83 (2d Cir. 1998). Plaintiffs' "acceptances" did not meet the Proposal's requirements because they sought to accept the Injunction Offer for non-injunction bonds and included claims for bonds that the Republic concluded were time-barred. (PI Opp. at 14-16.) As a result, those "acceptances" could not have created a binding agreement. *King v. King*, 208 A.D.2d 1143, 1143-44 (3d Dep't 1994) ("[I]n order for an acceptance to be effective, it must comply with the terms of the offer and be clear, unambiguous and unequivocal."). For this same reason, this Court also need not accept as true the Plaintiffs' statement that, despite the failure to exchange countersignatures, the parties nevertheless reached a meeting of the minds on material terms of the contract. (Opp. at 13-14.) Instead, Plaintiffs purported "acceptances" were, at most, counteroffers that would then have to have been accepted by the Republic in order to create an enforceable contract. *See King,* 208 A.D.2d 1144 (holding that an acceptance that "does not contain a positive, unequivocal and unqualified acceptance of plaintiff's offer . . . . amount[s] to nothing more than a rejection and counteroffer".)

C. The Republic's Conduct Does Not Show That Delivery of Completed Agreement Schedules Formed Binding Agreements.

Plaintiffs' allegations that emails sent by the Republic confirm that the Proposal was binding are unfounded and based upon mischaracterizations of those communications. The words "[I am] providing the following link and agreement for you to execute" and "[t]he deadline today was for plaintiffs with an Injunction taking the Injunction Offer . . . ." in emails from the Republic do not override the clear, repeated words and meaning in the documents accompanying the Proposal that the Republic was not bound unless and until the Countersignature Condition was satisfied. (*See also* PI Opp. at 12-14.)

Plaintiffs also contend that the Republic's mistaken statement to the Court that "an agreement in principle" had been reached with Red Pines meant that "delivery of an Agreement Schedule created a binding contract". (Opp. at 14.) As the Republic has explained, the inclusion of the Red Pines settlement was an error because the Republic had not, in fact, countersigned the Agreement Schedule submitted by Red Pines. But even if that statement could have bound the Republic, Plaintiffs have not identified how or why that statement, which concerned Red Pines only, meant that the Republic had abandoned the express Countersignature Condition with respect to any other alleged agreement.[5]

D. Judicial Estoppel Does Not Apply Because the Republic Has Not Taken Inconsistent Positions.

Plaintiffs argue that the Republic's prior representations to the Court that the Proposal was an "offer to settle the claims of all outstanding holders of defaulted Argentine debt" and that "[e]very FAA bondholder is free to accept the general proposal" judicially estop

[5] Red Pines subsequently withdrew from this action and concluded a settlement with the Republic, which it would not have done had it believed that it *already* had a binding settlement agreement.

the Republic from arguing that they are not bound to the alleged agreements with the Plaintiffs. (Opp. at 22.) However, Plaintiffs have not shown that the Republic has taken any "clearly inconsistent positions" that would result in "unfair advantage" or the imposition of "unfair detriment", which they must show in order to justify the imposition of judicial estoppel. *Intellivision v. Microsoft Corp.*, 484 F. App'x 616, 619 (2d Cir. 2012). That the Republic requires the opportunity to review and determine if it agrees with the submitted Agreement Schedules (and indicate such agreement by countersigning) before being bound to them, does not mean that bondholders are not free to accept the Proposal and settle their claims in accordance with the required procedures (including reconciliation and countersignature).

E. The Proposal Excluded Claims Barred by the Statute of Limitations.

Plaintiffs are wrong that the Proposal did not exclude time-barred claims. The Proposal stated 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.) The Master Settlement Agreement in turn incorporated the terms that had been set forth in the 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 communications on which Plaintiffs rely (Opp. at 23) cannot change the unambiguous terms in the Proposal and Master Settlement Agreement. 22 N.Y. Jur. 2d Contracts § 210 ("Extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face"). The parties' disagreement about the amount of Plaintiffs' valid claims reinforces the importance of reconciliation and review, and shows that the parties failed to reach a meeting of the minds on the material terms of the agreements. (*See also* PI Opp. at 14-18.)

F. Plaintiffs Should be Denied Leave to Amend.

Plaintiffs should not be granted leave to amend their Amended Complaint. (Opp. 24-25.) They already have amended the Complaint once in response to the motion to dismiss, but those amendments, and any other amendments Plaintiffs could make, will not be able to resolve the fatal flaws identified above, particularly the failure to allege satisfaction of the Countersignature Condition. Plaintiffs can prove no set of facts that entitle it to relief, and any amendments will be futile. *See Bender v. GSA, HWA Sec. Patrol Inc., et al.*, 2006 WL 1643345 at 1* (S.D.N.Y. June 9, 2006) (dismissing a request for leave to amend as "it appears beyond a doubt that the movant can prove no set of facts in support of its claim which would entitle it to relief.") (quotation omitted); *Berman*, 580 F. Supp. 2d at 203 (denying leave to amend as Plaintiffs had not pled facts that could show "an enforceable contract as a matter of law.").

II. CONCLUSION

For the reasons stated above, the Republic respectfully requests that the Amended Complaint be dismissed with prejudice.

April 11, 2016

Respectfully submitted,

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by

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