UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HENRY H. BRECHER, Individually And On Behalf Of All Others Similarly Situated,	:	No. 06 CV 15297 (TPG)
Plaintiff,	:	
v.	:	
REPUBLIC OF ARGENTINA,	:	
Defendant.	:	

MEMORANDUM OF PLAINTIFF HENRY H. BRECHER IN SUPPORT OF CLASS PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE SETTLEMENT WITH THE REPUBLIC OF ARGENTINA AND FOR APPROVAL OF THE PLAN OF DISTRIBUTION

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I. INTRODUCTION

On May 25, 2016, the Court preliminarily approved the May 23, 2016 Settlement Agreement between plaintiff Henry H. Brecher, on behalf of himself and the Class, and the defendant Republic of Argentina ("Settlement"), as well as the Notice Plan proposed by Gilardi & Co., the Court-approved notice and claim administrator.[1] In compliance with the Preliminary Approval Order, the required notice was provided to the Class. Pursuant to Federal Rule of Civil Procedure 23, plaintiff now requests that the Court grant final approval of the Settlement and the Distribution Plan, and enter the Proposed Order. The fairness hearing for this Settlement is currently set for November 10, 2016.

The Settlement fully satisfies the standards for concluding that it is fair, adequate, and reasonable. If approved, the Settlement will resolve all claims against Argentina relating to the Republic of Argentina European Medium Term Note Bond, with a coupon rate of 9.25%, a maturity date of July 20, 2004, and which bears the ISIN XS0113833510 ("the Bond"). And, it will finally put to rest this lengthy and arduous litigation. Further, for their tireless pursuit of compensation connected to Argentina's default on its obligations with respect to the Bonds, the Settlement will provide class members with significant compensation. Class members will receive *approximately 65% of their damages*.[2] In contrast, as has been reported, those who participated in the 2005 and 2010 Exchange Offers received merely a small fraction of their damages. Even taking into account the time value of money, the compensation received by those who participated in the Exchange Offers pales into comparison to what class members will receive here. Finally, not only is the amount of the Settlement fair, reasonable, and adequate, but the Settlement bears all of the hallmarks of a settlement negotiated in good faith by

[1] Dkt. No. 115 ("Preliminary Approval Order"). The May 23, 2016 Settlement Agreement is attached as Ex. 1 to the May 23, 2016 Declaration of Jason A. Zweig in Support of Plaintiff's Motion for Preliminary Approval (Dkt. No. 108-1).

[2] A calculation of the Class's settlement payment as a percentage of damages is annexed to the October 3, 2016 Declaration of Steve W. Berman ("Berman Decl."), Ex. 4.

experienced counsel. And, the involvement of the Special Master, Daniel Pollack, in the negotiations, provides additional evidence of the Settlement's fairness.

For the reasons set forth herein, plaintiff respectfully requests that the Court grant his motion for an order: (i) finding that the Settlement is fair, reasonable, and adequate and warrants final approval; (ii) finding that the Notice Plan satisfied due process; and (iii) finding that the Distribution Plan is fair, reasonable, and adequate.

II. PROCEDURAL HISTORY

A. Plaintiff's Allegations in this Lawsuit

In the late 1990's, Argentina issued a significant amount of debt instruments to the investing public throughout the world.[3] In regard to this case, Argentina issued approximately €1 billion of the Bonds.[4] In 2000 and 2001, plaintiff collectively purchased approximately €55,000 of Bonds.[5] The Bonds were issued under, and governed by, among others, a Trust Deed dated July 27, 1993 ("the Trust Deed"), and a Fifteenth Supplemental Trust Deed dated December 20, 2001 ("the Supplemental Trust Deed").[6]

On or about December 23, 2001, Argentina declared a moratorium on the payment of principal and interest with respect to all of its external debt, including all payments on the Bonds.[7] The moratorium on payment violated the terms of the Trust Deed and Supplemental Trust Deed and constituted a default with respect to the Bonds.

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[3] December 19, 2006 complaint in *Brecher v. Republic of Argentina*, No. 06-CV-15297 (S.D.N.Y.), Dkt. No. 1, ¶¶ 18-19.

[4] *Id.* at ¶ 20.

[5] *Id.* at ¶ 21.

[6] *Id.* at ¶ 7.

[7] *Id.* at ¶ 4.

B. Procedural Background

On December 19, 2006, plaintiff filed this class action in this Court on behalf of himself, and all others who continuously held the Bonds. On June 6, 2011, this Court granted plaintiff's motion for class certification, and certified the following Class: "All current holders of beneficial interests in the Bond who purchased or otherwise acquired the interests prior to December 19, 2006, and who will continue to hold those interests until the date of final judgment."[8] Excluded from the Class were those who participated in the 2005 or 2010 Exchange Offers, those who failed to continuously hold their Bonds, those who initiated separate proceedings, Argentina, and those who opt-out.[9]

On December 5, 2011, plaintiff moved for summary judgment on liability and class-wide damages.[10] On August 29, 2012, the Court heard argument on plaintiff's motion for summary judgment, and, the following day, issued an order granting the motion as to liability, but required that there be an evidentiary hearing with respect to damages sustained by the plaintiff and the Class.[11] On September 12, 2013, prior to the scheduled evidentiary hearing on damages, plaintiff moved under Rule 23 to modify the class definition from a so-called "continuous holder class," to a Class encompassing all holders of the Bonds.[12] The Court held a hearing on plaintiff's motion to modify the Class, and on August 29, 2014, entered an order modifying the class definition to include all holders of the Bonds.[13]

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[8] Dkt. No. 56.

[9] *Id.*

[10] Dkt. No. 57.

[11] Dkt. No. 70.

[12] Dkt. No. 78.

[13] Dkt. No. 90.

Argentina then sought leave under Rule 23(f) of the Federal Rules of Civil Procedure to appeal the Court's certification order to the United States Court of Appeals for the Second Circuit.[14] On November 25, 2014, the Second Circuit granted Argentina's Rule 23(f) petition.[15] On appeal, the Second Circuit vacated this Court's order modifying the class definition, and remanded for an evidentiary hearing in order to determine plaintiff's damages with respect to a continuous holder class.[16] Following the Second Circuit's remand, the parties entered into settlement negotiations which led to a February 16, 2016 Agreement in Principle to settle this action. In fact, this case was the first class action that Argentina settled. Others then followed.

C. Settlement Negotiations

The first settlement discussions in this case took place during the summer of 2014, shortly following the Court's appointment of the Special Master.[17] Those preliminary discussions, which also involved many of the other parties to related litigations, were unfruitful. Settlement negotiations then took a hiatus.

In early January 2016, the negotiations resumed in earnest.[18] At that time, Class Counsel and the Special Master resumed their negotiations concerning a settlement of this class action. Between mid-January 2016 and mid-February 2016, there were a series of bilateral and multilateral discussions involving Class Counsel and the Special Master, Class Counsel and representatives of the Finance Minister of Argentina's office directly, and sometimes both.[19] During these discussions there were a

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[14] *See* The Republic of Argentina's Petition Pursuant to Fed. R. Civ. P. 23(f) for Leave to Appeal from the District Court's Order Granting Class Certification, *Brecher v. Republic of Argentina*, No. 14-3409 (2d Cir. Sept. 12, 2014), Dkt. No. 1.

[15] *Id.* at Dkt. No. 25.

[16] *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015).

[17] Berman Decl., ¶ 54. For a more fulsome description of the settlement negotiations, *see* ¶¶ 59-64 of the Berman Decl.

[18] Berman Decl., ¶ 55.

[19] *Id.*

series of proposals and terms exchanged, some of which were rejected and some of which were accepted. These discussions led to the execution of an Agreement in Principle on February 16, 2016.[20] The Agreement in Principle, however, contained only the amount Argentina agreed to pay in settlement (150% of principal), that Argentina would pay up to $25,000 in notice costs, and that the Settlement was contingent on Argentine congressional approval, and the lifting of the *pari passu* injunctions entered by this Court.

Following the execution of the Agreement in Principle, the parties then negotiated a more comprehensive Settlement Agreement. Those discussions involved Class Counsel and Argentina's outside counsel from Cleary Gottlieb.[21] Those negotiations took place over approximately April and May 2016.[22] Those negotiations, which also involved the exchange of numerous settlement terms, some of which were accepted and some of which were rejected, were also contentious, and at all times, conducted in good faith and at arm's-length.[23] Ultimately, these negotiations resulted in the May 23, 2016 Settlement Agreement.

III. THE PROPOSED SETTLEMENT

The terms of the Settlement are straightforward. Under the Settlement, Argentina will pay in settlement an amount representing 150% of the outstanding principal of every class member who submits a valid proof of claim form. In addition, Argentina has agreed to pay $25,000 towards the costs of notice and claims administration. In exchange, each class member will release all of their claims against Argentina relating to the Bonds.

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[20] A copy of the February 2016 executed Agreement in Principle is attached as Ex. 5 to the Berman Decl.

[21] *Id.* at ¶ 63.

[22] *Id.*

[23] *Id.* at ¶¶ 63-64.

IV. THE APPROVED NOTICE WAS ADEQUATE AND SATISFIED DUE PROCESS

In accordance with paragraph 4 of the Preliminary Approval Order, beginning on or around July 1, 2016, Gilardi disseminated a long form notice to a proprietary list of institutional investors maintained by Gilardi who are likely to hold interests in the Bonds on behalf of their customers.[24] In addition, Gilardi also sent the notice and claim forms to those individuals and entities who contacted Class Counsel in connection with the proof of claim form that was disseminated to potential members of the Class in connection with the Court's January 8, 2016 order requiring proofs of claim be mailed to the Class in anticipation of an evidentiary hearing on damages.[25] Class Counsel also issued a press release, in English and Spanish, announcing the Settlement and the various deadlines.[26] The long form notice and proof of claim were also made available at a case dedicated website at www.argentinabondclasses.com.[27]

Substantively, the notice (i) described the nature of this lawsuit and identified the Class; (ii) described the potential claims and defenses, as well as the issues on which the parties disagree; (iii) notified class members of their rights to appear and object; (iv) clearly explained the binding nature of the Settlement; and (v) sets forth the plan of distribution pursuant to which the settlement fund would be allocated among members of the Class.[28]

It is obvious that the notice and proof of claim reached most, if not all, members of the Class, even those who reside overseas (which is the majority of the Class). Based on data exchanged by plaintiff and Argentina during the litigation, the parties believed there was only about €28.7

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[24] *See* September 28, 2016 Declaration of Michael Jacoby ("Jacoby Decl.") (Dkt. No. 123), ¶ 5. A copy of the long form notice can be found at Ex. A to the Jacoby Decl.

[25] *Id.* at ¶ 4.

[26] *Id.* at ¶¶ 10-12.

[27] *Id.* at ¶ 12.

[28] *Id.* at Ex. A.

million in outstanding Bonds that were part of this class action.[29] That the claims rate is so high, is a testament to the fact that notice reached most, if not all, of the Class here.

V. THE SETTLEMENT MEETS THE STANDARDS FOR FINAL APPROVAL

"There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation …."[30] This is especially true for complex litigation.[31] Although public policy encourages settlement, court approval is necessary for class action settlements. The standard for approval is well-established: the court will approve a settlement if it is fair, adequate, and reasonable, and not a product of collusion.[32]

A. The Settlement Process was Procedurally Fair

The initial determination of fairness, often called "procedural fairness," focuses on the settlement process itself.[33] "A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery."[34]

In granting preliminary approval of the Settlement, the Court held "that the Settlement is the product of arm's-length negotiation by experienced counsel."[35] There is nothing in the record which suggests, in any way, that the Settlement was anything but the result of a prolonged, contentious, and hard fought battle between highly experienced practitioners, who fought hard for their clients at

[29] Dkt. No. 61 (Declaration of Joel E. Lesch), ¶ 11, Ex. A.

[30] *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

[31] *See Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 328 (S.D.N.Y. 2005), *aff'd in part*, *vacated in part on other grounds*, 443 F.2d 253 (2d Cir. 2006).

[32] *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *New York v. Salton, Inc.*, 265 F. Supp. 2d 310, 313 (S.D.N.Y. 2003).

[33] *Ebbert v. Nassau Cnty.*, 2011 WL 6826121, at *7 (E.D.N.Y. Dec. 22, 2011).

[34] *Cronas v. Willis Grp. Holding, Ltd*, 2011 WL 6778490, at *2 (S.D.N.Y. Dec. 19, 2011) (quoting *Wal-Mart Stores, Inc.*, 396 F.3d at 116). *See also New York by Vacco v. Reebok Int 'l*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *McReynolds v. Richards Cantave*, 588 F.3d 790, 803-04 (2d Cir. 2009) (citing *Wal-Mart Stores Inc.*, 396 F.3d at 116).

[35] Dkt. No. 115, at p. 2.

all times. The assistance of the Court-appointed Special Master, Daniel Pollack, reinforces the conclusion that the Settlement is non-collusive.[36] Such findings confirm the conclusion that the Settlement is procedurally fair.

B. The Settlement Is Reasonable, Adequate, and Substantively Fair

Courts within the Second Circuit must consider the nine factors outlined in *City of Detroit* v. *Grinnell Corp.*[37] to determine whether class action settlements are reasonable, adequate, and substantively fair.[38] "In finding that a settlement is fair, not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'"[39] Here, the totality of these factors weighs in favor of approving the Settlement.

1. The anticipated complexity, duration, and expense of additional litigation.

Absent a settlement, of course, this already 10-year-old litigation would continue, perhaps, as it had before—seemingly indefinitely. The next steps of the litigation, an evidentiary hearing on damages, would take place. The hearing would likely be relatively straightforward; plaintiff would put on proof as to the amount of outstanding Bonds, and the Court would enter judgment in favor of the plaintiff and the Class for the amount established at the hearing. However, that is where straightforward ends, and the totally unpredictable begins.

Although the current Argentine President, President Macri, has made it a priority to resolve the defaulted debt litigation, if these last years have shown us anything, it is that if it wished, Argentina could prolong these cases indefinitely. As a sovereign nation, Argentina has significant

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[36] *See, e.g.*, *Kelen v. World Fin. Network Nat'l Bank*, 302 F.R.D. 56, 68-69 (S.D.N.Y. 2014) (discussing how involvement of mediator supports finding of fairness with respect to class action settlement).

[37] 495 F.2d 448, 462-63 (2d Cir. 1974).

[38] *See In Re Nissan Radiator/Transmission Cooler Litig.*, 2013 WL 4080946, at *5 (S.D.N.Y. May 30, 2013).

[39] *In re Global Crossing Sec.* & *ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (quoting *Thompson v. Metro. Life Ins.* Co., 216 F.R.D. 55, 61 (S.D.N.Y. 2003)).

political and financial resources at its disposal which it deployed throughout this litigation. Further, Argentina seems to have very few, if any, assets outside of Argentina that could be seized to satisfy a judgment. A number of plaintiffs in related litigations have spent many years (and much money) trying to seize Argentine assets to satisfy their judgments, only to come up empty. Further, as described in the accompanying Berman Declaration, unlike those plaintiffs in related litigations who obtained a *pari passu* injunction against Argentina preventing Argentina from paying interest on its performing bonds until it pays the defaulted bonds, it is far from clear whether plaintiff could have obtained one. Plaintiff's Bonds are governed by English law, not New York law, which was the governing law for those who obtained a *pari passu* injunction.[40] Therefore, failing to accept this Settlement carried the significant risk of recovering nothing at the end of the day.

2. **The Class' reaction to the Settlement.**

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy."[41] As discussed above, notice of the Settlement was sent to several different groups who either held the Bonds on behalf of their clients (custodial banks), or, directly to those who Class Counsel knew possessed the Bonds.[42] This notice program was designed to ensure that a very high percentage of class members received the important information about their legal rights relating to this Settlement. And, it appears that the notice program, and the Settlement itself, have been highly successful. Based on plaintiff's data as of October 3, 2016, it appears that the claims rate in this case will likely be near 100% of the remaining Class. This is an unusually high participation rate, attesting to the Class' positive reaction to the Settlement.

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[40] Berman Decl., ¶ 54.

[41] *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) (citing *In re American Bank Note*, 127 F. Supp. 2d 418,425 (S.D.N.Y. 2001)).

[42] *See* section IV above. *See also* Jacoby Decl., ¶¶ 4-7.

"[T]he lack of objections may well evidence the fairness of the [s]ettlement."[43] Pursuant to the May 25, 2016 Preliminary Approval Order, formal objections to the Settlement, and Class Counsel's application for Attorneys' Fees, are due October 21, 2016.[44] Although the deadline to object has not yet arrived, to date, only one "objection" has been filed.[45] However, as Class Counsel stated in their September 19, 2016 letter to the Court,[46] the purported objector has no standing to object. In a conversation with Class Counsel, the purported objector, John Levin, stated he does not meet the class definition because he acquired his bonds after December 19, 2006.[47] Therefore, he is not a member of the Class, and cannot object. Only class members may object to a settlement.[48] Further, even if he were a member of the Class, which he is not, he bears the burden of demonstrating that he is a member of the Class.[49] However, Mr. Levin has provided no *bona fides* that he is a member of the Class, and therefore, his objection cannot stand. His objection should be stricken, which is proper remedy with respect to defective objections.[50]

The exceedingly high claims rate, and the lone invalid objection, strongly support final approval of the Settlement.

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[43] *Maley*, 186 F. Supp. 2d at 362.

[44] Dkt. No. 115, at ¶ 6C.

[45] Dkt. No. 115. To the extent any additional objections are filed between now and the deadline to object, Class Counsel will address them in their reply papers due November 1, 2016 under the May 27, 2016 Preliminary Approval Order.

[46] Dkt. No. 120.

[47] *See generally* the September 28, 2016 Declaration of Jason A. Zweig being filed concurrently with this motion.

[48] Fed. R. Civ. P. 23(e)(5) ("Any *class member* may object to the [settlement] if it requires court approval.") (emphasis added); *accord Rowe v. E.I. DuPont de Nemours & Co.*, 2011 WL 3837106, at *3 (D.N.J. Aug. 26, 2011); *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990).

[49] *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1008 (N.D. Cal. 2015).

[50] *Miller v. Ghirardelli Chocolate Co.*, 2015 WL 758094, at *10 (N.D. Cal. Feb. 20, 2015) (listing cases).

3. **The stage of the proceeding and the amount of the discovery completed.**

This factor considers whether the litigation was developed sufficiently to provide counsel with an adequate appreciation of the merits of the case from which to fairly negotiate and settle the action. Class Counsel is intimately familiar with the facts, the defenses, and legal precedents affecting the case, and the practical considerations surrounding plaintiff's ability to enforce a judgment against Argentina. Class Counsel has been involved in these proceedings, and fully understands the complex dynamics associated with this case. Class Counsel fully understand the merits of this case, and the risks of proceeding further without a settlement. This factor strongly supports approval of the Settlement.

4. **The risks of establishing liability and damages.**

The fourth and fifth *Grinnell* factors take into account the risks of establishing liability and damages. Here, the risks of establishing liability is low, perhaps even non-existent, since plaintiff had already obtained a class liability judgment against Argentina, which Argentina does not appear to challenge. While plaintiff had not yet secured a judgment against Argentina with respect to damages, plaintiff believes such a task would present minimal risk, particularly since plaintiff now knows the identity of most, if not all, class members, and would present their holdings at trial to establish damages. Thus, these factors are neutral.

5. **The risks of maintaining the class action through trial.**

A risk of establishing and maintaining class certification through trial and appeal exists for any settlement. However, this factor, like the risks of establishing liability and damages, is relatively low. Thus, this factor is also neutral.

6. **The ability of the defendants to withstand a greater judgment.**

Given that Argentina is a sovereign nation with significant resources, it is likely that Argentina could withstand a greater judgment than the amount it is paying out in settlement here.

But, "[while] evidence that the defendant will not be able to pay a larger award at trial tends to weigh in favor of approval of a settlement, … the converse is not necessarily true; *i.e.*, the fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate."[51] This factor weighs neither in favor of nor against the Settlement.

7. The range of reasonableness of the Settlement amount in light of the best possible recovery and in light of all attendant risks of litigation.

The last two *Grinnell* factors are often considered together:

> Fundamental to analyzing a settlement's fairness is 'the need to compare the terms of the compromise with the likely rewards of litigation.' This determination 'is not susceptible of a mathematical equation yielding a particularized sum,' but turns on whether the settlement falls within 'a range of reasonableness.' The adequacy of the amount offered in settlement must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.[52]

Here, this factor strongly weighs in favor of the Settlement. Based on Class Counsel's estimates, the Settlement amount represents approximately 65% of the Class' damages. An extraordinary outcome, especially considering about 92% of those who initially held defaulted Argentine debt, participated in the exchange offers and received only about 30 cents on the dollar.

In light of all possible litigation risks and possible outcomes, application of the *Grinnell* factors supports the conclusion that the Settlement is fair, reasonable, and adequate.

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[51] *In re Paine Webber Ltd. Pships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

[52] *In re Paine Webber Ltd. Pships Litig.*, 171 F.R.D. at 129-30 (internal citations omitted).

VI. THE DISTRIBUTION PLAN MEETS THE STANDARDS FOR FINAL APPROVAL

The fair, adequate, and reasonable standard also applies to the distribution of the settlement funds to class members.[53] The Distribution Plan here ensures that each class member will receive 150% of their principal, minus their *pro rata* share of attorneys' fees and expenses, and any named plaintiff service award. Their *pro rata* share will be determined by the percentage that their settlement payment represents of the total settlement fund, and the class member will then be responsible for that percentage of any attorneys' fees, litigation expenses, and named plaintiff incentive payment awarded by the Court. This Plan of Distribution was fully disclosed in the notice which was disseminated to members of the Class.[54] And there have been no objections to the Plan of Distribution.

VII. THE PROPOSED CLASS MEETS ALL THE REQUIREMENTS OF RULE 23

The Court previously certified a litigation class, and for the same reasons the Court previously certified a litigation class, the Class remains appropriate here.[55]

A. The Class Satisfies the Requirements of Rule 23(a)

Certification is appropriate because the Class readily meets each of the four requirements of Rule 23(a).

1. The class members are too numerous to be joined.

Plaintiffs meet the first requirement of Rule 23(a) because the Class is so numerous that joinder of all members is impracticable.[56] To satisfy the numerosity requirement, "a plaintiff need not show that joinder is impossible. Nor need the plaintiff know the exact number of class

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[53] *Maley*, 186 F. Supp. 2d at 367. *See also In re Paine Webber*, 171 F.R.D. at 132; *White v. NFL*, 822 F. Supp. 1389, 1417 (D. Minn. 1993).

[54] Jacoby Decl., Ex. A, at p. 5.

[55] *See, e.g.*, *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (certifying same settlement class as litigation class).

[56] *See* Fed. R. Civ. P. 23(a)(1).

members."[57] Rather, while "[t]here is no strict numerical test for determining impracticability of joinder[,] … [w]hen class size reaches substantial proportions … the impracticability requirement is usually satisfied by the numbers alone."[58]

The number of potential class members, coupled with their widely-dispersed locations in the United States and around the world, makes joinder impracticable and class treatment appropriate.

2. **There are common questions of law or fact.**

Rule 23(a)(2) requires that there must be questions of law or fact common to the class. The commonality requirement of Rule 23(a) is met if the claims involve questions of law or fact that are common to the class.[59] The commonality requirement is satisfied if the named plaintiff shares at least one question of fact or law in common with the purported class.[60]

The plaintiff and the class members have numerous issues of law and fact in common, including:

a) The terms of the Bonds;

b) Whether Argentina violated the terms of the Trust Deed and Supplemental Trust Deed when it defaulted on the Bonds; and

c) The amount of damages caused by Argentina's default.

These common issues are more than sufficient to satisfy Rule 23(a)(2).

[57] *Saddle Rock Partners Ltd. v. Hiatt*, 2000 WL 1182793, at *2 (S.D.N.Y. Aug. 21, 2000) (citations omitted).

[58] *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (citations omitted); *Gortat v. Capala Bros.*, 949 F. Supp. 2d 374, 383 (E.D.N.Y. 2013) (finding that as little as 24 class members may meet the numerously requirement), *aff'd*, 568 F. App'x 78 (2d Cir. 2014).

[59] *See Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001).

[60] *See Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

3. **The Class Representative's claims are typical.**

Rule 23(a)(3) requires that "claims or defenses of the representative parties [be] typical of the claims or defenses of the class."[61] Like the test for commonality, "[t]he typicality requirement is 'not demanding.'"[62] The typicality requirement is readily met where "the claims of the named plaintiffs arise from the same practice or course of conduct that gives rise to the claims of the proposed class members."[63] There is no requirement, however, that the claims of all members of a proposed class be identical.[64]

The plaintiff's claims are typical of the claims of other class members because their losses all derive from Argentina's default on the same debt instrument. As a consequence, plaintiff and the Class were injured in the same way. The facts necessary to advance plaintiff's potential claims are the same as those necessary for absent class members to establish theirs; thus, typicality is established.

4. **The Class Representative will fairly and adequately protect the interests of the Class.**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." This requirement is met if it appears that: (1) the named plaintiff's interests are not antagonistic to the class' interests; and (2) the named plaintiff's attorneys are qualified, experienced, and generally able to conduct the litigation.[65]

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[61] Fed. R. Civ. P. 23(a)(3).

[62] *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 87 (S.D.N.Y. 2004), *vacated on other grounds*, 471 F.3d 24 (2d Cir. 2006) (citations omitted).

[63] *In re Vivendi Universal S.A. Sec. Litig.*, 242 F.R.D. 76, 85 (S.D.N.Y. 2007) (internal quotation and citation omitted).

[64] *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *10, (S.D.N.Y. Dec. 23, 2009).

[65] *See In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 291 (2d Cir. 1992); *In re Marsh*, 2009 WL 5178546, at *10.

Here, plaintiff and members of the Class are similarly situated because they share the same claims and have the same interest in maximizing the recovery from Argentina.[66] The plaintiff has thus far protected the interests of the Class vigorously and without conflict, and will continue to do so. The plaintiff and the Class have the same interest in establishing that Argentina caused or contributed to their damages; therefore, their incentives align perfectly.

Class Counsel, Hagens Berman Sobol Shapiro LLP ("Hagens Berman"), has extensive experience and expertise in complex litigation and class action proceedings throughout the United States and has recovered billions of dollars for its clients and the classes it has represented,[67] and is qualified and able to conduct this litigation. Thus, the requirements of Rule 23(a)(4) are satisfied.

5. **The predominance requirement of Rule 23(b)(3) is satisfied.**

Rule 23(b)(3) requires that the common questions of law or fact predominate over any questions affecting only individual class members and that a class action is superior to other available methods of adjudication. Both of these requirements are met here.

a. Common questions predominate.

Rule 23(b)(3) does not require a complete absence of any individual issues.[68] Rather, it requires predominance, which entails that "some of the legal or factual questions" can be resolved through "'generalized proof" and that "these particular issues are more substantial than the issues subject only to individualized proof."[69] The Supreme Court has defined this inquiry as establishing

[66] *See Drexel*, 960 F.2d at 291; *In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) (no conflict of interest between class representatives and absent class members where they share the common goal of maximizing recovery).

[67] *See* www.hbsslaw.com for a description of the firm and some of Hagens Berman's most significant recoveries and achievements. Also, attached to the Berman Decl. at Ex. 6 is a copy of the firm's resume.

[68] *See Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 99 (S.D.N.Y. 1981) ("To be sure, individual issues will likely arise in this as in all class action cases.").

[69] *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002) (internal quotation marks omitted).

"whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[70] This inquiry is "similar" to Rule 23(a)(3)'s typicality requirement.[71]

This case involves the type of "common nucleus of operative facts and issues with which the predominance inquiry is concerned."[72] The proof of any liability on the part of Argentina would be common to the Class as a whole, and because such class-wide proof will be the overriding focus of any trial of this case, Rule 23(b)(3)'s predominance requirement is thus satisfied.

b. A class action is the superior method of adjudication.

Rule 23(b)(3) also sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: "(A) the class members' interests in individually controlling the prosecution … of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by … class members …; and (D) the likely difficulties in managing a class action."[73] Considering these factors, proceeding by means of a class action is clearly "superior to other available methods for fairly and efficiently adjudicating"[74] the potential claims against Argentina.

The high cost of individualized litigation of plaintiff's claims against Argentina make it unlikely that the vast majority of the class members would be able to pursue their own potential claims and obtain relief without class certification. This is particularly true because numerous class members reside outside of the United States and are unfamiliar with the United States court system or have claims that are too small to adjudicate individually. Plaintiff, for example, purchased approximately €55,000 worth of Bonds, and even taking into account the interest payments he is

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[70] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

[71] *Id.* at 623 n.18.

[72] *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006).

[73] Fed. R. Civ. P. 23(b)(3).

[74] *Id.*

entitled to, the costs to litigate this case would far exceed any recovery he would be entitled to obtain if his claim were litigated on an individual basis. Separate actions would also "risk disparate results among those seeking redress, … encourage a race to judgment given the limited funds available to fund recovery here, … exponentially increase the costs of litigation for all, and … be a particularly inefficient use of judicial resources."[75]

VIII. NO SECOND OPT-OUT OPPORTUNITY SHOULD BE PROVIDED[76]

On June 6, 2011, this Court certified the Class. In connection with that certification, notice was sent to the Class informing the Class of the certification order, and that those who wished to opt-out of the Class, were free to do so. The notice said nothing about the possibility that there would be a second opt-out opportunity, should there be a class settlement. Instead, the notice stated, "[p]ersons who fall within the definition of class membership and do not exclude themselves from the Class may be bound by the results of this litigation and may be eligible to participate in any benefit that may be obtained for Class Members as a result of this litigation."[77] Thus, class members were previously provided notice and given a chance to exclude themselves from the Class and respectfully, this Court should not permit another opportunity to opt-out of the Class.

Rule 23(e)(4) of the Federal Rules of Civil Procedure provides that, "[i]f the class action was previously certified under Rule 23(b)(3), the court *may* refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier

[75] *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 133 (S.D.N.Y. 2001) (footnote omitted).

[76] As of the date of this motion, there have been no opt-out requests received.

[77] December 5, 2011 Declaration of Carole K. Sylvester re Mailing of the Notice of Pendency of Class Action, Request for Exclusion, and Publication of the Summary Notice, at Ex. A, p. 2, Dkt. No. 60. In addition, the notice also provided, "[i]f you do not request exclusion from the Class and do not meet the requirements for automatic exclusion, you will be considered a member of the Class until there is further action of the Court. If you do not request exclusion from the Class, eventually you may be bound by the results of this litigation and you will not be able to pursue your own individual legal action against the Republic based upon the claims asserted in the class action." *Id.* at p. 4.

opportunity to request exclusion but did not do so." (Emphasis added.) The 2003 Advisory Committee Notes make clear that the decision as to whether to permit a second opt-out is a matter that is confided in the Court's discretion.[78] There are numerous decisions from Courts within this Circuit, in which Courts have declined to afford a second opt-out opportunity when, like here, a court previously certified a litigation class, and then later, the same class for settlement purposes, even over the objection of certain class members.[79] Here, the Court need not provide class members with a second opportunity to opt-out, since a previous opportunity to do so was provided. To hold otherwise, would disrupt settlement proceedings, and discourage settlement, since, "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately."[80]

Here, although there had not been a settlement in hand as of the date of the prior opt-out opportunity, class member's knew about this litigation, the chances of recovery in this case, and the various risks that existed. These cases have been highly publicized for years, including at the time the first opt-out opportunity was provided. Further, as the Court is aware, outside of this litigation, Argentina has extended a settlement offer to any holder of defaulted Argentina debt, including the Bonds in this case, at 150% of the bond holder's principal.[81] Thus, if one were provided an opt-out opportunity, it would be to likely participate in the same offer that has been provided in this class

[78] Advisory Comm. 2003 Notes to Fed. R. Civ. P. 23(e)(3). *See also Denney v. Deutsche Bank AG*, 443 F.3d 253, 271 (2d Cir. 2006).

[79] *See In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 n.18 (E.D.N.Y. 2003) (Judge Gleeson).

[80] *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 635 (9th Cir. 1982).

[81] *See* www.economia.gob.ar/wp-content/uploads/2016/04/Argentina_Settlement_Agreement_and_Schedule.pdf (visited September 26, 2016).

action, and thus, no prejudice would come from declining to permit a second opt-out opportunity. Finally, class members retain their rights to object to any aspect of the proposed Settlement.

IX. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests the Court:

1. Find that notice of the Settlement was fair, adequate, and reasonable and in compliance with due process, Rule 23, and the Court's prior orders;

2. Grant final approval of the Settlement Agreement and Distribution Plan;

3. Strike the "objection" filed on September 19, 2016; and

4. Find that the Class previously certified by the Court, remains an appropriate class.

A Proposed Final Judgment for the Court's consideration is attached to the notice of motion.

Dated: October 3, 2016

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

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Class Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each other party through the Court's electronic filing service on October 3, 2016, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman