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.	.	

OMNIBUS REPLY MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE PROPOSED SETTLEMENT AND PLAN OF DISTRIBUTION, CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES, REIMBURSEMENT OF LITIGATION EXPENSES, AND PAYMENT OF SERVICE AWARD TO PLAINTIFF HENRY H. BRECHER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Plaintiff Henry H. Brecher and the Class respectfully submit this reply memorandum in further support of their Motion for Final Approval of the proposed Settlement with defendant Republic of Argentina,[1] and Class Counsel's application for the payment of attorneys' fees, reimbursement of litigation expenses and for an incentive award to named plaintiff Henry Brecher.[2] The Settlement—150% of class member's outstanding principal—represents an excellent recovery, and is fair, reasonable, and adequate. Most notably, thousands of Settlement notices were provided to potential members of the Class, and not a single objection to the Settlement (or to Class Counsel's motion for attorneys' fees) was made. For the reasons discussed below and in Plaintiff's Final Approval Memorandum,[3] which is incorporated herein, respectfully, the Court should: 1) grant final approval of the proposed Settlement; 2) Class Counsel's request for attorneys' fees in the amount of 30% of the Settlement; 3) reimbursement of litigation expenses in the amount of $37,540.40; and 4) award $5,000 to Plaintiff Henry Brecher for his devoted service to the Class during the decade this case has been pending.[4]

I. BACKGROUND AND PROCEDURAL HISTORY

A description of the full procedural history of this litigation is set forth in Plaintiff's Final Approval Memorandum.[5] Here, Plaintiff provides only a summary of the history relating to the Settlement proceedings.

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[1] Dkt. Nos. 126, 127. Unless otherwise indicated, all defined terms in this memorandum have the same meaning as the defined terms in the October 3, 2016 Memorandum in Support of Final Approval, Dkt. No. 127 ("Final Approval Memorandum").

[2] Dkt. Nos. 128-130.

[3] Dkt. No. 127.

[4] In Class Counsel's October 3, 2016 Application for Attorneys' Fees, Class Counsel requested a fee of 25% to 33% of the Settlement, depending on the ultimate settlement amount which was still subject to negotiation between Class Counsel and Argentina. *See* Dkt. No. 129, at pp. 1, 6. As further discussed below, the parties have now resolved all disputes concerning the claims and the Settlement amount is now known.

[5] *Id.*

On May 27, 2016, this Court preliminarily approved the Settlement, and directed that notice of the Settlement be disseminated to the Class.[6] As set forth in the September 28, 2016 Declaration of Michael Jacoby Regarding Notice Dissemination, Publication,[7] the notice program ordered by the Court has been dutifully carried out. Specifically, Gilardi, the Court approved notice and claims administrator, mailed 2,641 copies of the long form notice and proof of claim (the Claims Package) to those potential class members who could be identified through reasonable effort, and others who requested copies of the Claims Package.[8] In addition, Gilardi disseminated the Claims Package to a list of 251 "nominal holders" who hold securities in "street name" for the benefit of their customers.[9] In Gilardi's 25 plus years of experience providing notice of class action settlements, the "majority" of class members in securities-related actions, hold their securities in street name through these nominal holders.[10] In total, Gilardi has mailed 3,192 Claims Packages.[11]

In addition to the provision of the Claims Package, Gilardi also established a toll-free number to accommodate potential class member inquiries, and established a website dedicated to this case (www.argentinabondclasses.com and www.argentinabondbrecher.com), and on which Gilardi has posted documents related to this case including the various pleadings related to final approval, motions for attorneys' fees, and the Settlement notices and claim form.[12] Gilardi also caused the summary notice to be published over PR Newswire, and over the Euroclear system.[13]

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[6] Dkt. No. 106.

[7] Dkt. No. 122.

[8] *Id.* at ¶ 4.

[9] *Id.* at ¶ 5.

[10] *Id.*

[11] *Id.* at ¶ 9.

[12] *Id.* at ¶¶ 10-11.

[13] *Id.* at ¶ 13.

Finally, Class Counsel has also communicated with a large number of class members and non-class members, who had questions about the Settlement or the attorneys' fees application.[14] Many of these communications came from class members in Italy, or other European countries.[15]

As set forth in the Court's May 27 preliminary approval order, the deadline by which class members were to submit objections to the Settlement or Class Counsel's application for attorneys' fees was October 21, 2016. There have been no objections to the Settlement or Class Counsel's Application for Attorneys' Fees. Further, although the Court previously reserved decision as to whether it would permit a second opt-out,[16] the point is now moot since there were no opt-out requests.[17]

II. ARGUMENT

A. The Settlement Is Procedurally And Presumptively Fair

A proposed settlement is procedurally fair where, as here, there are non-collusive, arm's-length negotiations between the parties.[18] As more fully described in the October 3, 2016 Declaration of Steve W. Berman,[19] the settlement negotiations between the parties were at all times conducted in the utmost good faith. As further indicia of the arm's-length nature of the negotiations, the negotiations also involved the Court appointed Special Master Daniel A. Pollack. There have

[14] November 1, 2016 Declaration of Jason A. Zweig ("Zweig Reply Decl.") filed concurrently, at ¶ 2.

[15] *Id.*

[16] *See* Dkt. No. 115, at ¶ 11.

[17] As detailed in the previously filed September 28, 2016 Declaration of Jason A. Zweig (Dkt. No. 131), one individual purported to opt-out. However, that individual is not a class member and therefore cannot opt-out. Thus, his purported objection should be stricken.

[18] *See Collins v. Olin Corp.*, 2010 WL 1677764, at *2-3 (D. Conn. Apr. 21, 2010); *see also Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

[19] Dkt. No. 130, at ¶¶ 59-64.

been no objections raised to the substantive or procedural fairness of the Settlement. Accordingly, the Settlement is both procedurally and presumptively fair.

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

This Court is required to apply the *Grinnell* Factors (discussed at length in Plaintiff's moving papers) when assessing a class action settlement's fairness, reasonableness, and adequacy.[20]

1. The complexity, expense, and likely duration of the litigation justifies the Settlement.

Absent the Settlement, Argentina could litigate against Plaintiff and the Class indefinitely, as it was doing prior to the Settlement. Moreover, even if the Plaintiff was to prevail at all stages of the litigation, any potential recovery in the absence of the Settlement may be meaningless given the virtual inability to enforce any judgment against Argentina.[21]

2. The reaction of the Class to the Settlement.

A favorable reaction by the class constitutes "strong evidence" of the fairness of a proposed settlement and supports judicial approval.[22] Here the Class' reaction is favorable. There have been ***no*** objections or opt-out requests. The notice effort in this case was extensive and was conducted in accordance with the Court's May 27 Preliminarily Approval Order. That there is unanimous approval by the members of the Class supports the reasonableness and adequacy of the Settlement.[23]

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[20] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

[21] *See In re Bear Stearns Cos., Inc. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 265 (S.D.N.Y. 2012) (weighing the probable costs of continued litigation against settlement).

[22] *Grinnell*, 495 F.2d at 462; *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) ("the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry") *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000), *aff'd sub nom.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.").

[23] The Court could still approve the Settlement even if substantial portions of the Class had objected. *See*, *e.g.*, *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982) (affirming approval of settlement where between 54 and 58 percent of class members objected); *Cnty. of Suffolk v. Long Isl. Lighting Co.*, 907 F.2d 1295, 1325 (2d Cir. 1990).

3. The stage of the proceedings and the amount of discovery completed.

In determining whether a class action settlement is fair, reasonable, and adequate, courts also consider the stage of the proceedings and the amount of discovery completed.[24] The Settlement was reached after nearly a decade of litigation. Class Counsel had thoroughly analyzed the legal claims, Argentina's defenses, and the risk of being unable to enforce any judgment. As a result, at the time the Settlement was agreed to, Plaintiff had a full understanding of the strengths and weaknesses of possible claims against Argentina and the difficulties they would encounter in further pursuing those claims.

4. The risk of establishing liability and damages.

In determining the reasonableness of a settlement, courts are not required to "foresee with absolute certainty the outcome of the case."[25] Instead, courts look to the likelihood of success by plaintiffs against the relief offered by the settlement.[26] Here, although the risks of establishing liability were very small, this litigation presented unique risks with respect to establishing class-wide liability given the continuous holder class definition. Further, the risk of non-collection was high.

5. The risk of maintaining the class action through trial.

Absent settlement, there are no assurances that Plaintiff could maintain class status through trial, since courts may exercise their discretion to re-evaluate the appropriateness of class certification at any time.[27] Here, that was a particularly acute risk, since the Class only included those who continuously held their Bonds. Because of this continuous holder requirement, and the

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[24] *See Weinberger*, 698 F.2d at 74; *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 213-14 (S.D.N.Y. 1992).

[25] *Austrian*, 80 F. Supp. 2d at 177.

[26] *Id.*

[27] *See Chatelain*, 805 F. Supp. at 214 ("Even if certified, the class would face the risk of decertification."); *In re Sumitomo Cooper Litig.*, 189 F.R.D. 274 (S.D.N.Y. 1999) (risk of class decertification favored settlement approval).

uncertainty as to when there would be an enforceable judgment against Argentina that could be monetized, class members could very well have decided that they did not want to wait any longer for their recovery, and pursued their own relief, leaving a small, or possibly no, class.

6. Reasonableness of the Settlement in light of the best possible recovery and the attendant risks of litigation.

Whether the proposed Settlement falls within the range of reasonableness "is not susceptible of a mathematical equation yielding a particularized sum,"[28] but rather must "be judged in light of the strengths and weaknesses of the plaintiff[s'] case."[29] However, courts have long recognized that complex class actions, such as the present case, are notoriously difficult to litigate.[30] Given the unique circumstances of this case, the Settlement falls well within the range of reasonableness. In making this determination, the Court should recognize that "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'"[31] Notably, as detailed in the Plaintiff's Final Approval Memorandum, the Settlement provides for a payment significantly above the compensation received by those who participated in Argentina's 2005 and 2010 Exchange Offers.[32] Further, it is believed that this Settlement provides class members with 65% of their damages.[33] Consequently, the Settlement represents a substantial recovery for the Settlement Class, and, as such, may well be the best possible recovery in light of the risks posed by this litigation.

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[28] *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993).

[29] *Austrian*, 80 F. Supp. 2d at 178 (internal quotation marks omitted).

[30] *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009) ("The complexity of Plaintiff's claims *ipso facto* creates uncertainty."), *aff'd*, 405 F. App'x 532 (2d Cir. 2010); *In re Art Mat. Antitrust Litig.*, 100 F.R.D. 367, 372 (N.D. Ohio 1983).

[31] *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982).

[32] Dkt. No. 127, at pp. 1, 12.

[33] Dkt. No. 130, at Ex. 4.

7. Defendant's ability to withstand a greater judgment.

Plaintiff believes that Argentina's ability to pay is not an issue here and that it could withstand a judgment greater than that secured by the Settlement. Nevertheless, under all the *Grinnell* Factors this Court should find that the Settlement is fair, reasonable, and adequate, and an excellent resolution of potential claims against Argentina. It should be approved.

C. Summary of the Submitted Claims

To date, there have been 86 claims filed with respect to the Settlement. Class Counsel and Argentina negotiated extensively, and in good faith, to determine the validity of each of those claims. In an effort to resolve Argentina's objections with respect to certain claims, Class Counsel had extensive communications with certain members of the Class, and requested these class members provide additional documentation to establish the *bona fides* of their claims.[34] Every class member provided the additional requested information, and such additional documentation was then shared with Argentina's counsel. As a result of their extensive negotiations, with two very minor exceptions explained below, the parties have been able to agree upon the validity of all of the filed claims.[35]

The parties agree that of the 86 claims filed, 59 should be considered valid.[36] Those 59 claims total €813,200 in outstanding principal, or using a Euro-Dollar exchange rate of $1.097 (as of 10/31/16),[37] $1,989,080.14. This would yield a total Settlement in U.S. dollars of $2,983,620.60.

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[34] Zweig Reply Decl., ¶ 3.

[35] Under the Settlement agreement between Plaintiff and Argentina, potential class members who submit a claim directly to Argentina under the Master Settlement Agreement, are referred to Class Counsel by Argentina in the first instance. Over the past week, Class Counsel was referred two potential claimants who inquired as to their ability to file a claim in this case, but, they have not yet filed a claim. It is possible that between now and the date of the Fairness Hearing, members of the class seek to file a claim in this case. If that happens, Class Counsel will inform Argentina and the Court of these additional claims. As of the date of this memorandum, however, all filed claims are accounted for.

[36] A chart identifying the various claims is attached as exhibit one to the Zweig Reply Decl.

[37] http://www.xe.com/currencyconverter/convert/?Amount=1&From=EUR&To=USD.

There are two claims, RER-100017 and RER-100077 (collectively totalling €34,000 in outstanding principal), which, for now, the parties are considering valid, but require further documentation. Based on conversations between Class Counsel and these class members, Class Counsel expects this documentation will be provided in short order. Once this information is received, and is satisfactory to both parties, Class Counsel will update the Court as to the validity of these claims.[38]

In addition, the parties agree that there are 27 invalid claims. These claims were deemed invalid because: 1) the claimant purchased a bond that is not part of this Class; or 2) no longer holds the Bonds; 3) or the claim was a duplicate of a previously filed valid or invalid claim.

D. Attorneys' Fees Requested

In the October 3, 2016 Memorandum of Law in Support of Class Counsel's Application for Attorneys' Fees,[39] Class Counsel assumed the total Settlement would amount to $3.7 million, but also noted that discussions remained ongoing between Class Counsel and Argentina concerning the validity of the claims and therefore, the ultimate Settlement amount was not known. Assuming the total Settlement was $3.7 million, Class Counsel requested that it be awarded 33% of the Settlement as attorneys' fees. As a result of further negotiations between Class Counsel and Argentina, however, the parties have resolved their differences with respect to the claims which have been filed. The total claims that the parties have determined are valid yield a total Settlement amount of $2,983,620. Because of the lower Settlement amount, Class Counsel now seeks a 30% fee (or $895,086), and not a 33% fee. Regardless of whether the fee is 30% or 33%, either fee would amount to a negative multiplier of Class Counsel's lodestar, which is strong evidence of the requested fee's

[38] These claims are highlighted in Ex. 1 to the Zweig Reply Decl.

[39] Dkt. No. 129, at pp. 16-17.

reasonableness.[40] And, the Settlement notice fully disclosed the requested fee, disclosing that Class Counsel would seek attorneys' fees of up to 33% of the Settlement. There were no objections to the requested fee.

"In this Circuit, Courts routinely award attorneys' fees that run 30% and even a little more of the amount of the common fund."[41] "Courts in other federal jurisdictions similarly have determined that a fee award of 33% or more is reasonable and should be awarded."[42] Here, the requested fee of 30% is "'consistent with the norms of class litigation in this circuit.'"[43] Further, the risk undertaken by Class Counsel in this case also supports the requested fee. At the time this case began, the chances of non-recovery were significant. Other attorneys apparently believed the risk was so high, that this was the only class action filed with respect to the Bonds. Given all of the developments which occurred during the pendency of the litigation, the risk of non-payment only increased. This factor strongly supports the requested fee.

Under a lodestar cross-check, the requested fee of $895,086, would represent a negative multiplier of .86 when considering Class Counsel's lodestar on a historic basis. When considering Class Counsel's lodestar on a current basis, the multiplier would be even lower at .72.

III. CONCLUSION

Class Counsel respectfully requests that the Court grant final approval to the Settlement and Plan of Distribution, its application for attorneys' fees in the amount of 30% of the Settlement

[40] *See City of Providence v. Aeropostale, Inc.*, 2014 WL 1883494, at *13 (S.D.N.Y. 2014) (awarding fee with negative multiplier and finding that a negative multiplier is evidence of fees reasonableness), *aff'd*, 607 F. App'x 73 (2d Cir. 2015).

[41] *In re Hi-Crush Partners L.P. Secs. Litig.*, 2014 WL 7323417, at *12 (S.D.N.Y. Dec. 19, 2014).

[42] *Id.* at *13 (citing cases).

[43] *Azogue v. 16 for 8 Hospitality LLC*, 2016 WL 4411422, at *6 (S.D.N.Y. Aug. 9, 2016).

($895,086), request for reimbursement of litigation expenses in the amount of $37,540.40, and for the payment of a $5,000 service award to Henry H. Brecher.

DATED: November 1, 2016

Respectfully submitted,

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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 November 1, 2016, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
Steve W. Berman