UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ACE TEMPEST REINSURANCE, LTD., Plaintiff, - *against* - CONVERIUM REINSURANCE (NORTH AMERICA) INC., Defendant.	Civil Action No. 06-CV-1059 (GBD) (ECF case)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Defendant Converium Reinsurance (North America) Inc. ("Converium") respectfully submits this memorandum of law in support of its motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

PRELIMINARY STATEMENT

The Complaint[1] requests that the Court replace the parties' written contract with a new deal that not only differs from, but contradicts, the contract's plain language. The dispute involves the extent to which a Commutation Agreement[2] released Defendant from liability under one particular reinsurance contract (the "Per Person Agreement"). The Per Person Agreement provided for an undivided two-year term, and Plaintiff claims that the Commutation Agreement

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1 The Complaint will be cited by paragraph ("¶_") herein.

2 The Commutation Agreement is attached to the Complaint as Exhibit A, and will be cited as ("Comm. Ag.") herein, by numbered paragraph if so numbered, and otherwise by page.

released the liability attributable to the period prior to the middle of such term but not subsequent to such date. Neither the Per Person Agreement nor the Commutation Agreement purports to divide the term of the Per Person Agreement into subperiods.[3] Defendant contends that the express release of "all liabilities" means what it says.

Count I, for declaratory judgment, fails to state a claim upon which relief can be granted because the declaration Plaintiff requests is contrary to the unambiguous language of the Commutation Agreement. Specifically:

- the Commutation Agreement expressly releases Defendant from "all liabilities" under the agreements listed on the attached schedule (Comm. Ag. at ¶ 2B);
- Plaintiff concedes that the Per Person Agreement is one of the listed agreements (¶ 31); and
- Plaintiff concedes that the Per Person Agreement covers a two-year period (s*ee, e.g.*, ¶¶ 11, 33).

That is the end of the inquiry: "all" Defendant's "liabilities" under the Per Person Agreement explicitly have been released. The various asserted items of extrinsic evidence offered by Plaintiff as a matter of law are inadmissible to alter the unambiguous terms of the Commutation Agreement, particularly given that such agreement contains an integration/merger clause. The case law, including two factually apposite cases (*National Union* v. *Walton* and *Hunt* v. *Lifschultz*, cited and discussed below), establishes that it would be error to look beyond the four corners of the agreements in question to find ambiguity, if the contracts are unambiguous as written. Accordingly, this case is ripe for decision on a motion to dismiss.

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[3] The Per Person Agreement had a provision permitting Plaintiff to cancel the Agreement after one year but otherwise contemplated an indivisible two-year period.

Count II, for reformation, is more of the same. Plaintiff seeks to have the Court determine that the express release of "all liabilities" under the listed agreements was a mutual mistake and, in fact, the parties intended not to release "all liabilities," but rather only liabilities on "expired" contracts or portions thereof (*see, e.g.*, ¶ 2). There is no discussion of expired (or in-force) contracts in the Commutation Agreement. Further, were this the parties' intent, the logical cut-off would have been the date of the Commutation Agreement, *i.e*., through September 9, 2004 (the "expired" portion of the Per Person Agreement), not the midpoint of the term of the Per Person Agreement, *i.e*. through January 1, 2004. The alleged "mistake" is no scrivenor's error, but rather seeks to change the deal as expressly set forth and agreed. Moreover, the Complaint itself recounts a continuous history of disagreements post-execution regarding the scope of the Commutation Agreement. (*See, e.g.*, ¶¶ 23-28) This refutes the fundamental prerequisite to reformation — *i.e.*, that there ever was an agreement.[4]

STATEMENT OF FACTS

The essential facts are undisputed. Between 1994 and 2003, Plaintiff and Defendant entered into various reinsurance contracts. (¶ 10) In September, 2004, Plaintiff and Defendant entered into a Commutation Agreement releasing the parties from their obligations under certain of those reinsurance contracts listed on the Schedule thereto. (¶ 18) As Plaintiff correctly alleges, "Under the typical commutation agreement, the reinsurer pays the cedent a negoti-

[4] Defendant is prepared to live by the Commutation Agreement as written. If, however, this motion is denied, Defendant reserves the right to counterclaim for reformation to include certain contracts which it believes were included in the pricing of the Commutation Agreement and inadvertently omitted from the Schedule thereto or, in the alternative, for invalidation of the Commutation Agreement on the basis that there was no meeting of the minds, "Where the mistake is both mutual and substantial . . ., there is absence of the requisite meeting of the minds to contract." *D'Antoni* v. *Goff*, 52 A.D.2d 973, 974 (3d Dept 1976) (citation and internal quotation marks omitted).

ated amount, in exchange for the cedent's agreement that particular reinsurance agreements are extinguished, such that the reinsurer and the cedent will have no further liability to each other under those reinsurance contracts." (¶ 12)

The Relevant Agreements

It is undisputed that the Per Person Agreement is one agreement. (*See* ¶ 11 ("*One* such reinsurance contract between ACE and Converium was *the* Per Person Agreement") (emphasis added)) The Per Person Agreement, attached as Exhibit A to the Rosenthal Declaration submitted herewith,[5] defines the time period it covers in Article 4 as a single two-year period:

> "This Agreement shall cover losses occurring on in-force, new and renewal policies during the period from 12:01 A.M., Eastern Standard Time, January 1, 2003 to 12:01 A.M., Eastern Standard Time, January 1, 2005." (Ex. A at 2)[6]

The Commutation Agreement releases the parties from obligations under "certain reinsurance agreements as more fully identified on [the schedule attached to the Commutation Agreement as] Exhibit 1." (*See* Comm. Ag. at p. 2) That schedule (Exhibit 1 to the Commutation Agreement, attached to the Complaint in Exhibit A, hereinafter referred to as the "Schedule") to the Commutation Agreement lists approximately 50 reinsurance contracts. (*See* Schedule) The last agreement listed on the Schedule is the Per Person Agreement at issue in this case, identified by CNRA number "1003390A", with an "Incept Date" of "1/1/2003." (*Id.*)

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5 The Per Person Agreement is cited at length in the Complaint (*e.g.*, ¶¶ 1, 11 and 21) and, thus, may be considered as incorporated by reference in the context of a motion to dismiss. *See International Audiotext Network, Inc.* v. *American Telephone and Telegraph Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (affirming dismissal); s*ee also* 5 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 1327, at 438-39 (3d ed. 2004) ("[W]hen the plaintiff fails to introduce a pertinent document as part of her pleading, . . . the defendant may introduce the document as an exhibit to a motion attacking the sufficiency of the pleading; that certainly will be true if the plaintiff has referred to the item in the complaint and it is central to the affirmative case.").

6 The Per Person Agreement allows for early cancellation by Plaintiff "after 1 year from the inception of this Agreement." (Ex. A at 2)

With respect to the Reinsurance Agreements listed on the schedule — including the Per Person Agreement — paragraph 2B of the Commutation Agreement contains the following release:

> Releases: "Subject to and upon full payment by CONVERIUM to ACE of the amount set forth in paragraph 1, ACE hereby releases and forever discharges CONVERIUM, its officers, directors, shareholders, employees, representatives and agents and its successors, affiliates, subsidiaries, administrators and assigns *from any and all liabilities and obligations under the Reinsurance Agreements, whether known or unknown, reported or unreported, and whether currently existing or arising in the future*, including but not limited to all claims, debts, demands, allegations, actions, causes of action, suits, duties, dues, sums of money, accounts, reckonings, bonds, specialties, indemnities, exonerations, covenants, contracts, controversies, agreements, promises, omissions, trespasses, variances, damages, judgments, costs, expenses and losses, and including salvage and recovery credits." (emphasis added)

The Commutation Agreement also contains a merger/integration clause at paragraph 5, which states:

> Integration: This Commutation Agreement constitutes the entire agreement between CONVERIUM and ACE related to the Reinsurance Agreements. *All prior statements, agreements, or representations between the parties concerning the Commutation Agreement are merged herein.* This Commutation Agreement may not be amended except by a written amendment executed by the parties hereto. (emphasis added)

Paragraph 8 of the Commutation Agreement specifies that "[t]his Commutation Agreement shall be governed by and interpreted in accordance with the laws of New York."

The Remaining Allegations

Plaintiff alleges a variety of extrinsic facts concerning the negotiation of the Commutation Agreement (*see, e.g.*, ¶¶ 10, 13-16) as well as subsequent negotiations of the parties. (*See, e.g.*, ¶¶ 23-28) While Defendant contests Plaintiff's characterization of events, one fact is undisputed: since shortly after the agreement was executed, the parties have been engaged

in an ongoing series of written and oral disputes as to what contracts were intended to be released by of the Commutation Agreement. (*See, e.g.*, ¶¶ 23, 28)

ARGUMENT

I.
PLAINTIFF FAILS TO STATE A CLAIM FOR DECLARATORY JUDGMENT

A. The Commutation Agreement Unambiguously Releases Defendant from All Liabilities Under the Per Person Agreement

The first task is to determine whether the language of the contract is unambiguous. *See Morse/Diesel, Inc.* v. *Trinity Industries, Inc.*, 67 F.3d 435, 443 (2d Cir. 1995) (term was unambiguous as a matter of law and submitting interpretation to the jury was reversible error). "'Under New York law, . . . the Court must look first to the parties' written agreement to determine the parties' intent and [must] limit its inquiry to the words of the agreement itself if the agreement sets forth the parties' intent clearly and unambiguously.'" *Stroll* v. *Epstein,* 818 F. Supp. 640, 643 (S.D.N.Y.) (citation omitted) (refusing to consider extrinsic evidence), *aff'd*, 9 F.3d 1537 (2d Cir. 1993)[7]; *see also W.W.W. Assocs., Inc.* v. *Giancontieri*, 77 N.Y.2d 157, 162 (Ct. App. 1990) ("before looking to evidence of what was in a parties' minds, a court must give due weight to what was in their contract"). Looking to extrinsic evidence before ambiguity presents itself on the face of the document "unnecessarily denigrates the contract and unsettles the law." 77 N.Y.2d at 163.

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[7] In *Stroll*, the court considered evidence outside the Complaint, thus converting defendant's motion to dismiss into one for summary judgment. Nevertheless, the court precluded any extrinsic evidence to alter the terms of the unambiguous, integrated writing.

"Language whose meaning is otherwise plain is not rendered ambiguous simply because the parties urge different interpretations in litigation." *Sterling Drug Inc.* v. *Bayer AG*, 792 F. Supp. 1357, 1366 (S.D.N.Y. 1992) (citing *Metropolitan Life Insurance Co.* v. *RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990)). In *Sterling Drug Inc.*, the court rejected defendants' argument that the history of negotiations rendered the term "consumer advertising media" ambiguous because to consider such evidence would create "the anomalous position that the Court should consider extrinsic evidence in order to determine whether extrinsic evidence should be considered . . . . *Extrinsic evidence is not admissible to show the existence of ambiguity in an otherwise unambiguous document*." *Id.* (citation omitted, emphasis added). The *Sterling* court also noted that the rule against considering extrinsic evidence applied equally to bar the introduction of the parties' subsequent conduct. "When a contract is unambiguous, there is 'no need . . . to examine the conduct of the parties over the intervening years to ascertain their intent.'" *Id.* at 1369 (quoting *International Klafter Co.* v. *Continental Casualty Co.*, 869 F.2d 96, 100 (2d Cir. 1989)) (alteration in original).

Plaintiff concedes that the Per Person Agreement is one of the agreements listed on the Schedule. (¶ 11) The Commutation Agreement, releases "*any and all liabilities and obligations*" under the listed agreements. (Comm. Ag. at ¶ 2B) The Commutation Agreement contains no limitations, of any kind, on this broad release. There is no basis in the text of the agreement for Plaintiff's claim that only business through the midpoint of the term was released. *See Bethlehem Steel Co.* v. *Turner Construction Co.*, 2 N.Y.2d 456, 459 (1957) (the Court should not "strain[ ] the contract language beyond its reasonable and ordinary meaning"). Indeed, the Complaint specifically highlights exactly what is not present in the Commutation Agreement, but would have to be to support their claims. In the Complaint, Plaintiff adds emphasis to only two words. (*See* ¶ 1 (alleging that the Commutation Agreement applied only to "<u>expired</u>" agree-

ments) and ¶ 2 (noting that the Per Person Agreement was still "in-force") (emphasis in original).) These terms, which Plaintiff alleges were the central feature of the bargain, appear nowhere in the Commutation Agreement. Moreover, even assuming for the sake of argument that Plaintiff were correct, the entire portion of the Per Person Agreement contract term prior to the date of the Commutation Agreement, *i.e.*, January 1, 2003 to September 9, 2004, would be the "expired" portion of the term, not just through January 1, 2004.

The Per Person Agreement is also unambiguous — on its face, the Per Person Agreement defines one two-year term. (Ex. A at 2) Plaintiff concedes that the Per Person Agreement is one agreement that covers both years. (*See, e.g.*, ¶ 11 ("*One* such reinsurance contract between ACE and Converium was *the* Per Person Agreement"); ¶ 33)

Plaintiff claims that the agreements listed on the schedule "are identified, *inter alia*, according to their annual periods." (¶ 18) This allegation directly contradicts the plain text of the Schedule, which specifically identifies the third column as referring to the "Incept date," *not* the annual period. There is no mention of "annual period(s)" in the Commutation Agreement or the attached schedule.

A similar situation was addressed in *National Union Fire Insurance Co.* v. *Walton Insurance Ltd.*, 696 F. Supp. 897 (S.D.N.Y. 1988), albeit in the context of summary judgment. Plaintiff, an insurer, brought suit against defendant, a reinsurer, asserting breach of a reinsurance contract that defendant asserted was released by a commutation agreement. *See id.* Plaintiff claimed that particular reinsurance contract had not been released, even though it was identified in the commutation agreement. In support of this claim plaintiff asserted, among other things, that: (i) negotiation of the commutation agreement did not include the contract at issue; (ii) defendant specifically was advised that plaintiff did not intend to include the contract at issue; and

(iii) reference to the contract in the commutation agreement was ambiguous. The court rejected these arguments, granting summary judgment for defendant. *Id.* at 898-902. After discussing the extensive negotiation history and various arguments made by the parties, the court based its holding explicitly, and exclusively, on the text of the commutation agreement. The court noted that the commutation agreement released "any and all liability" under the listed agreements, and that the insurance contract in question indisputably was listed, identified by its contract number.[8] *Id.* "The release unambiguously and unequivocally, on its face, discharges defendant from liability to the plaintiff with regard to the [contract at issue]. Inasmuch as the language of the release is susceptible to only one reasonable interpretation, and the intention of the parties can be gathered from within the four corners of the document, this Court will not look to parol or other extrinsic evidence to ascertain the contract's meaning." *Id.* at 902.[9] The same release of "all liabilities" is present in this case and commands the same result.

B. Plaintiff's Extrinsic Evidence Is Inadmissible and Cannot Support a Claim for Declaratory Judgment

Once it has been determined that the contract language is unambiguous, extrinsic evidence is inadmissible. "It is well settled that 'extrinsic and parol evidence is not admissible to create ambiguity in a written agreement which is complete and clear and unambiguous upon its face.'" *W.W.W. Associates, Inc., supra* 77 N.Y.2d at 163 (citation omitted); *Clalit Health Ser-*

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8 Plaintiff contended that the agreements were ambiguous because the contracts commonly were referred to by name and the contract failed to list the specific contract by name (instead referring to the insurance agency that managed the particular agreement, as well as another that plaintiff believed to be included instead). The court held that the unambiguous reference to the contract number controlled.

9 The court also rejected plaintiff's claim that the court should reform the contract to conform with their proposed interpretation, as the Court should do here. *See id.*

vices v. *Israel Humanitarian Foundation*, 2003 WL 22251329, at **4-6 (S.D.N.Y. Sept. 30, 2003) (granting a motion to dismiss where the terms of the contract were unambiguous and noting that therefore "this Court may not resort to extrinsic evidence").

Extrinsic evidence is particularly inappropriate here because the Commutation Agreement contains an integration (or merger) clause. "The purpose of a merger clause is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing." *Jarecki* v. *Louie*, 95 N.Y.2d 665, 669 (2001) (refusing to consider extrinsic evidence in light of the unambiguous language and valid merger clause); *Furniture Consultants, Inc.* v. *Datatel Minicomputer Co.*, 1986 WL 7792, at *2 (S.D.N.Y. July 10, 1986) (granting a motion to dismiss and refusing to consider extrinsic evidence where the contract was unambiguous and contained an integration clause).

The Second Circuit rejected plaintiff's offer of extrinsic evidence regarding a similar contract interpretation dispute in *Hunt Ltd.* v. *Lifschultz Fast Freight, Inc.*, 889 F.2d 1274 (2d Cir. 1989). In *Hunt*, the contract entitled plaintiff to a service fee of 2% of his monthly "bookings." *Id.* at 1275. Defendant refused to pay certain service fees, arguing that the term "bookings" was intended to refer to new customers only, and not existing customers. The Second Circuit affirmed the district court's holding that the common meaning of the term "booking" did not connote any limitation as to only new business. *Id.* at 1278. Because the common meaning was unambiguous, the court rejected defendant's proffer of extrinsic evidence as "not admissible on the interpretation issue." *Id.* The distinction offered by Plaintiff here — between expired and in-force policies — appears nowhere in the Commutation Agreement, just as the distinction between existing customers and new customers appeared nowhere in the *Hunt* contract.

Accordingly, Count I, for declaratory judgment, should be dismissed based on the unambiguous language of the relevant agreements.

II.
PLAINTIFF FAILS TO STATE A CLAIM FOR REFORMATION

To make out a claim for reformation, plaintiff must demonstrate that the parties reached a valid agreement, but that by mutual mistake their agreement is not accurately reflected in the written instrument. *See Chimart Assocs.* v. *Paul*, 66 N.Y.2d 570, 573-74 (1986).[10] There is a "heavy presumption that a deliberately prepared and executed written instrument [manifests] the true intention of the parties." *New York First Avenue CVS, Inc.* v. *Wellington Tower Assocs.*, 299 A.D.2d 205, 205 (1st Dep't 2002) (internal quotation marks and citation omitted). That burden is even higher in disputes among parties such as Plaintiff and Defendant here. "Where sophisticated business entities execute mutual releases in the course of arm's length negotiations, courts are even more scrupulous in holding the parties to their bargain." *2 Broadway L.L.C.* v. *Credit Suisse First Boston Mortgage Capital L.L.C.*, 2001 WL 410074, at *6 (S.D.N.Y. Apr. 23, 2001) (citing *VKK Corp.* v. *National Football League*, 244 F.3d 114 (2d Cir. 2001)). While extrinsic evidence may be appropriate for a reformation claim:

> "this obviously recreates the very danger against which the parol evidence rule and Statute of Frauds were supposed to protect—the danger that a party, having agreed to a written contract that turns out to be disadvantageous, will falsely claim the existence of a different, oral contract. To this end—'for freedom to contract would not long survive courts' ready remaking of contracts that parties have agreed upon'—reformation has been limited both substantively and procedurally."

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10 Reformation is also appropriate in the case of unilateral mistake resulting from fraud, but Plaintiff alleges mutual mistake and does not allege fraud. (*See* ¶¶ 35-41)

Chimart Assocs., 66 N.Y.2d at 573-74 (citation omitted) (affirming summary judgment where an affidavit strongly suggested, if anything, that the mistake was not mutual).

Dismissal of a claim for reformation is appropriate when — as here — a plaintiff fails to adequately allege mutual mistake and the terms of the relevant agreements contradict the claim. *See William P. Pahl Equipment Corp.* v. *Kassis*, 182 A.D.2d 22, 30 (1st Dep't 1992) (dismissing a reformation claim). In *Kassis*, plaintiff asserted that two related agreements intended to provide that a default under either agreement would constitute a default for both. The Court disagreed, reversing a lower court and granting defendant's motion to dismiss the reformation claim. *See id.* at 26.

> "As for the claim of mutual mistake and scrivener's error, the second amended complaint fails to allege the existence of a single mistake, much less a mutual one . . . . Plaintiffs cannot point to a single provision that contains even a hint that the parties intended . . . [what plaintiff request by way of reformation]. In fact, as the documents disclose, the parties had mutually agreed to the contrary." *Id.* at 30.

The same is true here. It is difficult to determine what provision Plaintiff asserts is mistaken. The shift from releasing "all" liabilities under the scheduled agreements as set forth in ¶ 2B of the Commutation Agreement to releasing only expired liabilities, or only components of listed agreements, could have been accomplished in numerous ways, and Plaintiff does not allege how the parties supposedly agreed to do so. "'[T]he proponent of reformation must show in no uncertain terms not only that mistake or fraud exists, but exactly what was really agreed upon between the parties.'" 182 A.D.2d at 29 (quoting *South Fork Broadcasting Corp. v. Fenton*, 141 A.D.2d 312, 314 (1st Dep't), *appeal dismissed*, 73 N.Y.2d 809 (1988)). Moreover, the Schedule would also have to be changed, as Plaintiff's interpretation requires that the Schedule refer to annual periods, whereas now is refers to the "Incept date." Two independent asserted "mistakes" in distinct parts of the agreement (*i.e.*, Section 2B and the Schedule), both of which

contradict Plaintiff's claim but are consistent with each other and with Defendant's interpretation of the agreement, are too much for Plaintiff to overcome.

Plaintiff recites a post-execution history of disagreements over the proper scope of the Commutation Agreement. (¶¶ 23, 28) These allegations, if true, suggest that the parties never had the same understanding as to which reinsurance contracts were covered, or to what extent.

> "Reformation presupposes a valid, integrated plan. It does not contemplate the voiding of a clearly evidenced intention in order that another clearly evidenced, but wholly inconsistent, intention may prevail. It does not give life to a nullity. It corrects, but does not favor one avowed purpose to the exclusion of another avowed purpose. It may rectify mistakes, but does not choose between varying purposes." *In re Suffolk County Trust Co.*, 65 N.Y.S.2d 243, 252 (Sup. Ct. Suffolk Co. 1946)

The Court should not, under the guise of reformation, replace the unambiguously expressed purpose of an integrated writing with a conflicting purpose.

Because Plaintiff: (i) has failed to allege a particular mistaken provision and what the provision should have stated — and indeed requests multiple changes to otherwise consistent parts of the agreement; and (ii) itself alleges the history of disputes that make clear there never was an agreement outside the terms of the document, Count II should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: New York, New York
April 10, 2006

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