UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ACE TEMPEST REINSURANCE, LTD.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 06 CV 1059 (GBD) (ECF Case)
CONVERIUM REINSURANCE (NORTH AMERICA) INC.,	:	District Judge Daniels
Defendant.	:	

ACE TEMPEST REINSURANCE, LTD.'S MEMORANDUM OF LAW IN OPPOSITION TO CONVERIUM'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff ACE Tempest Reinsurance, Ltd. ("ACE"), respectfully submits this memorandum of law in opposition to the Fed. R. Civ. P. 12(b)(6) motion filed by Defendant Converium Reinsurance (North America) Inc. ("Converium").

INTRODUCTION

Relying on extrinsic evidence – the Per Person Excess of Loss Reinsurance Agreement ("the Per Person Agreement"), which is not specifically identified in nor attached to the Commutation Agreement – Converium improperly attempts to create a single integrated Commutation Agreement that it unilaterally decrees to be free of any ambiguity. Converium's play, in and of itself, demonstrates an ambiguity in the Commutation Agreement; if the Commutation Agreement is unambiguous on its face, reliance on the Per Person Agreement is unnecessary. Moreover, Exhibit 1 ("the Schedule") to the Commutation Agreement (which is attached to the Commutation Agreement, while the commuted reinsurance contracts are not) lists both annual periods of other two-year contracts when the parties intended on commuting both annual periods. Yet Converium fails to explain why the parties treated at least three two-year contracts ("the Specialty Products contracts") one way and another two-year contract (the Per Person Agreement) another way. Thus, both Converium's reliance on extrinsic evidence and the terms of the Commutation Agreement call for denial of Converium's motion.

Even if the Court considers the terms of the Per Person Agreement, the Court should deny Converium's motion because the Schedule clearly shows that the parties viewed two-year term contracts as having two separate, divisible annual periods. Drawing all reasonable inferences in ACE's favor, these facts demonstrate that the Commutation Agreement (a) contains an ambiguity; or, (b) in the alternative, must be reformed to reflect the parties' mutual intent. Respectfully, the Court should deny Converium's motion.

BRIEF STATEMENT OF FACTS

ACE and Converium entered into an agreement effective September 3, 2004, commuting obligations arising out of approximately 50 reinsurance contracts, which (for term contracts) were identified by their annual periods. (Compl. ¶¶ 17-18.) ACE and Converium identified those contract on the Schedule, which was attached to the Commutation Agreement. As reflected in the Commutation Agreement, the parties intended to commute obligations arising out of only expired reinsurance contracts, not in-force business. (*Id.* ¶ 1.)

After executing the Commutation Agreement, Converium attempted to expand the scope of the Commutation Agreement without any additional consideration. (*Id.*) Converium contended, *inter alia*, that the 2004 annual period of the Per Person Agreement had not been commuted even though the 2004 annual period was (a) not listed on the Schedule and (b) still in force at the time the parties executed the Commutation Agreement. (*Id.* ¶¶ 17-18 & 21.) That the parties did not consider the 2004 annual period to be commuted was further confirmed by the parties' conduct after execution of the Commutation Agreement – approximately 6 months later – when they specifically discussed commuting the 2004 annual period. (*Id.* ¶¶ 17, 22 & 26.)

Converium subsequently changed its position and later began contending that the 2004 annual period had been commuted. Converium's changed position forced ACE to file this action seeking a declaration that the 2004 annual period had not been commuted. Alternatively, ACE seeks reformation of the Commutation Agreement to reflect the parties' mutual intent.

ARGUMENT

Conspicuously absent from Converium's memorandum is a statement of the standard by which this Court analyzes a Fed. R. Civ. P. 12(b)(6) motion. All facts alleged in the

complaint must be taken as true and all reasonable inferences must be drawn in ACE's favor. *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) (vacating and remanding dismissal order). "A complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 106 (2d Cir. 2005) (vacating and remanding dismissal order) (quoting *Todd v. Exxon Corp.*, 275 F.3d 191, 197-198 (2d Cir. 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), *petition for cert. filed*, 74 U.S.L.W. 3517 (U.S. Mar. 6, 2006) (No. 05-11). Finally, "[a]t the pleading stage … the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to support the claims." *Twombly*, 425 F.3d at 106 (quoting *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 177 (2d Cir. 2004)).

Accepting the allegations as true and drawing all reasonable inferences in ACE's favor, the conclusion to be drawn at the pleading stage is that the parties did not intend to commute the 2004 annual period, *i.e.*, the Commutation Agreement contains an ambiguity. Coupled with the facts alleged in the complaint regarding how the parties viewed the reinsurance contracts (by annual periods), what they intended to commute (expired business), and how they viewed the Commutation Agreement post-execution (as not commuting the 2004 annual period), ACE certainly can (and will) prove that the parties intended to commute only the expired component of the Per Person Agreement. Indeed, even though ACE contends that it will prevail on the merits, the pleading stage is not the time for it to offer its supporting evidence or litigate the merits. Additionally, and in the alternative, ACE has sufficiently pleaded facts to show mutual mistake, entitling it to offer evidence supporting its reformation claim. Under the well-pleaded complaint rule, ACE's complaint states a claim for relief.

I. The Complaint States A Claim For Relief As To The Scope Of The Commutation Agreement.

A. The Per Person Agreement Is Not Specifically Listed On The Schedule.

The Commutation Agreement's ambiguity comes into sharp relief upon only a cursory review of the Commutation Agreement (including the Schedule). Neither the Commutation Agreement nor the Schedule actually identifies the Per Person Agreement. Indeed, none of the contracts listed on the Schedule specifically provides: "Per Person Excess of Loss Reinsurance Agreement." Ironically, it is only when Converium resorts to the use of extrinsic evidence is Converium purportedly able to make its argument as to which of the approximately 50 contracts listed on the Schedule is the Per Person Agreement.[1] In the end, however, Converium's efforts prove unsuccessful.

Converium states that the Per Person Agreement is the "last agreement listed" on the Schedule and identifies it as "CRNA number '1003390A.'" (Def. Mem. at 4.) ACE's contract description for the last reinsurance contract listed on the Schedule is "A&H CAT/A&H Global Personal Accident" while the Converium's contract description is "A&H CAT." Obviously, neither of these descriptions is "Per Person Excess of Loss Reinsurance Agreement."

Attempting to cure this ambiguity, Converium attached to and filed with its motion a copy of the "Per Person Excess of Loss Reinsurance Agreement." (Ex. A to Rosenthal Decl.) The only numeric descriptions on that reinsurance contract are "119-6" and "JPW No. 3300-03," neither of which translates to "1003390A." Whether the last agreement listed on the Schedule is, in fact, the Per Person Agreement, that is a matter to be resolved through discovery.

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[1] ACE's complaint does not specifically identify which reinsurance contract listed on the Schedule is the Per Person Agreement.

It cannot be determined based on the face of the Schedule, nor can it be determined by comparing the Schedule to the reinsurance contract that Converium submitted.

Significantly, the Per Person Agreement is not attached as an exhibit to the Commutation Agreement. Nor is there anything contained within the four corners of the Commutation Agreement to suggest that the parties intended to incorporate the terms of Per Person Agreement into the Commutation Agreement. The Per Person Agreement is thus outside the four corners of the Commutation Agreement making it, by definition, extrinsic evidence. On this basis alone, all of the cases cited by Converium are distinguishable.[2]

Because the Per Person Agreement is extrinsic to the Commutation Agreement, Converium sidesteps this fact entirely and invokes the procedural rule that "[w]hen a plaintiff fails to introduce a pertinent document as a part of her pleading … the defendant may introduce the document as an exhibit to a motion attacking the sufficiency of the pleading; that certainly

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[2] Many of the cases cited by Converium, including the two cases Converium contends are "apposite," are also distinguishable on the basis that the decision by those courts were issued either on summary judgment or after a trial. *See National Union Fire Ins. Co. v. Walton Ins. Ltd.*, 696 F. Supp. 897 (S.D.N.Y. 1988) (summary judgment); *Hunt v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274 (2d Cir. 1989) (bench trial).

The only decisions that Converium cited in support of its motion to dismiss the claim for declaratory relief that are not decisions issued on summary judgment motions or after a trial or injunction are the unreported decisions in *Clalit Health Servs. v. Israel Humanitarian Found.*, No. 02 Civ. 6552, 2003 WL 22251329 (DC) (S.D.N.Y. Sept. 30, 2003), and *Furniture Consultants, Inc. v. Datatel Minicomputer Co.*, No. 85 Civ. 8518 (RLC), 1986 WL 7792 (S.D.N.Y. 1986). *Clalit* is inapplicable here because the plaintiff in that case, which was not a named party in the underlying testamentary documents, had failed to adequately allege that a "breach" had occurred. *Clalit*, at *5. *Furniture Consultants* is distinguishable because the plaintiff there asserted claims for breach of implied warranties under contract governed by the U.C.C. even though the contract at issue specifically provided that there would be "NO WARRANTIES, EXPRESS OR IMPLIED." *Furniture Consultants*, at *2. The court denied the motion as to the contract that "upgraded" the goods at issue in the initial contract because that contract had not been provided to the court. This case is distinguishable because there was no dispute that the warranty exclusion was contained within the four corners of the contract.

will be true if the plaintiff has referred to the item in the complaint and it is central to the affirmative case." (Def. Memo. at 4 n.5 (quoting 5 Charles A. Wright *et al.*, *Federal Practice and Procedure* § 1327 at 438-439 (3d ed. 2004); *International Audiotext Network, Inc. v. AT&T Co.*, 62 F.3d 69, 72 (2d Cir. 1995)[3]). Converium is improperly attempting to rely on a procedural rule to incorporate one contract (the Per Person Agreement) into a four corners of another contract (the Commutation Agreement), artificially creating a single "integrated" agreement that Converium pronounces to be unambiguous. This is improper because the facts alleged in the complaint address the scope of the Commutation Agreement, not the Per Person Agreement. Thus, to determine whether the Commutation Agreement is unambiguous on its face, the Court should focus on the terms of the Commutation Agreement, not the Per Person Agreement.

Assuming (without admitting at this stage of the litigation) that the last listed agreement is the Per Person Agreement, the reasonable inference to draw is that the Commutation Agreement (*i.e.*, Schedule) contains an ambiguity. In construing a contract, New York law provides the provisions of the agreement must be "read in the context of the entire agreement." *Sayers v. Rochester Telephone Corp.*, 7 F.3d 1091, 1095 (2d Cir. 1993) (quoting *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990)). "By examining the entire contract, we safeguard against adopting an interpretation that would render any individual provision superfluous." *Sayers*, 7 F.3d at 1095 (citations omitted). Adopting Converium's

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[3] The lone decision cited by Converium, *International Audiotext*, is distinguishable. In that case, the contract that the plaintiff had failed to attach to its complaint was the actual contract giving rise to the dispute; additionally, the plaintiff's claim was a statutory claim for violation of antitrust laws allegedly arising out of the unattached contract, not a claim for contract construction. *See International Audiotext*, 62 F.3d at 71-72. Here, however, ACE seeks a declaration as to the scope of the Commutation Agreement, which is the actual contract giving rise to the dispute; and ACE attached a copy of that Commutation Agreement to its complaint.

construction of the Schedule is unattainable by reading only the Commutation Agreement (including the Schedule) and renders certain provisions superfluous.

Specifically, at least three reinsurance contracts identified on the Schedule list two "Incept date[s]" for a single reinsurance contract. Those three contracts ("the Specialty Products contracts") are the three contracts listed immediately above the last agreement:

Flag	ACE	CRNA	Incept date	ACE Contract Description	CRNA Contract Description
I	OUA9	CA113383A/B	10/1/1998/ 10/1/1999	Specialty Products	Special Prod/Servs
I	OUBA	CA113383A/B	10/1/1998/ 10/1/1999	Int'l Spec. Prods. & Servs. Group First XOL[4]	Special Prod/Servs
I	OUBF	CA113383A/B	10/1/1998/ 10/1/1999	Int'l Spec. Prods. & Servs. Group Second XOL	Special Prod/Servs

Given that each of the Specialty Products contracts contains (a) a single ACE number, (b) a single Converium number, (c) a single ACE contract description, and (d) a single Converium description, the only conclusion to draw (which is also factually accurate) is that each of these contracts is a single contract. Yet the parties listed two "Incept date[s]" for each contract. Reading the parties' decision to list both "Incept date[s]" in the context of the entire Commutation Agreement and drawing all reasonable inferences in ACE's favor, the reasonable inference to draw is that the parties viewed these three single reinsurance contracts as having separate, divisible annual periods; indeed, there would have been no reason for the parties to list the second "Incept date" for each contract if the parties viewed these three contracts as single contracts with a single "Incept date." Adopting Converium's construction of the Schedule, as least insofar as it relates to the Per Person Agreement, would render superfluous the parties'

[4] The last two descriptions in the text have been abbreviated to fit on one line. The actual ACE Contract Description for the last two exhibits listed in the text, and as listed on the Schedule, are: "International Specialty Products & Services Group First Excess of Loss" and "International Specialty Products & Services Group Second Excess of Loss," respectively.

decision to list the second annual period of the two-year Specialty Products contracts. Thus, ACE certainly can show facts in support of its claim for declaratory relief.

Moreover, none of the approximately 50 contracts listed on the Schedule has an "Incept date" during 2004, which is the year that the parties executed the Commutation Agreement. (Compl. ¶ 18 & Exhibit A.) The reasonable inference to draw is that the parties clearly intended on commuting only expired business, not in-force business, as ACE alleged. (*Id*. ¶ 1, 14-15 & 20.) Again, this reasonable inference must be drawn in ACE's favor.

If the Court considers the terms of the Per Person Agreement at this stage, then it should also consider the terms of other reinsurance contracts listed on the Schedule, including the three Specialty Products contracts. The term for each of the Specialty Products contracts is "for two years." Specifically, the "Term" of each of those contracts provides, in relevant part:

> This Agreement shall become effective at 12:01 a.m., Eastern Standard Time, October 1, 1998, and shall remain in full force and effect <u>for two years</u>, expiring 12:01 a.m., Eastern Standard Time, October 1, 2000.

(Emphasis added) (Attached as Exhibits 1, 2, and 3, respectively, to the Declaration of Daniel J. Neppl, submitted herewith.) Because the parties listed both annual periods of these contracts on the Schedule, they considered reinsurance contracts with specified two-year terms as having separate and distinct annual periods that could be commuted separately. Converium's motion should be denied.[5]

[5] In the event that the Court grants Converium's motion, ACE requests that the Court do so without prejudice and give ACE leave to file an amended complaint. *See*, *e.g.*, Fed. R. Civ. P. 8(a) (notice pleading); Fed. R. Civ. P. 15(a) (leave to amend should be "freely given").

Drawing all reasonable inferences in ACE's favor, the parties viewed the Per Person Agreement as having two separate, divisible components – the 2003 annual period and the 2004 annual period. This is precisely what ACE alleged in its complaint. Specifically, ACE alleged: "At the time the parties negotiated the Commutation Agreement, the Per Person Agreement included an expired component (the 2003 year) and an in-force component (the 2004 year)." (Compl. ¶ 21.)

B. The Integration Clause Does Not Assist Converium.

Converium's reliance on the Commutation Agreement's integration clause is misplaced. (Def. Memo. at p. 10.) "Integration and ambiguity are not mutually exclusive." *U.S. Fire Ins. Co. v. General Reinsurance Corp.*, 949 F.2d 569, 571 (2d Cir. 1991) (stating that "a word or phrase is ambiguous when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.") (quoting *Garza v. Marine Trans. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988)). Because ACE seeks to explain and clarify the terms of the Commutation Agreement, extrinsic evidence is admissible. *U.S. Fire*, 949 F.2d at 571 (quoting *67 Wall St. Co. v. Franklin Nat. Bank*, 37 N.Y.2d 245, 248 (1975)). Accordingly, ACE should be permitted to offer extrinsic evidence to demonstrate that "[i]t was never the intent of the parties that obligations arising out of in-force contracts would be commuted or released" and that parties did not intend to commute the 2004 annual period of the Per Person Agreement. (Compl. ¶¶ 1, 20-22 & 26-29.)

Finally, ACE alleged that post-execution conduct demonstrates that the parties did not intend to commute the 2004 annual period of the Per Person Agreement. ACE alleged:

- "Subsequent to entering into the Commutation Agreement, the parties specifically discussed termination of the 2004 year of the Per Person Agreement" (Compl. ¶ 22); and

- "In or about April 2005, Converium approached ACE respecting a possible commutation of additional reinsurance contracts. Included within Converium's April 2005 commutation proposal was the 2004 annual period of the Per Person Agreement" (Compl. ¶ 26).

These allegations must be accepted as true. *Karedes*, 423 F.3d at 113.

New York law provides that the fact-finder "may consider extrinsic evidence such as the parties' course of conduct throughout the life of the contract" to determine their intent. *New York State Law Officers Union v. Andreucci*, 433 F.3d 320, 332 (2d Cir. 2006) (citing *Big Tree Energy Partners v. Bradford*, 219 A.D.2d 27, 640 N.Y.S.2d 270, 273 (3d Dep't 1996)). Furthermore, New York law provides that "the parol evidence rule does not bar the introduction of extrinsic evidence to show a subsequent waiver or modification of a written contract." *Expocorp v. Hyatt Mgmt. Corp. of New York, Inc.*, 134 A.D.2d 234, 235, 520 N.Y.S.2d 579, 579 (2d Dep't 1987) (citing, *inter alia*, 9 Wigmore, Evidence § 2441 (Chadborn rev. 1981)). Because the Commutation Agreement contains an ambiguity, and because ACE has sufficiently alleged facts to suggest that the parties' post-execution conduct supports ACE's construction of the Schedule, Converium's motion to dismiss should be denied. Indeed, ACE should be permitted to present evidence to prove that the parties' course of conduct demonstrates that they did not intend to commute the 2004 annual period, nor did they view it as being commuted.

II. The Complaint States A Claim For Reformation Because ACE Has Sufficiently Alleged That The Commutation Agreement Does Not Reflect The Parties' Intent.

New York law allows parties to seek reformation of a contract "on the basis of mutual mistake if the writing does not accurately reflect the mutual intention of the parties."

Perry v. Vanteon Corp., 192 F. Supp. 2d 93, 99 (W.D.N.Y. 2002) (denying a Fed. R. Civ. P. 12(b)(6) motion to dismiss a reformation claim) (quoting *Investors Ins. Co. v. Dorinco Reinsurance Co.*, 917 F.2d 100, 105 (2d Cir. 1990)). In its complaint, ACE alleged specific facts to state a claim for reformation if the Schedule is construed to commute the 2004 annual period of the Per Person Agreement. Yet, adopting Converium's theory of reformation would render any reformation claim virtually unattainable.

Specifically, ACE alleged facts to show that the parties did not intend to commute the 2004 annual period of the Per Person Agreement, *i.e.*, then-in-force business:

- 14. In or about July 2004, in order to improve its financial condition by reducing its exposures, Converium approached ACE about commuting <u>expired</u> reinsurance contracts, *i.e.*, business that was no longer in-force.

- 16. During their negotiations, the parties made clear their intent to commute only expired contracts, not in-force business.

- 18. The Commutation Agreement specifically identified, in Exhibit 1 thereto, approximately fifty (50) expired reinsurance contracts that were being commuted; those contracts are identified, *inter alia*, according to their annual periods.

- 20. It was never the intent of the parties that obligations arising out of in-force contracts would be commuted or released.

- 21. At the time the parties negotiated the Commutation Agreement, the Per Person Agreement included an expired component (the 2003 year) and an in-force component (the 2004 year).

- 22. Subsequent to entering into the Commutation Agreement, the parties specifically discussed termination of the 2004 year of the Per Person Agreement.

- 26. In or about April 2005, Converium approached ACE respecting a possible commutation of additional reinsurance contracts. Included within Converium's April 2005 commutation proposal was the 2004 annual period of the Per Person Agreement.

Furthermore, the parties executed the Commutation Agreement during 2004. (Compl. ¶ 17.) None of the approximately 50 contracts listed on the Schedule has an "Incept date" during 2004. The reasonable inference to draw is that the parties intended to commute only expired business, not in-force business.

All of the facts recited above must be accepted as true. *Karedes*, 423 F.3d at 113.

Extrinsic evidence is admissible to prove these and other facts, 27 *Williston on Contracts* § 70:22 (Dec. 2005), which establish that the parties did not intend to commute in-force business. Indeed, Converium concedes (as it must) that extrinsic evidence is admissible to prove a reformation claim. (Def. Mem. at 11.) Thus, if the Commutation Agreement is construed to release the parties from the then-in-force component of the Per Person Agreement, the Commutation Agreement must be reformed to reflect the parties' mutual intent to commute only expired business. *See Olin Corp. v. Ins. Co. of N. Am.*, 743 F. Supp. 1044, 1051 (S.D.N.Y. 1990) (reforming an insurance policy where, *inter alia*, the parties' negotiations established that they intended to include a notice provision, but that term was omitted from the final contract), *aff'd*, 929 F.2d 62 (2d Cir. 1991); *Westchester Resco Co. v. New England Reinsurance Corp.*, 648 F. Supp. 842, 847 (S.D.N.Y. 1986) (reforming an insurance policy where, *inter alia*, industry custom and practice and the parties' negotiations established that they intended to include a three-year completed operations coverage in the final policy language, but it was omitted), *aff'd*, 818 F.2d 2 (2d Cir. 1987). Respectfully, Converium's motion to dismiss the reformation claim should be denied.

The cases that Converium relies on are readily distinguishable and do not call for a contrary result. (*See* Def. Mem. at 11-13 (citing *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 572

(1986) (the party seeking reformation admitted in his affidavit in opposition to a motion for summary judgment that, before signing the agreement he sought to reform, he "had not read" it); *2 Broadway LLC v. Credit Suisse First Boston Mortgage Capital LLC*, No. 00 Civ. 5773 (GEL), 2001 WL 410074, at *5 (S.D.N.Y. Apr. 23, 2001) (not a reformation case); *William P. Paul Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27-28 (1st Dep't 1992) (issue on appeal was one of discretion in which the appellate court determined that newly assigned trial judge abused his discretion when granting a motion to reassert a twice-dismissed complaint)[6]; *New York First Ave. CVS, Inc. v. Wellington Tower Assocs.*, 299 A.D.2d 205, 205 (1st Dep't 2002) (sufficient factual discussion not provided)). Although not reciting sufficient facts to determine applicability, *Wellington Tower* states that "extrinsic evidence is admissible in a reformation action even if there is no ambiguity in the contract." 299 A.D.2d at 205. This statement of New York law effectively guts Converium's basis for dismissing the reformation claim, *i.e.*, that the facts alleged in the complaint would "replace the unambiguously expressed" Commutation Agreement.

It is beyond legitimate debate that ACE has alleged facts sufficient to establish that the parties intended to commute only expired business. It is also beyond legitimate debate that ACE has alleged facts sufficient to show that, after the parties executed the Commutation Agreement, they did not view the 2004 annual period of the Per Person Agreement as being commuted. Seizing on an opportunity to reap an economic windfall, Converium changed its view and contended that the 2004 annual period had not been commuted. The parties'

[6] Assuming that the court's discussion of the reformation claim were not *dicta*, *Kassis* is distinguishable because the plaintiff in that case was attempting to convert two separate agreements – which were "structured as two separate sales … [to] avoid certain adverse tax consequences" – into a single integrated agreement under the guise of reformation. 182 A.D.2d at 25.

negotiations and course of conduct will show otherwise and ACE should be permitted to offer that evidence, which is sufficiently alleged in the complaint, at the appropriate time.

CONCLUSION

For the foregoing reasons, Converium's motion to dismiss should be denied in its entirety. Alternatively, ACE should be given leave to file an amended complaint.

Dated: New York, New York
April 24, 2006

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing to be served on:

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by U.S. Mail, proper postage prepaid, and by E-mail to the addresses listed above on this 24th day of April 2006.

By: /s/ Daniel J. Neppl (DN-5538)