UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CONVERIUM HOLDING AG
SECURITIES LITIGATION

(Meyer v. Converium Holding AG, et al.)

This Document Relates to:
04 Civ. 8038
04 Civ. 8060
04 Civ. 8295
04 Civ. 8994
04 Civ. 9479

Civil Action No.
04 Civ. 7897 (MBM)
ECF Case

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS UBS AG'S AND MERRILL LYNCH INTERNATIONAL'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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Pursuant to Fed. R. Civ. P. 12(b)(6), defendants UBS AG, acting through its business group UBS Warburg ("UBS"), and Merrill Lynch International ("Merrill") (collectively, the "Underwriter Defendants") respectfully submit this reply memorandum of law in further support of their motion to dismiss Counts I and III of the Consolidated Amended Class Action Complaint (the "Complaint").

Introductory Statement

Much like the September 23, 2005 Complaint, which referred to the newly added Underwriter Defendants in only three places, Lead Plaintiffs' Memorandum of Law in Opposition to All Defendants' Motions to Dismiss the Consolidated Amended Class Action Complaint ("Opposition Brief") largely ignores the arguments of the Underwriter Defendants in their motion to dismiss. Where Lead Plaintiffs do attempt to salvage their claims against the Underwriter Defendants first asserted in September 2005, their arguments fail.

In the Opposition Brief, Lead Plaintiffs contend—as they must to avoid clear dismissal on both the one-year and three-year limitations periods—that they are intended beneficiaries of, but not obligated parties to, the now extinguished tolling agreement between Michael Rubin and the Underwriter Defendants (the "Rubin Agreement" attached to the December 23, 2005 Declaration of John T. Zach ("Zach Decl.") as Exhibit 1). On this basis alone Lead Plaintiffs contend that their otherwise clearly stale Securities Act claims against the Underwriter Defendants are not barred by the applicable three-year statute of limitations that these plaintiffs consciously elected to let run long before they even knew the December 9, 2004 Rubin Agreement existed. The Rubin Agreement, however, did not expressly grant putative class members the right to bring their own untimely class action lawsuits against the Underwriter Defendants and clearly was not intended to do that. Moreover, under Lead Plaintiffs' reading of the agreement, Mr. Rubin intended not only to benefit his competitors for a "seat at the table", but also to agree to restrictions on his own ability to bring suit against the Underwriter Defendants while providing those same competitors with an unfettered right to initiate the same lawsuit when and where they pleased before Mr. Rubin himself could do so. That is plainly wrong. Thus, because Lead Plaintiffs are not entitled to invoke the Rubin Agreement, their claims against the Underwriter Defendants are barred by the three-year statute, as well as by the one-year "inquiry notice" statute. That is because the date that the underwriters were first named as defendants in this action was September 23, 2005, which is over three and half years after the date of the December 2001 initial public offering and over one year after the July 20, 2004 "shock" Lead Plaintiffs assert fully disclosed the alleged fraud.

Even were every would-be class plaintiff an intended beneficiary of the Rubin Agreement entitled to invoke it to revive claims against the Underwriter Defendants, Lead Plaintiffs were still on "inquiry notice" as of November 2002. Within one year of Converium Holding AG's ("Converium") initial public offering, the company increased its loss reserves four times in amounts totaling approximately seventy-five percent of Lead Plaintiffs' alleged loss reserves deficiency. Thus, the one-year statute had run long before the December 9, 2004 Rubin Agreement was executed.

Furthermore, Lead Plaintiffs' opposition fails to address the fact that the Underwriter Defendants were entitled to rely on the expertised portions of the offering documents and that the facts establishing this are part of their own pleadings. Lead Plaintiffs do not disagree with the fact that the Underwriter Defendants were not required, or competent, to perform the specialized and complex actuarial analysis of Converium's loss reserves. Nor do they point to any "red flags" alleged in the Complaint that would strip the Underwriter Defendants of their ability to rely on Tillinghast Towers-Perrin's ("Tillinghast") expert confirmation of Converium's loss reserves estimates and PricewaterhouseCoopers' audit and certification of Converium's financial statements, which contained numerous disclosures relating to the company's loss reserves. Lead Plaintiffs also do not explain how, under their theory of the case, it is possible that the Underwriter Defendants, who are not expert in the relevant actuarial issues, are subject to Securities Act liability for failure to conduct due diligence, whereas Tillinghast, the true actuarial experts who actually performed the analysis did nothing wrong.

Argument

To avoid repeating arguments being made by Zurich Financial Services ("ZFS"), Converium and the other co-defendants in reply to the Opposition Brief, the Underwriter Defendants join in the arguments of those reply briefs that address allegations against the Underwriter Defendants and, in this reply memorandum, concentrate on those matters that are unique to these belatedly added defendants. See, e.g., ZFS Reply Br. at §§ I.A (Lead Plaintiffs must satisfy Rule 9(b) pleading requirements), II.A, B & C (Lead Plaintiffs failed to allege an actionable misrepresentation), and IV.A & B (Securities Act claims are time-barred).[1]

[1] In addition, the Underwriter Defendants join with ZFS in pointing out that Lead Plaintiffs intentionally obfuscate the Complaint's allegations in the Opposition Brief in an effort to blame each defendant for other defendant's alleged conduct and to blur the varying procedural histories of the various defendants. For example, Lead Plaintiffs contend that "Defendants do not contest that the current consolidated class action relates back to the previously filed actions under Rule 15(c) . . . and, thus, the critical inquiry is whether the initial actions filed in October 2004 were timely." (Opp'n Br. at 38 n.14.) The Underwriter Defendants, however, were not named in any of the previous lawsuits

I. COUNTS I AND III AGAINST THE UNDERWRITER DEFENDANTS ARE TWICE BARRED BY THE STATUTE OF LIMITATIONS APPLICABLE TO SECTION 11 AND SECTION 12(A)(2) CLAIMS.

A. Lead Plaintiffs Are Not Intended Beneficiaries of the Rubin Agreement.

In the Opposition Brief (at 43-45), Lead Plaintiffs contend that they are entitled to enforce provisions of the Rubin Agreement to revive their otherwise time-barred claims against the Underwriter Defendants, which were brought independent of and prior to the claims filed by Mr. Rubin in New York state court (see Zach Decl. Exh. 4.). It is black-letter law, however, that a contract is enforceable only where the party seeking enforcement is a party to the agreement or an intended beneficiary of the agreement. Here, Lead Plaintiffs do not argue that they are actual parties to the Rubin Agreement, but instead contend that they are intended beneficiaries. (Opp'n Br. at 44.) They are not and the three-year statute of repose set forth in Section 13 of the Securities Act bars absolutely any claim they may have against the Underwriter Defendants. See P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102-03 (2d Cir. 2004) (holding that the "statute of repose begins to run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action.").

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filed in October 2004 and there is no potential for relation back. Rather, all of the Lead Plaintiffs decided not to sue the Underwriter Defendants and consciously elected to allow the statute of limitations to run on any potential Securities Act claims against them. Thus, the "critical inquiry" as to claims against the Underwriter Defendants is whether Lead Plaintiffs should be permitted to rely upon a tolling agreement that they were unaware of and whose terms they admit are not binding upon them to allow their untimely Securities Act claims to go forward against the Underwriter Defendants. The timeliness of the October 2004 actions is neither critical nor even relevant to the Underwriter Defendants' arguments.

The Rubin Agreement is governed by New York law.[2] The New York Court of Appeals has adopted section 302 of the Restatement (Second) of Contracts for determining whether a plaintiff seeking enforcement of a contract is an intended beneficiary with standing to sue on the agreement or an incidental beneficiary who has no such right. See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., Inc., 495 N.Y.S.2d 1, 45 (1985) (stating that "we think that analysis and exposition will be advanced by adopting the terminology and concepts of the Restatement."). The Restatement sets forth the following test:

> Unless otherwise agreed between promissor and promissee, a beneficiary of a promise is an intended beneficiary if recognition of a right of performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promissee to pay money to the beneficiary; or (b) the circumstances indicate that the promissee intends to give the beneficiary the benefit of the promised performance.

Restatement (Second) of Contracts § 302 (1981). Thus, "[u]nder New York law in order to recover as a third-party beneficiary of a contract, a claimant must show that the parties to the contract intended to confer a benefit on the third party." Subaru Distrib. Corp. v. Subaru of America, Inc., 425 F.3d 119, 124 (2d Cir. 2005). In addition, "[a] court in determining the parties' intention should consider the circumstances surrounding the

[2] "In contract cases, New York courts now apply a 'center of gravity' or 'grouping of contacts' approach. Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties." Brink's Ltd. v. South African Airways, 93 F.3d 1022, 1030-31 (2d Cir. 1996) (citations omitted). Here, the "center of gravity" is New York. The agreement was negotiated by Mr. Rubin's counsel who is based in New York, as is counsel for the Underwriter Defendants. In fact, there are no contractual contacts in any jurisdiction other than New York for the Rubin Agreement.

transaction as well as the actual language of the contract." Id. (citing Restatement (Second) of Contracts § 302, cmt. a.)

1. Lead Plaintiffs Fail to Plead any Facts in the Complaint That Demonstrate They Are Intended Beneficiaries of the Rubin Agreement.

As a threshold matter, plaintiffs fail to plead even the bare facts necessary to establish that they are intended beneficiaries of the Rubin Agreement. Under New York law, "[i]n order to state a cause of action, plaintiffs must plead facts sufficient, if proved, to establish that plaintiffs were intended beneficiaries of the contract." LaSalle Nat. Bank v. Ernst & Young L.L.P., 285 A.D.2d 101, 108 (N.Y. App. Div. 2001); see also First Capital Asset Mgmt., Inc. v. N.A. Partners, L.P., 260 A.D.2d 179, 180-81 (N.Y. App. Div. 1999) (dismissing complaint where there was no "allegation of any contractual language or other circumstances from which an intent to confer a benefit on petitioner could be inferred") (citation omitted). The sole allegation in the Complaint relating to the Rubin Agreement merely asserts that "the claims asserted in this Count [I] against the Underwriter Defendants were the subject of an agreement that tolled the statute of limitations." (Compl. ¶ 245.) While Lead Plaintiffs now argue that "the Underwriter Defendants baselessly claim [Mr. Rubin] is the sole beneficiary of the agreement" (Opp'n Br. at 43), the Complaint simply does not allege that Lead Plaintiffs were parties to the Rubin Agreement, nor does it allege that Mr. Rubin and the Underwriter Defendants intended to benefit Lead Plaintiffs in any way, let alone by granting them the right to initiate their own representative but untimely actions against the Underwriter Defendants. In addition, the Complaint states nothing as to how the Rubin Agreement relates to Count III (the only other count lodged against the Underwriter Defendants). Thus, Lead Plaintiffs fail to plead any facts, conclusory or otherwise, demonstrating that they are an intended beneficiary of the tolling agreement. Their claims against the Underwriter Defendants should be dismissed. See Epstein v. Haas Sec. Corp., 731 F. Supp. 1166, 1180-81 (S.D.N.Y. 1990) (holding that "[w]here the statute that creates the cause of action also contains a limitations period, a plaintiff must affirmatively plead compliance with the statute of limitations" and dismissing Section 12(2) claims for failure to plead such compliance) (citations omitted); Zola v. Gordon, 685 F. Supp. 354, 360 (S.D.N.Y. 1988) ("The court has a basis in law to dismiss plaintiffs' claims under these sections of the 1933 Act because plaintiffs have failed affirmatively to plead compliance with the statute of limitations contained in section 13, as they are required to so.") (citations omitted).

2. Neither Mr. Rubin Nor the Underwriter Defendants Intended to Benefit Lead Plaintiffs.

Under New York law, third-party beneficiary claims will be dismissed where "the complaint relies on language in the contract or other circumstances that will not support the inference that the parties intended to confer a benefit on the claimant." Subaru, 425 F.3d at 124. The reason Lead Plaintiffs fail to plead any facts in the Complaint demonstrating that they are intended beneficiaries is because it is clear from the plain language of the Rubin Agreement, as well as from the surrounding circumstances, that neither Mr. Rubin nor the Underwriter Defendants, the only parties to the Rubin Agreement, intended to grant them the right to bring their own otherwise time-barred actions against the Underwriter Defendants.

a. The express terms of the Rubin Agreement do not evidence an intent to benefit Lead Plaintiffs.

Nothing in the express provisions of the Rubin Agreement indicates that Lead Plaintiffs are intended beneficiaries of that agreement. The Rubin Agreement was entered into "by and between Michael Rubin individually, and as a representative of a class . . . [and the Underwriter Defendants]" and its terms are simple. (Zach Decl. Exh. 1 at 1 (emphases added).) Mr. Rubin agreed on December 9, 2004, only days before the maximum three-year statute would indisputably bar these claims, to refrain from bringing suit against the Underwriter Defendants until he complied with the notice requirement and the 30-day waiting period that are set forth in sections 2 and 3 of the agreement. In exchange, the Underwriter Defendants agreed with Mr. Rubin "to toll the applicable statute of limitations, and to assert no limitations, laches or other time-barring defenses, for the time period covered by the duration of this Agreement . . .". (Id. at §1.)

The Rubin Agreement grants Mr. Rubin individually the discretion to try to proceed in one of three ways: (1) elect not to sue the Underwriter Defendants; (2) bring suit against the Underwriter Defendants in his individual capacity; or (3) bring suit against the Underwriter Defendants as the representative of a class that he could seek to certify. This is made clear by the express terms of the agreement. Michael Rubin entered into the agreement "individually, and as a representative of a class". (Id. at 1.)[3] Thus, whether Mr. Rubin actually would seek to bring a claim, either individually or as a representative of a class, was within his sole discretion as a party to the Rubin Agreement. Nowhere does the Rubin Agreement confer or intend to confer on any other individual or group the right to bring an otherwise untimely individual or representative action against the Underwriter Defendants.

[3] The fact that Mr. Rubin contemplated the possibility that he might not sue the Underwriter Defendants is further demonstrated by the provision permitting him to take non-party discovery of the Underwriter Defendants. (Zach Decl. Exh. 1 at § 6 ("The Underwriters agree to accept service of any subpoena served on their undersigned representative.")

Lead Plaintiffs' contention that "the agreement was clearly intended to benefit not only Mr. Rubin but, by its own terms, the entire 'putative class of purchasers of shares or ADSs of Converium, traceable to the December 11, 2001 IPO'" (Opp'n Br. at 44) is a cribbed and distorted invocation of words in the Rubin Agreement. That, pursuant to the Rubin Agreement, Mr. Rubin might subsequently elect to proceed in a representative as well as an individual capacity does not mean that the Rubin Agreement confers or "clearly intended" to confer a right to commence an otherwise untimely class action on every potential member of the class Mr. Rubin might seek to represent. Indeed, such an interpretation would hardly confer much of a benefit on Mr. Rubin since any of the presumably thousands of similarly situated individuals could simply step ahead of Mr. Rubin and displace his ability to pursue this litigation. Moreover, there could not be any "clear intent" to benefit putative class members when it was unclear whether Mr. Rubin would in fact elect to bring a class action lawsuit against the Underwriter Defendants.

In addition to Mr. Rubin's explicit and discretionary right to pursue either individual or class claims (or none at all), the remaining terms of the agreement also demonstrate that there was no intent to permit any and all putative class members to bring their own representative suits against the Underwriter Defendants absent Mr. Rubin as their representative. Lead Plaintiffs admit as much when, in an attempt to address why they ignored and failed to comply with the terms of the Rubin Agreement prior to initiating this action, they argue that none of the terms of the Rubin Agreement are binding on them.[4] Specifically, they note that "[n]owhere in the agreement does it state that members of the putative class other than Rubin are obliged to refrain from bringing suit against the Underwriter Defendants." (Opp'n Br. at 45 n.19.) In other words, Lead Plaintiffs' interpretation of the express terms of the Rubin Agreement and the intent of the parties is that Mr. Rubin is saddled with various restrictions on his ability to commence an action against the Underwriter Defendants while other putative class members and non-parties to the Rubin Agreement are granted an unfettered right to bring their own identical lawsuit when and where they please, even though they consciously elected not to seek such a tolling agreement and to let the statute of limitations run on such claims before becoming aware of Mr. Rubin and his agreement. That obviously is not a credible reading of the agreement or a plausible articulation of the contractual parties' intent.[5]

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[4] Lead Plaintiffs assertion that they are both intended beneficiaries and not bound by the terms of the agreement is legally unsupportable. Prof. Farnsworth summarized the law on this point as follows: "the beneficiary's right under the contract rises no higher than the right of the promisee . . . Since the beneficiary is subject to all of the terms of the contract between the promisor and the promissee, the beneficiary is also vulnerable to defenses of the promisor that arise under those terms during the performance of the agreement." E. Allan Farnsworth, Farnsworth on Contracts, at § 10.9 (3d ed. 2004). Thus, even if Lead Plaintiffs were intended beneficiaries (and they are not), by admitting to the fact that they breached the promissee's obligations under the now-expired Rubin Agreement, Lead Plaintiffs forfeited the now ended tolling benefits it conferred.

[5] To support their absurd interpretation, Lead Plaintiffs point to the language in section 8 that states that "[t]he Parties acknowledge that their intent is to preserve the status quo as to the rights of Rubin and the putative class of purchasers" to claim that they are clearly intended beneficiaries of the agreement. That language, however, evidences no intention by either Mr. Rubin or the Underwriter Defendants to permit them to bring suit on their own behalf. Rather, it evidences no more than the intent of the actual parties as expressed here and in the other provisions of the agreement to preserve Mr. Rubin's ability to sue as an individual and as a representative of a putative class that he could seek to certify.

Plaintiffs are exactly wrong when they state that the Rubin Agreement contains language that "is exactly the type of express intent to benefit non-parties that courts have held sufficient for tolling the statute of limitations as to those non-parties." (Opp'n Br. at 44.) In fact, the only case they cite, Lindner Dividend Fund, Inc. v. Ernst & Young, 880 F. Supp. 49 (D. Mass. 1995), demonstrates how untenable their reading of the Rubin Agreement is vis-à-vis the express terms of the Lindner tolling agreement, which contained numerous, unambiguous expressions of the parties' intent to benefit putative class members and regarded them "as parties to this agreement". Id. at 55-56.

For example, the Lindner agreement stated that it was "entered into by the named plaintiffs in the class action litigation 'in behalf of the members of the class that said parties sought to represent . . .'". Lindner, 880 F. Supp. at 55 (emphasis added.) The phrase "in behalf of" normally means "[f]or the benefit of; in the interest of". American Heritage Dictionary (4th ed. 2002). In contrast, the Rubin Agreement states that it was entered into by "Michael Rubin, individually, and as a representative of a class . . .". (Zach Decl. Exh. 1 at 1 (emphasis added).) As described above, the clear intent of Mr. Rubin in entering into the agreement was to preserve whatever rights he then had to commence an action either as an individual or as a representative of a class that he could seek to certify; he had no intent to create or grant rights to hypothetical class members to bring their own untimely representative suits sometime in the future.

The Lindner agreement also clearly and unequivocally stated that it "was to 'run in favor of all putative class members in the consolidated amended complaint'". Lindner, 880 F. Supp. at 55. Indeed, the Lindner agreement even stated that "class members who do not opt out are to be regarded as parties to this agreement protected by this agreement." Id. The Rubin Agreement does not contain any language that is even remotely analogous. There is no provision in the Rubin Agreement that suggests any intent to single out putative class members as intended non-party beneficiaries with the right to commence their own representative but untimely actions. There is nothing comparable to those provisions of the Lindner agreement in the Rubin Agreement because the Rubin Agreement deals only with the rights of Mr. Rubin to proceed against the Underwriter Defendants; and Mr. Rubin had not yet drafted or served any complaint on the underwriters.

In summary, under any reasonable reading of the Rubin Agreement, it is obvious that neither Mr. Rubin nor the Underwriter Defendants intended to benefit Lead Plaintiffs by allowing them to bring an identical lawsuit on their own behalf after they had knowingly allowed the statute to expire. Lead Plaintiffs simply are not parties to, nor intended beneficiaries of, the Rubin Agreement.

b. The circumstances surrounding the execution of the Rubin Agreement do not evidence any intent to benefit Lead Plaintiffs.

An examination of the circumstances surrounding the execution of the Rubin Agreement leaves no doubt that neither of the parties to the Rubin Agreement intended to benefit Lead Plaintiffs. As a general matter, "[i]n ascertaining the rights of an asserted third-party beneficiary, the intention of the promisee is of primary importance, since the promisee procured the promise by furnishing the consideration therefor." Drake v. Drake, 89 A.D.2d 207, 209 (N.Y. App. Div. 1982). (citation omitted). In this case, counsel for Mr. Rubin—who participated in the drafting of the Rubin agreement—unequivocally stated that Mr. Rubin was the sole beneficiary of the tolling agreement:

> "And I am representing to your Honor that that agreement, that we entered into, with the Davis Polk firm, who are smart lawyers representing the underwriters, right, specifically provides that there's a tolling agreement with respect to any class action that can be brought by Mr. Rubin, not by anyone else. They [Lead Plaintiffs] will not be able to use that tolling agreement to bring that class action. Those claims will be lost."

(Zach Decl. Exh. 1 at 10.)

Moreover, as a matter of common sense, it is clear that it would have been against Mr. Rubin's own interests to benefit Lead Plaintiffs in the manner they suggest. In this action, Mr. Rubin sought a "seat at the table" to participate in the prosecution of the litigation previously commenced against Converium and ZFS but <u>not</u> the underwriters. As his counsel has since explained, because he has not been appointed a lead plaintiff, he "is not going to go forward with [Lead Plaintiffs'] counsel, who abandoned those [Securities Act] claims". (Zach Decl. Exh. 2 at 4.) It is well understood that plaintiffs and their counsel vie for the right to serve as a lead plaintiff and lead counsel in order to helm the litigation. <u>See</u>, <u>e.g.</u>, <u>In re Auction House Antitrust Litig.</u>, 197 F.R.D. 71, 75 (S.D.N.Y. 2000) ("The role therefore has become a coveted prize to be fought over or bargained for among competing plaintiff's attorneys."). In that context, Mr. Rubin had no incentive to benefit the other putative class members who failed to preserve Securities Act claims against the Underwriter Defendants by securing an agreement to give these other plaintiffs an unfettered ability to sue the Underwriter Defendants on those same claims at their leisure and on more advantageous terms than Mr. Rubin had agreed for himself.

Indeed, considering the circumstances surrounding the Rubin Agreement, it cannot reasonably be believed that Mr. Rubin and the Underwriter Defendants actually intended to benefit Lead Plaintiffs in the manner these Lead Plaintiffs now claim was "clearly intended". Accepting Lead Plaintiffs' reading of the Rubin Agreement as correct yields results that Mr. Rubin and the Underwriter Defendants plainly did not contract for, let alone intend. For example, such a reading would require one to believe that:

- Mr. Rubin contracted to place limitations on his ability to bring suit against the Underwriter Defendants while intending to give all the other putative class members—against whom he would have to compete for lead plaintiff status—the unfettered ability to sue the underwriters on otherwise time-barred claims they had consciously elected not to preserve;

- Mr. Rubin intended to permit other putative class members priority at any time to pick the first jurisdiction and court in which to file suit against the Underwriter Defendants while Rubin must wait 30 days to do so;

- Mr. Rubin intended to forfeit his ability, protected by the tolling agreement, to explore claims against the Underwriter Defendants because he also intended to permit every other putative class member to bring their own representative but untimely suit against the Underwriter Defendants whenever they pleased; and

- to obtain some forbearance solely by Mr. Rubin, the Underwriter Defendants—represented by the Davis, Polk firm—intended to agree to allow <u>any</u> putative class member to bring time-barred individual or class claims against them in any jurisdiction at a time of their choosing and with no limitations on their ability to do so.

Plainly, those were not the intentions of the parties and plaintiffs have alleged no facts or language that would support such a claim. Rather, the members of the putative class are incidental beneficiaries whose Securities Act claims could, <u>if</u> Mr. Rubin elected to sue as a representative of a class against the Underwriter Defendants (as he now has done in state court), be preserved for assertion in that Rubin class action as if <u>he</u> had asserted them on December 9, 2004. Because Lead Plaintiffs cannot claim the tolling benefit conferred on Mr. Rubin under the Rubin Agreement, their newly asserted claims are time-barred.

B. Lead Plaintiffs Were On "Inquiry Notice"—at the Latest—by November 17, 2002.

Even were Lead Plaintiffs able and entitled to try to invoke the Rubin Agreement to resuscitate their time-barred claims against the Underwriter Defendants, those claims are still time-barred by the one-year "inquiry notice" statute of limitations. This basis for dismissal, which is dispositive of all claims asserted by Lead Plaintiffs against the Underwriter Defendants (and presumably dispositive of Mr. Rubin's state court class action against the underwriters as well), was outlined at pp. 17-25 of our moving brief. Lead Plaintiffs' only response is to assert the ipse dixit that "these disclosures did not in any way put investors on notice that Converium's reserves were materially understated." (Opp'n Br. at 41.) We join in our co-defendants' reply briefs and will not reiterate the detailed "inquiry notice" arguments outlined by them except to highlight the straightforward Second Circuit precedent that dictates dismissal of the Securities Act claims. In the Opposition Brief, Lead Plaintiffs fail to rebut the following dispositive points:

- The fact that Converium increased its loss reserves four times totaling $165.9 million in a six-month period ending in November 2002 (less than one year following the initial public offering);
- the fact that Converium North America raised its reserves four times totaling $176.2 million in that same six-month period;
- the fact that those reserves increases amount to approximately three-fourths of the total reserves deficiency alleged in the Complaint; and

- the fact that LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003), mandates dismissal of this action. Converium increased its loss reserves estimates four times in six months, totaling nearly seventy-five percent of the loss reserves deficiency alleged by Lead Plaintiffs. In LC Capital Partners, the Second Circuit held that "a series of three charges in substantial and increasing amounts for the same purpose within four years should alert any reasonable investor that something is seriously wrong" and necessitated dismissal of the action on "inquiry notice" grounds. Id. at 155 (emphasis added).

II. THE UNDERWRITER DEFENDANTS WERE ENTITLED TO RELY UPON THE EXPERTISED PORTIONS OF THE REGISTRATION STATEMENT AND PROSPECTUS.

Lead Plaintiffs' only response to the Underwriter Defendants' argument that they were entitled to rely on the actuarial analysis of loss reserves performed by Tillinghast and the audit conducted by PricewaterhouseCoopers is to assert that due diligence is an affirmative defense that is "premature" to consider, apparently even if the facts on which it is based are conceded as part of Lead Plaintiffs' allegations. (Opp'n Br. at 34-35.) Lead Plaintiffs are, however, ignoring the fact that "[a]n affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6) . . . if the defense appears on the face of the complaint." Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 74 (2d Cir. 1998).

The facts alleged in the Complaint establish that the Underwriter Defendants are entitled to dismissal of the counts alleged against them. Indeed, these facts are conceded by plaintiffs, who nonetheless argue that "the fact that Tillinghast issued a report or that PWC audited the company's financial statements" (Opp'n Br. at 35) cannot establish any such ground for dismissal. But the Second Circuit has expressly noted that the calculation of loss reserves involves the application of complex actuarial tests that often rely on experienced actuaries exercising their professional judgment. See

Delta Holdings, Inc. v. Nat'l Distillers & Chem. Corp., 945 F.2d 1226, 1229-30 (2d Cir. 1991). In this case, plaintiffs allege that outside actuaries—Tillinghast—analyzed Converium's loss reserves estimates and certified them in the offering documents. In doing so, Tillinghast "expertised" the disclosures relating to Converium's loss reserves made in the offering documents. Nonetheless, Lead Plaintiffs have never asserted that Tillinghast acted anything but diligently in the performance of that analysis and do not allege that Tillinghast raised or suppressed any "red flags" relating to the loss reserves estimates. Likewise, Lead Plaintiffs admit that PricewaterhouseCoopers audited Converium and certified its financial statements in the prospectus, which contained multiple disclosures relating to Converium's loss reserves. Lead Plaintiffs likewise have never accused PricewaterhouseCoopers of any wrongdoing and do not contend that they raised or suppressed any "red flags". Nor do Lead Plaintiffs dispute the fact that the Underwriter Defendants were not required, or competent, to conduct an analysis of Converium's loss reserves estimates.

Against this conceded background, all Lead Plaintiffs tender is conclusory allegations that the Underwriter Defendants, who were non-experts in the relevant actuarial analysis, violated Sections 11 and 12(a)(2) of the Securities Act even though nothing in the Complaint indicates any "red flags" to strip them of their right to rely in this area upon Tillinghast's and PricewaterhouseCoopers' reserves figures in the prospectus. If such evidence existed, Tillinghast and PricewaterhouseCoopers would have been the ones to identify it because the complex analysis of the company's loss reserves was their expert bailiwick, not that of the Underwriter Defendants. If Lead Plaintiffs are unable to identify any wrongdoing on the part of the experts who actually performed the complex and specialized analysis of Converium's loss reserves, they cannot plausibly claim liability for understated reserves estimates on the part of the Underwriter Defendants, who were entitled to rely upon those experts and their expertised reserves estimates. Lead Plaintiffs new assertion that Converium executives duped Tillinghast are both absent from the complaint (see ZFS Br. at § II.A) and irrelevant here. Lead Plaintiffs do not claim to have alleged that the Underwriter Defendants were a part of that alleged deceit. Therefore, it is clear from the face of the Complaint that the Underwriter Defendants properly relied on Tillinghast and PricewaterhouseCoopers and that the Securities Act claims asserted against the Underwriter Defendants should be dismissed.

III. CO-LEAD PLAINTIFF AVALON HOLDINGS INC. AND OTHER PURCHASERS OF CONVERIUM SHARES ABROAD CANNOT TRACE THEIR SHARES TO THE U.S. REGISTRATION STATEMENT.

In the Opposition Brief, Lead Plaintiffs fail to address (or even mention) the Underwriter Defendants' argument (see Underwriters' Opening Brief at 36-38) that Avalon Holdings Inc. ("Avalon") and other purchasers of Converium shares abroad cannot trace their shares back to the Registration Statement because it explicitly states that "[o]ffers and sales of registered shares and American Depositary Shares outside the United States are being made pursuant to Regulation S and are not covered by this Registration Statement". (See Zach Decl. Exh. 8 at cover page.) Thus, because Lead Plaintiffs do not dispute that argument, any claims brought by Avalon and purchasers of Converium shares abroad should be dismissed. See DeMaria v. Andersen, 318 F.3d 170 (2d Cir. 2003) ("we read § 11's plain language to state unambiguously that a cause of action exists for any person who purchased a security that was originally registered under the allegedly defective registration statement—so long as the security was indeed issued under that registration statement and not another.") (citations & quotations omitted).

IV. PURCHASERS THAT SOLD SHARES AT OR ABOVE THE OFFERING PRICE SHOULD BE DISMISSED.

As the Underwriter Defendants previously argued (Underwriter Defendants' Opening Brief at 39), purchasers who sold their Converium shares or ADSs at or above the offering price should have their claims dismissed. As both the Underwriter Defendants and ZFS have pointed out, those purchasers asserting Section 12(a)(2) claims who sold at or above the offering price cannot demonstrate any compensable loss under the Supreme Court's decision in Randall v. Loftsgaarden, 478 U.S. 647 (1986). Moreover, the Underwriter Defendants also argued that Section 11 claims of putative class members who sold their shares at or above the offering price should be dismissed. That point is unequivocally supported by In re Initial Public Offering Securities Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003), a case upon which Lead Plaintiffs repeatedly rely. In that case, Judge Scheindlin concluded that "based on the plain language of Section 11 and its legislative history, a plaintiff who sells a security above its offering price has no cognizable damages under Section 11 of the Securities Act, notwithstanding the fact that such plaintiff may have actually suffered a loss." Id. at 351. Thus, purchasers asserting Section 11 and 12(a)(2) claims who sold at or above the offering should have their claims dismissed.

Conclusion

For the foregoing reasons, the Underwriter Defendants respectfully request that the Court dismiss the Complaint against them in its entirety and with prejudice.

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