UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH MERCADO and RMM RECORDS & VIDEO CORP., Plaintiffs, v. PETER THOMAS PATERNO, MARC STOLLMAN, KING, PURTICH, HOLMES, PATERNO & BERLINER, LLP, and STOLLMAN & STOLLMAN, Defendants.	Case No. 02-CV-4974 (MGC)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re RMM RECORDS & VIDEO CORP., Debtor.	Case No. 00-15350 (AJG)
RALPH MERCADO and RMM RECORDS & VIDEO CORP., Plaintiffs, v. PETER THOMAS PATERNO, MARC STOLLMAN, KING, PURTICH, HOLMES, PATERNO & BERLINER, LLP, and STOLLMAN & STOLLMAN, Defendants.	Adversary Proceeding No. 04-00004 (AJG)

REPORT AND RECOMMENDATION:
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

ARTHUR J. GONZALEZ, United States Bankruptcy Judge:

To the Honorable Miriam Goldman Cedarbaum, United States District Judge:

On or about June 27, 2002, RMM Records & Video Corp. ("RMM") and Ralph Mercado, RMM's principal, filed a complaint alleging legal malpractice in United States District Court for the Southern District of New York against the defendants Peter Thomas Paterno, King, Purtich, Holmes, Paterno & Berliner, LLP, Marc Stollman, and Stollman & Stollman, their former attorneys. Before this Court is the defendants' motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, joined and supported by Universal Music & Video Corp. ("Universal"). Defendants and Universal base their motion for judgment on the pleadings on their contention that RMM does not have standing to prosecute this action.

For the reasons set forth below, the defendants' motion for judgment on the pleadings should be GRANTED, and the plaintiff's complaint dismissed in its entirety.

FACTS

On November 14, 2000, RMM filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Case No. 00-15350. During the course of that bankruptcy proceeding, RMM and Universal entered into an Asset Purchase Agreement ("APA"), dated as of April 30, 2001, for the sale of RMM's assets to Universal. For APA, see Docket No. 261, Universal's Memorandum of Law, Affidavit of James S. Cochran, Exhibit C. On July 13, 2001, this Court entered an Order authorizing the sale of those assets in accordance with the terms of the APA.

RMM and Ralph Mercado, who had filed for personal bankruptcy in connection with RMM's bankruptcy, subsequently filed the instant complaint alleging legal malpractice against the Defendants, their former attorneys. The malpractice complaint arose in connection with the 1999 sale of RMM's recording contract with a popular performer to Sony Music. The District Court dismissed the malpractice claims brought by Ralph Mercado individually on December 2, 2002. On June 1, 2004, the Defendants filed the subject motion for judgment on the pleadings pursuant to Rule 12(c). On July 28, 2004, the District Court, pursuant to 28 U.S.C. § 157(a) and the Standing Order of the United States District Court for the Southern District of New York, dated July 10, 1984, ordered the motion transferred to this Court under Rule 9033 of the Federal Rules of Bankruptcy Procedure to hear and then submit proposed findings of fact and conclusions of law, holding that this motion was a non-core proceeding related to RMM's bankruptcy proceeding before this Court. By Stipulation of this Court dated December 22, 2004, Universal was joined to this proceeding as a necessary party. Arguments on the motion were heard by this Court on January 26, 2005.

The Defendants and Universal argue that the legal malpractice claims RMM has asserted in the complaint were sold to Universal pursuant to the APA, and that therefore, RMM has no standing to sue on the claims. Universal contends that as a matter of law the plain, unambiguous language of the APA effected the transfer of "all of" and "100%" of RMM's assets, thereby including any claims for legal malpractice. Universal urges the Court to conclude that the Defendants' motion for judgment on the pleadings should be granted on this ground.

RMM responds that the meaning of the APA is in fact ambiguous, and thus that the Court cannot determine as a matter of law whether the legal malpractice claims at issue here were transferred

under the APA without further interpreting the language of the agreement and the intentions of the parties. RMM argues that the APA is best interpreted as limited in application to those of RMM's assets used in or related to RMM's business and operations, which category RMM argues does not include the legal malpractice claims at issue here. RMM also contends that extrinsic evidence buttresses its contention that the APA was not intended to include the legal malpractice claims. RMM urges the Court to therefore conclude as a matter of law that, based on the preponderance of the evidence, the APA did not include the legal malpractice claims at issue here, or in the alternative, to find that this is an issue of material fact to be determined by a trier of fact. Finally, RMM argues that if the Court does conclude as a matter of law that the APA did transfer the legal malpractice claims, the Court should reform the APA to exclude those claims on the grounds of mutual mistake.

Discussion

The Defendants' motion here is for judgment on the pleadings pursuant to Rule 12(c). Generally, "[t]he standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2nd Cir. 2001) (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2nd Cir. 1998)). *See also*, *Sheppard v. Beerman*, 18 F.3d 147, 150 (2nd Cir. 1994); *Ad-Hoc Comm. Of Baruch Black & Hispanic Alumni Ass'n v. Bernard M. Baruch Coll.*, 835 F.2d 980, 982 (2nd Cir. 1987)); *Smith v. Barnhart*, 2005 U.S. Dist. LEXIS 1664 (S.D.N.Y. Jan. 31, 2005); *Bennerson v. City of N.Y., Dep't of Corr.*, 2004 U.S. Dist. LEXIS 7241 (S.D.N.Y. Apr. 28, 2004). Under such a standard, all allegations asserted in the complaint must be accepted as true, and all reasonable inferences must be drawn in favor of the plaintiff. *Giuliani*, 143 F.3d at 644.

Additionally, "the district court may not consider matters outside of the pleadings without converting the motion into a motion for summary judgment." *Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2nd Cir. 2003) (citing *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2nd Cir. 2000).

However, the Defendants' motion rests upon the claim that RMM lacks standing to bring this action for legal malpractice. Motions to dismiss for lack of standing are commonly brought under both Rule 12(b)(6) for failure to state a claim and under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. *See, e.g., Small v. General Nutrition Co., Inc.*, 388 F.Supp.2d 83 (E.D.N.Y. 2005) (dismissed for lack of standing under Rule 12(b)(6)); *Juvenile Matters Trial Lawyers Assoc. v. Judicial Dep't.*, 363 F.Supp.2d 239 (D.Conn. 2005) (dismissed for lack of standing under Rule 12(b)(1)). *See also*, *Rent Stabilization Ass'n. of New York v. Dinkins*, 5 F.3d 591, n. 2 (2nd Cir. 1994) (recognizing that challenges for lack of standing are brought under both rules and suggesting that standing and subject matter jurisdiction are distinct concepts). However, although it is the continuing practice of district courts in this circuit to accept challenges to standing under either rule, the Court of Appeals has fairly conclusively stated that issues of standing are more properly addressed under Rule 12(b)(1), concluding that "standing is perhaps the most important of the jurisdictional doctrines" and that "the concept of standing - even its prudential dimension - is a limitation on federal court jurisdiction." *Thompson v. County of Franklin*, 15 F.3d 245, 247-48 (2nd Cir. 1994) (noting that the issue was unresolved and reviewing its dicta in *Rent Stabilization*) (internal quotations and citations omitted). *But see*, *Bank of Am. Corp. v. Braga Lemgruber*, 385 F.Supp. 2d 200, 217-18 (S.D.N.Y. 2005) (suggesting that the proper ground for dismissal for lack of standing is still unclear).

This issue is of importance here because, while the general rule is for Rule 12(c) motions to be

treated as if they were Rule 12(b)(6) motions, the standards for Rule 12(b)(1) motions are distinct from the standards for Rule 12(b)(6) motions and particularly tailored to the unique issues of jurisdictional analyses. Accordingly, some courts have treated Rule 12(c) motions founded on a claim of lack of subject matter jurisdiction as if they were Rule 12(b)(1) motions. *See U.S. ex rel. Phipps v. Comprehensive Cmty.*, 152 F.Supp.2d 443 (S.D.N.Y. 2001); *Peters v. Timespan Communications, Inc.*, Case No. 97-CV-8750, 1999 WL 135231 (S.D.N.Y. March 12, 1999); *Alonzo v. Chase Manhattan Bank, N.A.*, 25 F.Supp.2d 455 (S.D.N.Y. 1998). Although *Phipps*, *Peters*, and *Alonzo* involved challenges to the court's subject matter jurisdiction, the District Court should find that a Rule 12(c) motion based upon a lack of standing should be treated as a Rule 12(b)(1) motion as well. Like a motion to dismiss for lack of subject matter jurisdiction, a motion to dismiss for lack of standing can raise "a *factual* challenge based on extrinsic evidence." *Guadagno v. Wallack Ader Levithan Assoc.*, 932 F.Supp. 94 (S.D.N.Y. 1996) (emphasis in original). Similarly, the Court noted in *Rent Stabilization* that "like many cases under 12(b)(1) (but not under 12(b)(6)), it may become necessary for the district court to make findings of fact to determine whether a party has standing to sue." 5 F.3d at 594. The standards for Rule 12(b)(6) motions are ill-fit to these types of factual analysis necessary to resolve an issue of standing. Moreover, a court analyzing a challenge to standing under Rule 12(b)(1) "'may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits.'" *Filitech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2nd Cir. 1998) (quoting *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90, 96 (2nd Cir. 1991), *vacated on other grounds*, 505 U.S. 1215 (1992). *See also, J.S. ex rel. N.S. v. Attica Cent. Schools*, 386 F.3d 107, 110 (2nd Cir. 2004). In considering a Rule 12(b)(6) motion, however, a

court may not consider evidence outside the pleadings without converting the motion to a Fed.R.Civ.P. 56 motion for summary judgment. *Friedl*, 210 F.3d at 83-84. Not only is such a requirement procedurally inconvenient, more importantly, summary judgment is not appropriate to resolve a question of standing, as "[i]n essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975).

The District Court should therefore apply the standards for a Rule 12(b)(1) motion to the instant Rule 12(c) motion. Under a 12(b)(1) motion, although all material allegations in the complaint are accepted as true, *Raila v. United States*, 355 F.3d 118, 119 (2nd Cir. 2004), "no presumptive truthfulness attaches to the complaint's jurisdictional allegations." *Guadagno*, 932 F.Supp. at 95 (citing *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)). *See also*, *Integrated Utils., Inc. v. United States*, No. 96-CV-8983, 1997 WL 529007, at *2 (S.D.N.Y. Aug. 26 1997) ("'argumentative inferences favorable to the party asserting jurisdiction should not be drawn'") (quoting *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.*, 968 F.2d 196, 198 (2nd Cir. 1992)). "[I]t is the affirmative burden of the party invoking [federal subject matter] jurisdiction... to proffer the necessary factual predicate - not just an allegation in a complaint - to support jurisdiction." *London v. Polishook*, 189 F.3d 196, 199 (2nd Cir. 1999). *See also*, *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 177 (2nd Cir. 2001). As previously noted, evidence outside the pleadings may be examined to resolve the disputed jurisdictional issues. *Filitech*, 147 F.3d at 932.

Plaintiff's Standing

At issue here are the prudential limitations on standing, which require that the plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 500. This standing issue turns on whether RMM owns the claims it is asserting in this action. The Defendants argue that RMM sold the legal malpractice claims to Universal pursuant to the terms of the APA and therefore has no standing to bring this action. RMM denies that such a transfer occurred and argues that any prudential standing requirements are satisfied as RMM is asserting claims it owns. The only dispute here then concerns whether the APA included these legal malpractice claims in those assets RMM transferred to Universal. The procedural issue of standing thus turns on the attendant substantive issue of the parties' contractual obligations and rights.

Interpretation of the APA

This action was brought in the United States District Court for the Southern District of New York on the basis of diversity jurisdiction. Accordingly, New York substantive law should be applied. *Erie R.R. v. Tompkins*, 304, U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938). Generally, and subject only to exceptions that are not applicable here, New York contract law honors choice of law provisions. *Turtur v. Rothschild Registry Int'l*, 26 F.3d 304, 310 (2nd Cir. 1994) (citing *Freedman v. Chemical Constr. Corp.*, 43 N.Y.2d 260, 265, 401 N.Y.S.2d 176, 372 N.E.2d 12 n. * (N.Y. 1977). Accordingly, per § 16 of the APA, which provides that New York law governs its provisions, the District Court should find that New York contract law controls interpretation of the APA's terms and language.

As the primary objective of a court in analyzing contractual provisions is to give effect to the

intent of the parties, the first inquiry concerns whether or not the APA is ambiguous on its face. Under New York law, whether a contract is ambiguous is a question of law for the Court. *W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 715 (N.Y. 1990); *Sutton v. East River Sav. Bank*, 55 N.Y.2d 550, 554, 450 N.Y.S.2d 460. 435 N.E.2d 1075 (N.Y. 1982). Contractual language is unambiguous where there is "'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2nd Cir. 1989) (quoting *Breed v. Insurance Co. Of North America*, 385 N.E.2d 1280 (N.Y. 1978). Alternatively, ambiguous language "is that which is capable of more than one meaning 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." *Seiden Associates, Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2nd Cir. 1992) (internal quotations omitted). If "a contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence." *RJE Corp. v. Northville Industries Corp.*, 329 F.3d 310 (2nd Cir. 2003) (quoting *De Luca v. De Luca*, 300 A.D.2d 342, 342, 751 N.Y.S.2d 766, 766 (2d Dept. 2002)) (internal quotations omitted). In determining the intent of the parties, it is axiomatic that the entire contract must be considered as a whole so that no individual provision is rendered superfluous. *Id.*

As previously stated, the issue before the Court turns on the determination as to whether the APA transferred to Universal ownership of the malpractice claim asserted here by RMM. Section 2,

entitled "Sale and Purchase," is the most obviously relevant provision of the APA. Section 2(a), "Sale and Purchase of Assets," defines the assets sold:

> "... Seller hereby agrees to sell, assign, grant, transfer, convey, and deliver to Buyer, and Buyer hereby agrees to purchase and acquire from Seller, on the Closing Date, *one hundred percent (100%) of the assets of the Seller, including (but not limited to)*, all of Seller's right, title, and interest, throughout the world in perpetuity, *in and to all of the assets, properties, and rights* owned, leased, licensed, or administered by Seller, or used or held for use by Seller in the operation of the Business, *of every type, and description, real, personal, and mixed, tangible and intangible*, wherever located and whether or not reflected on the books and records of Seller (all of the foregoing being collectively referred herein as the Assets") ...." (emphasis added).

On first impression, the language of §2(a) does not appear ambiguous as to the scope of assets sold. "'All', of course, means 'every,' 'the whole amount or quantity of," and "is 'one of the least ambiguous words in the English language.'" *American Home Products Corp. v. Cambr Co., Inc.*, Case No. 00-CV-2021, 2001 WL 79903 (S.D.N.Y. Jan. 30, 2001) (quoting *GEICO v. Fetisoff*, 958 F.2d 1137, 1142 (D.C.Cir. 1992). "100%" has an identical meaning. Section 2(b), "Enumeration of Assets," goes on to list a number of assets included within the meaning of §2(a), stating "*Without in any way limiting the scope of Section 2(a)*, the Assets shall include all of the Seller's right, title, and interest ...." These include: "(xv) *all* claims and causes of action in *any* way relating to the Assets, the Business, or Seller's operations, including all Avoidance claims; ... (xvii) *all other assets* (whether owned, leased, or licensed, real, personal, or mixed, tangible or intangible) of Seller." (emphasis added). Section 2(a) thus does not appear ambiguous as to scope.

RMM, however, argues that the general description "one hundred percent (100%) of the assets of Seller" in §2(a) is ambiguous, arguing that it could mean either "100% of all of RMM's assets" or "100% of RMM's assets used in or related to RMM's business and business operations." RMM

argues that less ambiguous language, such as "100% of the assets of every kind and description," would have been used if the former was intended, and that by extension, some more limited meaning must have been intended. RMM also argues that other provisions, specifically §3(d), of the APA demonstrate that not all assets of RMM were sold to Universal, which thus provides further support for its argument that §2(a) is ambiguous. RMM then contends that §2(b), which it argues only lists assets used in or related to RMM's business and business operations, should be read to limit the scope of §2(a) per the doctrine of *ejusdem generis*. As well, RMM argues that §2(b)(xv) specifically excludes legal malpractice claims, and that such exclusion must be read into §2(a) in order to not render §2(b)(xv) superfluous. Assuming that ambiguity has been established, RMM contends that extrinsic evidence should be admitted to resolve ambiguity in the APA, and that such evidence demonstrates that the parties intended to transfer only those assets used or related to the current operations of RMM. Finally, RMM argues that if the Court concludes the legal malpractice claims were sold pursuant to the APA, the Court should reform the contract on the grounds of mutual mistake to explicitly exclude those claims.

The Court should not find RMM's arguments persuasive. Rather the Court should conclude first, that the APA is not ambiguous as a matter of law, second, that the APA incorporated all of RMM's assets, including the legal malpractice claims asserted here, in the sale of RMM's assets to Universal, and third, that reformation is not warranted here.

As an initial conclusion, the phrase "one hundred percent (100%) of the assets of Seller" in §2(a) is not ambiguous on its face, but rather admits only one meaning, namely, all of RMM's assets. It is unreasonable, looking at the language alone, to read the phrase in any other way. RMM's contention

that it is limited to only those assets used in or related to RMM's business and business operations finds no support in that plain language. However, the Court must also look at the surrounding language to inform its interpretation of the phrase. Nonetheless, RMM's contention is further weakened by the non-exhaustive language "including (but not limited to)" that immediately follows, as such language indicates that the broad and general phrase "one hundred percent (100%) of the assets of Seller" is to be read broadly and generally, as no limitation is to be implied by any enumeration. Further, the meaning RMM puts forward is included within the non-exhaustive description of "the assets of the Seller" as only one of two categories of assets: (1) all of the assets, properties, and rights owned, leased, licensed, or administered by Seller, and (2) all of the assets, properties, and rights used or held for use by Seller in the operation of the Business. The use of the conjunctive "or" indicates clearly that both categories are to be included within the broader set of "the assets of the Seller." To limit the meaning of the general description to only one of the categories expressly listed would be to manifestly frustrate the provisions of the contract. Moreover, the descriptive language "of every type and description, real, personal and mixed, tangible and intangible, wherever located and whether or not reflected on the books and records of Seller" merely serves to buttress the conclusion that "one hundred percent of the assets of the Seller" is not ambiguous. RMM cannot create ambiguity simply by "urg[ing] [a] different interpretation," as its "view 'strains the contract language beyond its reasonable and ordinary meaning. *Seiden Assoc.*, 959 F.2d at 428 (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459, 161 N.Y.S.2d 90, 141 N.E.2d 590 (N.Y. 1957)).

RMM next argues that §3(d) of the APA demonstrates an internal inconsistency in the document, in that the provision demonstrates that not all of RMM's assets were sold, and thus shows

that §2(a) is ambiguous. Section 3(d) pertains to any post-closing adjustments in the purchase price, and in its relevant parts, states "... Seller shall have the right to conduct up to two (2) audits of Buyer's books and records ... with respect to the matters set forth below in a manner consistent with the audit rights that Seller currently has under the Universal Agreements (whichever set of audit rights is broader)." RMM argues that this provision signifies that RMM was to retain the audit rights it was granted under the Universal Agreements, and that therefore, not all assets were intended to be sold under the APA. This argument, however, conflicts with the plain meaning of §3(d). Section 3(d) provides in regard to RMM's prior audit rights only that the audit rights granted under the APA would be exercised in a manner consistent with those prior rights. This language does not suggest, as RMM argues, that RMM was to retain those prior rights. Rather, the plain language only states that the new audit rights were coterminous with the prior rights to the extent that the prior rights were broader in scope. Though §3(d) clearly does not provide that the prior audit rights were to be sold to Universal, equally clearly this language cannot reasonably be read to state that RMM was to retain the prior audit rights. The only effect of §3(d) in this context was to create and define the scope of the audit rights Universal granted RMM under the APA. Section 3(d) therefore does not create ambiguity in the language of §2(a).

Similarly, though the Court must interpret the contract in light of all its provisions, RMM's reference to §2(b) as evidencing a limitation to the language of §2(a) is without merit. RMM argues that the Court should apply the doctrine of *ejusdem generis* in relating the listed assets of §2(b) to the general provisions of §2(a). RMM argues that the listed assets in §2(b) are all of the category of those assets used in or related to RMM's business and operations, and that therefore, the general provisions

of §2(a) should be read to relate to only those assets in order to not render §2(b) superfluous. However, this doctrine does not apply where the document demonstrates that it was the clear intent of the parties that no such limitation was to be implied. *Rothenberg v. Lincoln Fam Camp, Inc.*, 755 F.2d 1017, 1020 (2nd Cir. 1985) (citing *Brooklyn City Railroad Co. v. Kings County Trust*, 214 A.D. 506, 511, 212 N.Y.S. 343 (2d Dep't 1925), *aff'd*, 242 N.Y. 531, 152 N.E. 414 (1926). *See also*, *In re Chateaugay Corp.*, 154 B.R. 843 (Bankr. S.D.N.Y. 1993). Here, to read §2(b) as limiting §2(a) would be to ignore the contrary intention expressed in the document. Section 2(b) is clearly non-exhaustive, as denoted by the language "*Without in any way* limiting the scope of §2(a)." Section 2(b) also contains a catch-all provision, subsection (xvii), which states "*all* other assets (whether owned, leased or licensed, real, personal, or mixed, or tangible or intangible) of Seller." The repeated use of such broad and general language and the express non-exclusionary provision signifies clearly the parties' intention that §2(b) not be read so as to limit the broader provisions of §2(a). Moreover, as §2(a) provides that assets "used or held for use by Seller in the operation of the Business" is only one category of assets covered, to apply the doctrine of *ejusdem generis* here would be to ignore the plain intent of §2(a) to include additional categories of assets.

RMM also contends that the language of §2(b)(xv) indicates a limitation to §2(a) to the extent §2(a) includes legal claims. RMM argues that the language "relating to the Assets, the Business, or Seller's operations" in that subsection indicates that legal malpractice claims were not to be included, as they do not fall under the categories enumerated, and that therefore, in order to avoid reading this limiting language as superfluous, §2(a) must be read so as to not include legal malpractice claims. However, such a reading would be proper only if the limitation in subsection (xv) to those claims

"relating to the Assets, the Business, or Seller's operations" excludes the legal malpractice claims at issue here. The subsection includes the language "*all* claims and causes of action *in any way related* ...." The "all" and "any" preceding the categorical listing substantially modify the meaning of the subsection. "In any way" in particular is a broad phrase with a particular meaning through usage that connotes the inclusion of every claim that has a more than minimal relationship to the stated objects. Such language evidences the intention of the parties to include the widest possible range of legal claims, suggesting that the included set of claims should be construed broadly. Even assuming, however, that the language requires some more substantial relationship, it is clear that the legal malpractice claims asserted here are related to "the Assets, the Business, or Seller's operations." The claims arose from the creation and execution of a contract licensing the use of RMM's assets as part of RMM's business operations. The legal malpractice claims are not direct claims in regard to RMM's assets or operations, but they are related to the operations in that the claims arose in the course of those operations, and are related to the assets in that the claims arose in connection with the licensing of those assets. The Court should find that the claims asserted here are related to "the Assets, the Business, or Seller's operations" and are therefore expressly included in the assets transferred by the APA under §2(b)(xv), in addition to the Court's conclusion that the APA incorporated all of RMM's assets through § 2(a).

Assuming ambiguity had been established, RMM argues that parol evidence should be admitted as to the parties' intention to not include legal malpractice claims among the assets sold per the APA. However, where the contract is clear and unambiguous, no parol evidence may be admitted to challenge the meaning of contractual terms and obligations. *Omni Quartz, Ltd. v. CVS Corp.*, 287

F.3d 61, 64 (2nd Cir. 2002). As the Court should find that the APA is not ambiguous, the Court should exclude consideration of any parol evidence RMM offered.

Finally, RMM argues that the APA should be reformed on the basis of mutual mistake. Mutual mistake is recognized under New York law as a basis for reformation of a contract. *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 573, 498 N.Y.S.2d 344 (N.Y. 1986). *See also, Collins v. Harrison-Bode*, 303 F.3d 429 (2nd Cir. 2002) (citing *Chimart*); *Travelers Indem. Co. of Illinois v. CDL Hotels USA, Inc.*, 322 F.Supp.2d 482 (S.D.N.Y. 2004) (citing *Chimart*). "In a case of mutual mistake, the parties have reached an oral agreement, and unknown to either, the signed writing does not express that agreement." *Id.* (citing *Harris v. Uhlendorf*, 24 N.Y.2d 463, 301 N.Y.S.2d 53 (N.Y. 1969)). Reformation will only be granted where the plaintiff "'show[s] in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties.'" *Id. at 574* (quoting *George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135 (N.Y. 1978). Parol evidence may be admitted to demonstrate both mistake and the true intentions of the parties, but "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties and a correspondingly high order of evidence is required to overcome that presumption." *Id.* This requirement "operates as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal, or contradictory." *Backer*, 46 N.Y.2d at 220.

To sustain a claim for reformation on the grounds of mutual mistake, RMM must allege and prove both (1) the true intentions of the parties at the time the contract was entered into, and (2) the failure of the written contract to express those true intentions. RMM has alleged "that RMM and

Universal did not intend or agree that the malpractice claims would be sold." Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 77. However, RMM did not allege that the parties *intended to exclude* the legal malpractice claims from the set of purchased RMM assets. The difference between these two negation forms is legally relevant here.

The mistake relevant to a claim for reformation is the mistaken understanding that the contract as written correctly expresses the contract as orally agreed to. The written contract, as previously discussed, includes the legal malpractice claims in the set of assets sold. Therefore, the key element of RMM's claim must be an allegation that Universal and RMM intended to exclude the legal malpractice claims. Only an allegation of an affirmative intention to exclude the claims from the contract will support a claim of reformation, as it is only an affirmative intention that may form the basis of an agreement, a meeting of the minds. Thus, it is only an affirmative intention that may lead to a legally relevant mistake, as mistake necessarily requires agreement on the issue alleged to be mistakenly expressed in the written contract. Here, however, RMM has merely alleged the absence of an affirmative intention to include. The absence of an affirmative intention to include is similar in common usage to an affirmative intention to exclude, but these two negations are not logically, and more importantly, not legally, identical. RMM has not alleged that the parties reached an agreement that the claims were to be excluded, the precondition to a claim of reformation here.

This is not merely technical formalism. An allegation of an affirmative intention to exclude is required because only evidence of such an intention can constitute the necessary proof for a claim of reformation. If RMM simply offered evidence of an absence of intent and agreement to include the malpractice claims, such as a showing that this issue was never raised by counsels, the Court would err

if it regarded such evidence as relevant to the issue of reformation, as it provides no insight as to the parties intentions. For this reason, the allegation must also correctly address the legally relevant elements.

It is true, however, that logically, the absence of an intention to include is not exclusive of an affirmative intention to exclude. That is, both propositions may be true with regard to one fact pattern; and in fact, in common usage, these two propositions are often used interchangeably to imprecisely signify the same meaning. It is worth analyzing then whether or not the allegation as stated is supported by the evidence necessary to establish a valid claim for reformation, so as to not unjustifiably hold RMM to too strict a standard of clarity and precision. To the extent that the allegation is supported by evidence that fails to show an intention to exclude, it is, as just discussed, clearly not legally sufficient. It is only to the extent that the allegation is supported by evidence showing an affirmative intention to *exclude* that it could be legally sufficient. However, RMM has failed to provide or suggest the future production of facts and evidence that would show an affirmative intention by both parties to exclude the claims. Rather, RMM's evidence seems at best to support the proposition that had Universal and RMM discussed the issue of legal malpractice claims, Universal would have most likely acquiesced in RMM's retention of those claims. Thus, RMM's allegation that the parties never agreed to include the malpractice claims may not sustain a claim for reformation because it does not raise an issue as to "exactly what was really agreed upon between the parties." *Chimart*, 66 N.Y.2d 574. For that reason, the Court should find that RMM has not alleged legally sufficient grounds for reformation as a matter of law.

Conclusion

For the reasons stated above, the defendants' motion to dismiss pursuant to Rule 12(c) should be GRANTED, and the plaintiff's complaint dismissed in its entirety.

Filing of Objections to this Report and Recommendation

Pursuant to 28 U.S.C. § 157(c)(1) and Rule 9033 of the Federal Rules of Bankruptcy Procedure, the parties shall have ten (10) days from service of the Report to file written objections. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Miriam Goldman Cederbaum, 500 Pearl Street, Room 1330, and to my chambers, 1 Bowling Green, Room 528. Any objections should identify the specific proposed findings or conclusions of law objected to and state the grounds for such objection. Any request for an extension of time for filing objections must be directed to Judge Gonzalez.

DATED: New York, New York
December 9, 2005

Respectfully Submitted,

s/ Arthur J. Gonzalez
Arthur J. Gonzalez
United States Bankruptcy Judge

Copies to: Stephen E. Tisman, Esq.
James F. Parver, Esq.
Janice J. DiGennaro, Esq.
Jeffrey A. Conciatori, Esq.
Alan M. Feld, Esq.