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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case Nos. 01-55472-JRG; and
CONDOR SYSTEMS, INC., a California 01-55473-JRG
corporation; CEI Systems, Inc., a
Delaware corporation,
Chapter 11
Debtors.

**ORDER GRANTING CONDOR'S MOTION TO ENFORCE
THE TERMS OF AN ASSET PURCHASE AGREEMENT**

I. INTRODUCTION

Through an Asset Purchase Agreement EDO Reconnaissance and
Surveillance Systems, Inc. (EDO) acquired essentially all the assets
of Condor Systems, Inc and CEI Systems, Inc. (Condor). This motion
resulted from a disagreement between EDO and Condor about the meaning
of a certain provision in that agreement. For the reasons hereafter
stated the motion will be granted.

II. FACTUAL BACKGROUND

On June 25, 2002, the Court approved the sale of Condor's assets
to EDO. Under the Asset Purchase Agreement EDO assumed various
obligations of Condor. The present dispute involves the breadth of
obligations to employees assumed by EDO. The assumption provision
provided:

/////

1 2.3 Assumed Liabilities. Subject to the terms and conditions
2 of this Agreement, at the Closing, Purchaser shall assume
3 no liability or obligation of Sellers except the following
4 specific liabilities and obligations of Sellers (the
5 "Assumed Liabilities"), which Purchaser will pay, satisfy
6 or discharge in accordance with their terms, subject to any
7 defenses or claimed offsets asserted in good faith against
8 the obligee to whom such liabilities or obligations are
9 owed:

10

11 (e) obligations relating to Employees which Purchaser
12 agrees to assume under Section 6.1.

13 The dispute deals with the terms of Section 6.1 which provides:

14 6.1 Employees.

15

16 (c) As of the Effective Time, Purchaser will assume
17 Sellers' obligations to the Transferred Employees and
18 to Kent Hutchinson with respect to paid personal time
19 off (PPTO) then accrued and outstanding and Sellers'
20 Pre-Petition obligations then accrued and outstanding
21 to the Transferred Employees and Kent Hutchinson of
22 the type described in §507(a)(3) of the Bankruptcy
23 Code in excess of the amount therein specified as
24 having priority.

25 More specifically, the dispute involves to what extent EDO
26 assumed Condor's obligation "with respect to personal time off (PPTO)
27 then accrued and outstanding" EDO believes it is only
28 responsible for the PPTO obligations accrued pre-petition, that is
those accrued up to the time the Chapter 11 petition was filed on
November 8, 2001. Condor, on the other hand, believes EDO is
responsible for those obligations up to the time of the closing of the
Asset Purchase Agreement on July 26, 2002.

 The dispute arose just at about the time the sale was to close.
The parties were unable to resolve it at that time but neither wanted
it to prevent the closing. They therefore entered into "Amendment No.
1 to Amended and Restated Asset Purchase Agreement." The Amendment

1 contained the following provision:

2 V. Dispute. At the time of the Closing, a dispute (the
3 "Dispute") has arisen between Purchaser and Sellers as to
4 whether the parties agreed under Section 6.1(c) of the
5 Purchase Agreement that the Purchaser will assume Sellers'
6 Post-Petition obligations to the Transferred Employees and
7 to Kent Hutchinson with respect to paid personal time off
8 (PPTO) accrued and outstanding at the Effective Time (the
9 "Postpetition PPTO"). Purchaser and Sellers agree that
10 Sellers may submit the Dispute to the Bankruptcy Court for
11 resolution (it being understood that both Purchaser and
12 Sellers reserve all of their rights with respect to the
13 Dispute, are not waiving any such rights by agreeing to the
14 provisions of this paragraph and neither party has the
15 burden of proof with respect to the Dispute). In the event
16 of a Final Determination (as defined below) that section
17 6.1(c) of the Purchase Agreement requires the Purchaser to
18 assume the Postpetition PPTO, the Purchaser shall promptly
19 reimburse Sellers for the amount of the Postpetition PPTO
20 that Sellers may have paid at the time of the Closing. For
21 purposes of this Amendment, "Final Determination" means a
22 final judgment of a court of competent jurisdiction having
23 the authority to determine the amount of, and liability
24 with respect to, the Dispute and the denial of, or
25 expiration of all rights to, appeal related thereto. The
26 committee may be a party to the proceedings relating to the
27 Dispute.

16 At time of the closing, EDO did not pay the PPTO benefits that
17 had accrued post-petition. According to Condor, as of the closing of
18 the sale, employees had accrued approximately \$328,634.94 in earned
19 and unpaid post-petition PPTO. Condor paid this obligation when EDO
20 refused to do so. This motion then followed.

21 **III. LEGAL STANDARD**

22 The question presented is whether the Court can consider parol
23 evidence to determine the meaning of the language in question.

24 The Asset Purchase Agreement provides that it shall be governed
25 and construed under the laws of the State of New York. New York law
26 requires a contract to be enforced according to the plain meaning of
27 its clear and unambiguous terms so as to give effect to the intent of
28 the parties. Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543,

1 548 (N.Y. 1995).¹ Ascertaining whether the language of a contract is
2 clear or ambiguous is a question of law to be decided by the court.
3 Lucente v. International Bus. Mach. Corp., 310 F.3d 243, 257 (2d Cir.
4 2002).

5 If the language of a contract is unambiguous, parol evidence is
6 not admissible. Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d
7 425, 428 (2d Cir. 1992). If a contract is unambiguous, a court is
8 required to give effect to the contract as written and may not
9 consider extrinsic evidence to alter or interpret its meaning. Courts
10 have cautioned that "[t]he language of a contract is not made
11 ambiguous simply because the parties urge different interpretations.
12 Nor does ambiguity exist where one party's view 'strain[s] the
13 contract language beyond its reasonable and ordinary meaning.'" Id.

14 Under New York Law, in order to apply the parol evidence rule the
15 court must employ a three-step inquiry:

- 16 (1) determine whether the written contract is an integrated
17 agreement; if it is,
- 18 (2) determine whether the language of the written contract is
19 clear or is ambiguous; and,
- 20 (3) if the language is clear, apply that clear language.

21 Municipal Capital Appreciation Partners, I, L.P. v. Page, 181 F. Supp.
22 2d 379, 392 (S.D.N.Y. 2002).

23 ¹ The New York Court of Appeals has explained the parol evidence rule as follows:

24 A familiar and eminently sensible proposition of law is that, when parties set down
25 their agreement in a clear, complete document, their writing should as a rule be
26 enforced according to its terms. Evidence outside the four corners of the document
27 as to what was really intended but unstated or misstated is generally inadmissible to
28 add to or vary the writing. That rule imparts "stability to commercial transactions
by safeguarding against fraudulent claims, perjury, death of witnesses[,] ...
infirmity of memory ... [and] the fear that the jury will improperly evaluate the
extrinsic evidence."

W.W.W. Assocs. Inc v. Giancontieri, 77 N.Y.2d 157, 162 (N.Y. 1990) (citations omitted).

1 An integrated contract is one which "represents the entire
2 understanding of the parties to the transaction." Id. Under New York
3 Law, a contract which appears complete on its face is an integrated
4 agreement as a matter of law. Battery Steamship Corp. v. Refineria
5 Panama, S.A., 513 F.2d 735, 738 n.3 (2d Cir. 1975). Here, this
6 Agreement along with the "Amendment No. 1" appear complete and should
7 be considered integrated.

8 However, the question remains about whether the Agreement is
9 ambiguous. Contract language is ambiguous if it is "capable of more
10 than one meaning when viewed objectively by a reasonably intelligent
11 person who has examined the context of the entire integrated agreement
12" Lucente, 310 F.3d at 257 (quoting Sayers v. Rochester Tel.
13 Corp. Supplemental Mgmt. Pension Plan, 7 F.3d 1091, 1094 (2d Cir.
14 1993)). "[T]he 'tests to be applied [to determine intent] ... are
15 common speech ... and the reasonable expectation and purpose of the
16 ordinary business[person],' in the factual context in which the terms
17 of art and understanding are used, often also keyed to the level of
18 business sophistication and acumen of the particular parties." Uribe
19 v. Merchants Bank of N.Y., 91 N.Y.2d 336, 341 (N.Y. 1998) (citations
20 omitted).

21 **IV. DISCUSSION**

22 Condor seeks an order that requires EDO to reimburse Condor for
23 the post-petition PPTO it paid. Based on the argument presented at
24 the hearing on January 9, 2003, EDO essentially argues that the phrase
25 "paid personal time off" unambiguously includes only pre-petition PPTO
26 and does not include accrued post-petition PPTO benefits. The Court
27 disagrees and concludes the term "paid personal time off"
28 unambiguously applies to both pre- and post-petition PPTO without any

1 distinction.²

2 The Court comes to this conclusion after reviewing the Agreement
3 and based on the following. EDO's interpretation of the phrase "paid
4 personal time off" is strained and fails to comply with notions of
5 common speech and reasonable expectations of an ordinary
6 businessperson. The phrase "paid personal time off," interpreted
7 according to its common usage and to the reasonable expectations of
8 an ordinary businessperson, would mean a vacation/sick-leave benefit.
9 The plain meaning of this phrase, by its self, does not have any pre-
10 or post-petition implications.

11 In addition, in the "Definitions" section of the Agreement the
12 words "pre-petition" and "post-petition" are defined. This section
13 states, "As used in this Agreement, the following terms shall have the
14 respective meanings ascribed to them in this Section." According to
15 the Definitions section, "pre-petition" means, "as to any matter,
16 agreement or other item, that such matter, agreement or other item
17 arose or was entered into prior to the commencement of the Cases."
18 "Post-petition" means, "as to any matter, agreement or other item,
19 that such matter agreement or other item arose or was entered into
20 from and after the commencement of the Cases." The parties were
21 obviously aware of the difference between "pre-" and "post-petition"
22 obligations. These definitions would be superfluous if the use of a
23 particular phrase such as "paid personal time off," could reasonably
24 be interpreted as suggesting only pre-petition PPTO.

25 Moreover, in different sections of the Agreement, "pre-petition"
26 and "post-petition" are specifically used to create the distinction

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28 ² For this reason the court will not consider any extrinsic evidence offered by
the parties.

1 that EDO argues is implicit in the use of the phrase "paid personal
2 time off." For example, the parties agree that Section 6.1(c) covers
3 two separate obligations. Under the first obligation, EDO assumed
4 Condor's "obligations to the Transferred Employees and to Kent
5 Hutchinson with respect to paid personal time off (PPTO) then accrued
6 and outstanding." Under the second obligation in Section 6.1(c), EDO
7 assumed Condor's "Pre-Petition obligations then accrued and
8 outstanding to the Transferred Employees and Kent Hutchinson of the
9 type described in §507(a)(3) of the Bankruptcy Code." (Emphasis
10 added.) As a practical matter obligations "of the type described in
11 § 507(a)(3)" only occur pre-petition, yet with respect to this
12 obligation the parties found it necessary to include the term "pre-
13 petition" as a qualifier. It is then reasonable to assume that had
14 EDO intended "paid personal time off" to include only pre-petition
15 accruals it would have so qualified the obligation. Thus, because the
16 Agreement did not explicitly state pre-petition PPTO, the intent of
17 the parties cannot reasonably be interpreted to include an implicit
18 pre-petition limitation.³

19 The court notes that both parties to the contract are
20 sophisticated entities. These are defense-industry companies, which
21 require high-level government security clearances to operate. Both

22

23 ³ There exist other provisions in the contract that explicitly use the words pre-
24 petition and post-petition in reference to the obligations EDO assumed. For example, in the
25 Definitions section the following definition appears:

26 "Assumed Accounts Payable" means, except as set forth on Schedule 2.5(j), all *Post-*
27 *Petition* trade accounts payable of the Business incurred in the ordinary course of
28 business determined in accordance with GAAP and reflected on the books and records of
Sellers with respect to the Business, plus those *Pre-Petition* trade accounts payable
identified on Schedule 1.1(a)."

(Italicized emphasis added.)

1 were represented by very experienced and competent counsel. There is
2 no reason to believe that lack of sophistication had any bearing on
3 the terms used and their intended meaning.

4 EDO also argues that it is not obligated to reimburse Condor for
5 the post-petition PPTO because the post-petition PPTO is not now
6 "outstanding." This argument fails to take into account section V of
7 "Amendment No. 1." By that amendment EDO agreed to "reimburse
8 [Condor] for the amount of the Postpetition PPTO that [Condor] may
9 have paid at the time of the Closing." This amendment modifies the
10 Purchase Agreement and as such, it sufficiently states that EDO will
11 pay those sums paid by Condor with respect to the post-petition PPTO.
12 The phrase "accrued and outstanding" in Section 6.1(c) is important
13 to understanding the parties' intent at the time of the original
14 contract; however, given the subsequent amendment, EDO cannot now rely
15 on the term "outstanding" to escape liability.

16 **V. CONCLUSION**

17 For the reasons stated above, Condor's motion is granted and EDO
18 is to reimburse Condor for the post-petition PPTO obligations that
19 Condor incurred.

20 DATED: _____

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JAMES R. GRUBE
UNITED STATES BANKRUPTCY JUDGE

1 Case No. 01-55472-JRG;
and 01-55473-JRG

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5 UNITED STATES BANKRUPTCY COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 CERTIFICATE OF SERVICE

8 I, the undersigned, a regularly appointed and qualified Judicial
9 Assistant in the office of the Bankruptcy Judges of the United States
10 Bankruptcy Court for the Northern District of California, San Jose,
California hereby certify:

11 That I, in the performance of my duties as such Judicial
12 Assistant, served a copy of the Court's: ORDER GRANTING CONDOR'S
13 MOTION TO ENFORCE THE TERMS OF AN ASSET PURCHASE AGREEMENT placing it
in the United States Mail, First Class, postage prepaid, at San Jose,
California on the date shown below, in a sealed envelope addressed as
listed below.

14 I declare under penalty of perjury under the laws of the United
15 States of America that the foregoing is true and correct.

16 Executed on _____ at San Jose, California.

17 _____
18 LISA OLSEN

19 U.S. Trustee
20 Office of the U.S. Trustee
21 280 So. First St., Rm. 268
22 San Jose, CA 95113

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