

**SUPREME COURT - OF THE STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46 SUFFOLK COUNTY**

Present: **HON. EMILY PINES**  
J. S. C.

Original Motion Date: 09-29-2011  
Motion Submit Date: 05-30-2012  
Motion Sequence Numbers: 001 MOTD  
002 MOTD

[ ] Final  
[ X ] Non Final

\_\_\_\_\_ X  
**WORLD CARE INTERNATIONAL INC d/b/a  
MEDSTOCK and MEDSTOCK, INC**  
**Plaintiffs,**

**Attorney of Plaintiff**  
Patrick McCormack, Esq.  
Campolo Middleton & McCormack, LLP  
3340 Veterans Memorial Highway  
Suite 400  
Bohemia, New York 11716

**-against-**

**SCOTT KAY, MFS INDUSTRIES INC, 1STOP  
MEDICAL SUPPLY, SUPERIOR MAINTENANCE  
SUPPLY LLC, JASON BRAND MARIELA  
JIMENEZ, ASHLEY MEEKINS, MARK LUCAS,  
ROBERT UBRIACO, AVRAN MUNOZ, and JAIME  
GATTUS,**

**Attorney of Defendants Scott Kay and  
MFS Industries**  
Rivkin Radler LLP  
Pia E. Rivero, Esq.  
Peter Chatzinoff, Esq.  
Max Gersheroff, Esq.  
926 Rexcorp Plaza  
Uniondale, New York 11556-0926

**Defendants**  
\_\_\_\_\_ X

**Attorney of Defendants Superior  
Maintenance Supply, Jason Brand,  
Mariela Jimenez, Robert Ubriaco and  
Jamie Gattus**  
Kaufman Dolowich Voluck & Gonzo LLP  
By: Matthew Minero, Esq.  
135 Crossways Park Drive, Suite 201  
Woodbury, New York 11797

Mark Lucas, **PRO SE**  
85-63 116 Street, Apartment 3  
Richmond Hill, New York 11418

In this action<sup>1</sup>, Defendants Scott Kay (“Kay”) and MFS Industries, Inc. (“MFS”) move, pursuant to CPLR § 3211 (a)(7) to dismiss Counts 1-13 and 18-20 of the Complaint of Plaintiffs Worldcare International Inc d/b/a Medstock and

<sup>1</sup>The Court would like to acknowledge the valuable aid of Stephen McLinden, legal intern.

Medstock Inc (collectively, “Medstock” or Plaintiff); and Defendants Jason Brand (“Brand”), Superior Maintenance Supply LLC (“Superior”), Mariela Jimenez (“Jimenez”) and Robert Ubraico (“Ubraico”) move to dismiss all twenty of the counts alleged against them pursuant to CPLR § 3211.<sup>2</sup> Plaintiff Medstock opposes both motions setting forth that the heavy burden required to dismiss on the pleadings alone has not been met by any of the Defendants herein. The Complaint constitutes an 88 page document, comprised of 640 paragraphs. It alleges that all the Defendants named participated in a grand criminal enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act of 1970 §§ 1961-1968 (“RICO”) for the purpose of stealing the customers and business of the Plaintiff. Sixteen common law causes of action, in contract, tort, and misappropriation of trade secrets belonging to Plaintiff are likewise alleged.

In essence, the Complaint states that the Defendants, trusted employees of Medstock and the son of the owner of Medstock’s largest customer, secretly created competing businesses, stole purchase orders and payments belonging to Medstock, and committed fraud and theft, resulting in Medstock losing 60 of its valued customers including gross revenues of over \$2,000,000.00 and lost profits. According to the Complaint, beginning in 2004, Defendant Kay, along with co-conspirator Brand, created Defendant Superior both to compete with Medstock and to actively divert Medstock customer orders to Superior. This allegedly expanded by the creation of another competing business, MFS, in 2007 by Kay and Brand. The Plaintiff alleges that after setting up this “enterprise”, Kay, with Medstock authority to set prices charged customers, periodically set prices artificially high so that his new companies could offer such customers lower prices and lure Medstock’s business away. In addition, Plaintiff sets forth that Kay actually manipulated the Medstock website by lowering the prices displayed and then notifying Medstock’s customers that his employer was charging them more than the prices quoted online. This allegedly resulted in many dissatisfied customers

---

<sup>2</sup> The complaint against Ashley Meekins and Avran Munoz has been withdrawn; Defendant Mark Lucas is pro se and has not participated in these motions.

leaving Medstock.

In furtherance of this scheme, Plaintiff asserts that in 2010, Kay continued with the same acts, but now with the aid of additional Medstock employees whom he lured to become part of the “enterprise”. In this vein, according to Medstock, all the Defendants stole employee files to destroy evidence, diverted customer orders, wrongfully took Medstock purchase orders and filled them through the competing companies, and stole checks belonging to Medstock. Plaintiff accuses Defendant Kay of utilizing physical force to intimidate those Medstock employees who would not join them.

As a result of the above activities, Medstock states that it lost 60 of its largest customers representing over \$2 million dollars in annual revenues, damaged Plaintiff’s business reputation and goodwill and caused Plaintiff to incur unnecessary business expenses. Plaintiff asserts that new acts of the enterprise are still being uncovered.

The Defendants argue, in general, with regard to the RICO claims, that the Plaintiff has attempted to color what is essentially a common law commercial dispute improperly into four RICO causes of action under 18 USC § 1962(a-d). They assert, citing, **Gross v Waywell**, 628 F Supp 2d 475, 482 (SDNY 2009):

“Branding defendants in civil actions with searing accusations of racketeering activities and thus prolonging ill considered litigation to promote the private interests of only one or a few victims, and in lawsuits arising from fraudulent schemes limited to localized impacts and wrongful conduct far afield from the dimensions and degree of serious criminal offenses Congress had in mind as RICO violations, is bound to endanger disfavor from courts and jurists alike”.

**RICO**  
**DEFENDANTS’ ARGUMENTS**  
**Predicate Acts and Pattern of Racketeering**

Specifically, Defendants assert that Plaintiff predicates its civil RICO claims on mail and wire fraud, neither of which are plead with the requisite specificity, failing in most instances to indicate the date, time, or location of the allegedly fraudulent statements, the identity of the recipients of such statements , the specific content thereof, or reliance by anyone on such statements. These Defendants point to numerous paragraphs in the complaint, all “upon information and belief”, alleging that on certain unspecified dates, the putative enterprise diverted Plaintiff’s yearly sales; fraudulently told Plaintiff’s customers to write checks to their companies; since 2007, used mails and wires somehow to give the impression that the corporate Defendants were engaged in lawful operations, used Plaintiff’s telephones and cell phones to make misrepresentations about Medstock orders, used mail and wires to obtain monies from Medstock clients belonging to Medstock, and transported goods in interstate commerce with funds obtained from stolen purchase orders. In one instance, Plaintiff asserts that on an unspecified date, Defendant Kay instructed a particular customer to write checks to one of the Defendant corporate entities, by falsely stating that it was the same entity as Plaintiff.

Furthermore, these Defendants argue, that to the extent that Plaintiff asserts that Defendants actions constitute money laundering in violation of 18 USC §§ 1956 and 1957, allegations of garden variety theft, including theft of purchase orders do not qualify. The specific sections of the law presumably referred to according to such Defendants include “specified unlawful activities” such as narcotics distribution, murder, extortion, arson, bribery and similar offenses, none of which are alleged by Plaintiff in this case.

In addition to the failure to specify as required, racketeering activities that fall within the ambit of the subject statutes, Defendants assert that Plaintiff has failed , as required, to plead a “pattern of racketeering activity”. To establish the same, a claimant must demonstrate at least two actions of racketeering activity within 10 years and, in addition, must also allege facts tending to show that the

racketeering actions amount to or pose a threat of continuing criminal activity, citing **H. J. Inc. v Northwestern Bell Tel Co.**, 492 US 229, 239 (1989). This requirement, referred to in the applicable federal case law as “continuity” must be satisfied either by showing a “close-ended” pattern, constituting a series of related predicate acts extending over a substantial period of time, or by demonstrating an “open-ended” pattern of racketeering activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed. **Spool v World Child Int’l Adoption Agency**, 520 F 3d 178 (2d Cir 2008). In this context, the subject Defendants point to a series of federal District Court opinions in the Second Circuit which hold that where the conduct asserted involves a limited number of perpetrators and victims and a limited goal, there simply does not exist the required “closed-ended pattern”. (citing, **FD Prop Holding Inc. v US Traffic Corp.**, 206 F Supp 2d 362 (EDNY 2002); **Pier Connection, Inc. v Lakhani**, 907 F Supp 72 (SDNY 1995); **Cont’l Realty Corp. v JC Penny**, 729 F Supp 1452 (SDNY 1990). Thus, Defendants assert that the lack of specified dates as well as the really limited perpetrators, all employees and one customer of Plaintiff with the limited goal of stealing their business to compete with them, simply does not qualify as a pattern of racketeering activity, utilizing the “close-ended” rubric. According to these Defendants the “open-ended” type of continuity fares no better under existing case law. In this context, they argue that existing precedent generally requires that the “open-ended” pattern of racketeering activity requires a showing that the enterprise’s business is inherently unlawful. **Spool**, supra. If as here, the so-called RICO enterprise is engaged in a lawful business, such as the sale herein of medical, janitorial, and stationary supplies, no such unlawful business exists or is even alleged. In addition, the threat of stealing away the Plaintiffs’ customers by its existing employees (the individual Defendants herein) ended when their employment with Plaintiff terminated. See, e.g. **Spool** at 186.

### **Injury**

Defendants assert that the applicable federal statutes require damages that

are provable before the claim in fact accrues. **First Nationwide Bank v Gelt Funding Corp.**, 27 F 3d 763, 768 (2d Cir 1994). It is the movants' position, that claims of lost profits based upon the allegedly stolen 60 customers amount to unquantifiable potential opportunity to earn profits in the future, a completely speculative assertion in a highly competitive field. As set forth by the **United States Supreme Court in Anza v Ideal Steel Supply Corp.**, 547 U S 451, 459 (2006):

“(b)usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of (the plaintiff’s) lost sales were the product of (the defendant’s) decreased prices”.

All of the above deficiencies require dismissal of the four RICO causes of action, according to Defendants. In addition, mandates within each of the statutes involved are allegedly not met. With regard to 18 USC § 1962 (c), Defendants assert that the “enterprise” which must engage in the pattern of racketeering activities, must be separate and distinct from the person or persons stated to have committed the acts. According to Defendants, referring to paragraphs 328, 330 and 332 of the Complaint, Plaintiff has set forth that the corporate entities involved, MFS, 1 Stop Medical (apparently a d/b/a of MFS) and Superior, are both RICO enterprises as well as persons. In addition, the putative “enterprise” in this case is assertedly nothing more than the sum of the individual Defendants and lacks distinction therefrom. **First Capital Asset Mgmt. v Satinwood, Inc.**, 385 F 3d 159, 183 (2d Cir 2004). 18 USC § 1962(a) requires a showing that a defendant received income from the pattern of racketeering activity, which income was then invested in a separate enterprise causing the Plaintiff injury. According to Defendants, there is no allegation that any money derived from the so-called activities was invested in an enterprise that is distinct from the RICO enterprises. See, **Tuscano v Tuscano**, 403 F Supp 2d 214, 227, 228 (EDNY 2005). Nor were the injuries alleged, according to Defendants, in any way distinct, as they must be, from those resulting from the asserted predicate acts, requiring dismissal of the 1962(a) claim. See, **Crab House of Douglaston v Newsday Inc.**, 2011 U S Dist LEXUS 75181 (EDNY 2011). Likewise, Defendants argue that the 18 USC § 1962(b) cause of action should be dismissed because Plaintiff fails to make the

required allegation that the pattern of racketeering activity, for the purpose of acquiring or maintaining control of an enterprise, resulted in injury that again is in any way distinct from the injury allegedly suffered as a result of the predicate acts themselves. See, **United States Fire Ins Co. v United Limousine Serv.**, 303 F Supp 2d 432, 450 (SDNY 2007). In addition, as with the 1962 (c) claim, the Plaintiff has not alleged, as per Defendants, acquisition or control of an entity distinct from the so-called racketeering enterprises. **Greenstone/Fontana Corp. v Feldstein**, 20 Misc 3d 1118A, 867 NYS 2d 16 (Sup Ct Nassau Cty 2008).

With regard to 18 USC § 1962(d), as this statute requires that the defendants agree to participate in the affairs of an enterprise through the pattern of racketeering activity, the success of such cause of action is dependent entirely on stating a cause of action based on one of the three other statutes. As such was not allegedly met here, Defendants argue that the 1962 (d) cause of action must, likewise be dismissed. **Grafstein v Schwartz**, 78 AD 3d 772,773, 910 NYS 2d 180 (2d Dep't 2010).

## **PLAINTIFF'S ARGUMENTS**

Plaintiff vehemently opposes the motions to dismiss, claiming that when the Court examines the facts alleged in the Complaint in the light most favorable to the Plaintiff, as is required on a motion to dismiss the pleadings, no dismissal will lie unless it is clear that no relief could be granted under RICO under any set of facts that could be proved consistent with the allegations. **H. J. Inc. v Northwestern Bell Tel Co.**, 492 U S 229 (1989).

### **18 USC § 1962 (c)**

Plaintiff asserts that its Complaint states a claim under 18 USC § 1962(c), as it has asserted the existence of an ongoing organization which has an existence

separate and apart from the pattern of activity in which it is engaged. Here, Plaintiff states the “enterprise” is comprised of corporate and individual Defendants, which began in 2004 and 2005 by the creation of Superior by Kay and Brand, continued in 2006, when Kay instructed other Defendants to undertake acts to destroy Plaintiff’s business, and in 2007, when Kay and MFS used Kay’s position at Plaintiff to convert and divert sales from Plaintiff’s customers , and grew in 2010 with the recruitment of the additional members. Plaintiff sets forth that the persons involved in the scheme can still be one of a number of members of the “enterprise” and yet maintain the claim. See, **Riverwoods Chappaqua Corp. v Marine Midland Bank N. A.**, 30 F 3d 339 (2d Cir 1994). In any case, the pleading, as per Plaintiff, sets forth that the “enterprise” is an “association in fact” comprised of several corporations and employees, forming a collective unit, with a hierarchical structure. The Complaint allegedly goes on to set forth the separate acts of the individuals and the racketeering “enterprise” (Complaint 265-325). Moreover, the diversion of orders of Plaintiff’s out of state customers, implicated interstate commerce.

With regard to the requirement of a showing of a pattern of racketeering activity, the Complaint assertedly shows a related group of individuals and entities involved in transactions with a common fraudulent purpose and a common victim. The Complaint meets the “closed-ended” continuity requirement, as it pleads the existence of a continuing 7 year scheme during which the Defendants diverted money and customers through use of mail and wire fraud all with the clear intent of destroying Plaintiff’s business. The “open-ended” continuity requirement is also allegedly met in the pleading because Plaintiff has asserted that Kay and his co-conspirators continue to contact Plaintiff’s customers; continue to hold themselves out as employees of Plaintiff and continue to utilize Plaintiff’s trade secrets and proprietary material.

With regard to the requirement that the predicate acts be set forth with particularity, Plaintiff asserts that it has done so adequately by alleging that the Defendants utilized mail and wire fraud to divert orders and payments belonging to

Plaintiff; and it outlines both the parties to and the methods of communication. In this vein, the pleading assertedly sets forth that the customer orders received by fax, e-mail and phone were diverted to the “enterprise”; that customers were told to write checks to the “enterprise”; and that Kay, Jimenez, Ubriaco, and Gattus all committed acts of wire fraud while employed by Plaintiff, citing, **Crab House of Douglaston, Inc**, supra. Plaintiff states that the exact dates of mail fraud need not be plead but only the specific circumstances constituting the overall fraudulent scheme.

Plaintiff likewise sets forth that it has met the requirement of “relatedness” since the pleading demonstrates that the predicate acts have a similar purpose, results, victims and methods of commission. **H. J. Inc. v Northwestern Bell Tel Co.**, 492 US 229, 240 (1989). The purpose was to divert employees, customers, orders, payments and proprietary information to further the “enterprise”. The result was the loss of Plaintiff’s employees, orders, customer payments and proprietary information; the participants were all the named Defendants; the victim was the Plaintiff and the commission was via diversion of orders, directing customers to make payments to certain Defendants, lying about the relatedness of Plaintiff and 1 Stop Medical and disseminating false and defamatory statements regarding Plaintiff.

Plaintiff alleges that its Complaint also meets the requirement of demonstrating that the Defendants’ violations were the proximate cause of its injury as they have alleged the loss of customers, payments and profits, directly resulting from the Defendants’ scheme. See, **Terminate Control Corp. v Horowitz**, 28 F 3d 1335, 1343 (2d Cir 1994); **Commercial Cleaning Services, L.L.C. v Colin Service Systems Inc.**, 271 F 3d 374 (2d Cir 2001).

### **18 USC § 1962 (a), (b), and (d)**

Here Plaintiff asserts that the Complaint states that the corporate Defendants

were formed and funded with monies obtained through the operation of the scheme and that such funds were and continue to be used to invest in, continue and grow these competing businesses for the benefit of the individual Defendants as well as to purchase inventory, lease property and make capital improvements. Thus, they assert they have met the investment, acquisition and separate damage requirements of the 1962 (a) and (b).

As the Defendants' sole attack on the 1962 (d) claim is the attack on the predicate RICO claims, Plaintiff asserts that once it demonstrates the validity of such, as it has, the conspiracy cause of action has been alleged and should remain.

### **DEFENDANTS' REPLY**

In reply, Defendants state that the court sanctioned lowered specificity requirement only applies where, as in **Crab House**, the assertion is that the mailings themselves are not false or misleading; but, rather, in furtherance of an alleged fraudulent scheme. **Crab House** supra. However, in this case Defendants argue that the Complaint repeatedly states that the unspecified mailings and wire transmissions were themselves false or misleading. (Complaint 313, 343, 322, 368, 372). Even if Plaintiff were now to take the position that these transmissions were merely part of a fraudulent scheme, they have still not fulfilled the requirement of setting forth the who, what, when, where and why of the underlying fraudulent misrepresentations. See **Crab House** supra; **Curtis & Assocs P. C. v Law Office of David Bushman, Esq.**, 758 F Supp 2d 153, 177 (EDNY 2010).

With regard to the required demonstration of a "pattern" Defendants assert that the earliest date given for alleged mail or wire fraud is sometime in February 2010 and the last date thereof is set forth as May 20, 2011, not meeting the two year minimum requirement in the Second Circuit for a "closed-ended" pattern. See, First **Capital Asset Mgmt. v Satinwood, Inc.**, 385 F 3d 159 (2d Cir 2004). They also cite the reluctance of federal courts to utilize the RICO "closed-ended" pattern requirement when the allegations concern a single victim and limited

participants as herein. See, **Ritter v Klisivitch**, 2008 U S Dist LEXUS 58818 (EDNY 2008). Defendants counter the allegation that Plaintiff has set forth an “open-ended” pattern of racketeering activity because the alleged goal of stealing away the Plaintiff’s customers is, by its nature, discreet and as set forth by the Second Circuit in **Spool**, supra, inherently terminable when “(t)hey have no more (of plaintiffs’) files with which to work”. **Id** at 185,186.

Defendants reassert their argument that lost profits are the type of speculative injury which cannot be used to sustain a RICO action and set forth that the recent U S Supreme Court holding in **Anza v Ideal Steel Supply Corp**, supra, has overruled any Second Circuit statement to the contrary.

With regard to the 18 USC § 1962 (c) claim, Defendants argue that it is insufficient to state, as Plaintiff does in its argument, that the Defendants acted together to commit a wrong. Rather, the Plaintiff must allege facts to demonstrate an association-in-fact “enterprise”, as a whole, that is somehow different than and had some existence beyond the sum of its parts. See, **Cont’l Fin Co. v Ledwith**, 2009 U S LEXIS 52618 (SDNY 2009). Defendants opine that not one paragraph of the Complaint accomplishes this. There is no difference between the alleged acts of all the individuals and the three (really two) entities to divert Plaintiff’s business, that is in any way distinct from the alleged acts of the putative “enterprise”. Moreover, where, as here, a corporate entity is named as a RICO defendant, the association-in-fact “enterprise” cannot, as per Defendants, consist of the corporation and its employees, as distinctiveness is just not present. See, **Riverwoods Chappaqua Corp.**, supra. In addition, several corporations, Defendants state, under common ownership and guided by a single common consciousness, cannot associate together with their employees to form an “enterprise” distinct from those corporations themselves. See, **Crab House**, supra.

With regard to the 1962(a) and (b) causes of action, Defendants state that the Plaintiff’s alleged re investment of the proceeds of the racketeering activity back into the alleged RICO enterprise, does not qualify to sustain either such claim.

See, **Tuscano v Tuscano**, supra. Moreover, the Plaintiff has assertedly not plead any injury arising from the investment or use of the racketeering income that is different at all from the alleged injuries that form the predicate acts of mail and wire fraud.

Again, because the 18 USC § 1962 (a-c) claims are defective, Defendants argue that the 1962(d) conspiracy to so commit the other acts, must likewise be dismissed. See, **Grafstein**, supra.

### **Analysis**

In this Court's view, any discussion of the applicability of the RICO statute should begin with an examination of the stated legislative purpose in its enactment. The Statement of Findings and Purpose of the federal act encompassing RICO set forth that it was the activities of organized crime that gave rise to the legislation since such activities "(w)eaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens". Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub L No 91-452, 84 Stat 922,923 (1970).

This statement of Purpose both sets forth the guiding principles to be followed by a Court in its determination of the validity of claims brought pursuant to the legislation and at the same time, gives the Court some sense of the seriousness of assertions that must be made in order to come within the ambit of what has been characterized as the "(s)earing accusations of racketeering activities" especially in "(l)awsuits arising from alleged fraudulent schemes limited to localized impacts . . .," **Gross v Waywell**, 628 F Supp 2d 475 (SDNY 2009).

To establish a claim under RICO, a plaintiff must show: 1) a violation of the RICO statute, 18 USC § 1962; 2) an injury to business or property; and 3) that the

injury was caused by the violation of Section 1962. **DeFalco v Bernas**, 244 F 3d 286, 305 (2d Cir 2001). Under 18 USC § 1962 (a)-(c), there must be an alleged “pattern” of racketeering activity, which may include mail and wire fraud as alleged in the Complaint here. Therefore, under any of the sections plead in this action, the Plaintiff will be required to establish a “pattern” of such predicate acts. The definitional section of the Act requires “(a)t least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity”. 18 USC § 1961(5). The so-called “pattern” has been referred to as a ‘continuity’ requirement that is met either by showing a “closed-ended” pattern, consisting of a series of related predicate acts extending over a substantial period, or by showing an “open-ended” pattern of such activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed. **H.J. Inc. v Northwestern Bell Tel Co.**, 492 U S 229, 241 (1989). In the Second Circuit, the Courts have never held a period of less than two years to constitute the required substantial period of time. **Spool v World Child International Adoption Agency**, 520 F 3d 178 (2d Cir 2008). As the Court in **Spool** explained, the relevant period for measuring the pattern is the time the alleged predicate activity occurred and not the time during which the asserted scheme was developed. **Id** at 184. Moreover, when considering whether an alleged “closed-ended” pattern can be sustained, especially where a short period is alleged, activities involving a limited number of participants as opposed to a multi participant , complex conspiracy simply do not meet the requirements. **Id**.

With regard to the alternate means of meeting the “pattern” requirement to sustain a RICO cause of action, the claimant must establish that the predicate acts involve a distinct threat of long term racketeering activity . **H. J. Inc.**, 492 U S at 242. This has been applied to inherently unlawful acts such as murder or obstruction of justice by an organized crime family, giving rise to the clear threat of ongoing operations, see, **GICC Capital Corp v Tech Finance Group**, 67 F 3d 463,466 (2d Cir 1995). However, as set forth in **Skyline Corp v Guilford Mills, Inc**, 1997 WL 88892 (SDNY 1997), it should not apply to alleged racketeering activities in furtherance of commercial endeavors that are not inherently unlawful,

and will not sustain the open-ended requirement where the “pattern” consists of “verbal and written misrepresentations made over the telephone and in letters, constituting mail and wire fraud”. **Id**

The Complaint describes a scheme developing over a period of seven years, yet only sets forth specific predicate activities between February 2010 and May 2011, a period of fifteen to sixteen months, based upon an alleged scheme commencing some time in 2004. As set forth in **Spool**, supra, the Second Circuit has never sustained as a “pattern”, predicate activities which are alleged to have occurred during a period of less than two years. Although Plaintiff’s counsel has suggested that nothing in the statutes or case law prevents such an application, there has been no basis set forth to this Court to do so. More important, however, to this Court in view of the real purpose Congress set forth in enacting the subject legislation, is the fact that the alleged activities involved in the pattern are limited to a closed group of participants and a single victim. There is no allegation that this alleged scheme or activities involve a multi participant complex conspiracy which this Court believes is necessary to support the “closed-ended” pattern requirement. See, **Spool**, supra.

The Complaint’s attempt to sustain the “open-ended” pattern of racketeering activity fares no better, in the Court’s opinion. First, as set forth by Defendants, the threat of racketeering activity cannot be long term in this case, taking the Plaintiff’s assertions as true, since its goal is limited to the transfer of Plaintiff’s limited number of customers to the Defendants. Defendants’ alleged racketeering acts, described as manipulating the Plaintiff’s website, diverting Plaintiff’s purchase orders and checks from Plaintiff to the new employer competitors, secreting the identity of the competitor corporations, and stealing Plaintiff’s lists were really related to the individuals’ acts as Plaintiff’s employees, which they no longer are. Moreover, the “open-ended” rubric will not apply, in this Court’s opinion, in cases where the racketeering activities are in furtherance of commercial endeavors that are not inherently unlawful and where, the alleged pattern consists

of written and telephonic communications, such as alleged herein, to constitute wire fraud. While the Court is willing to accept that the Plaintiffs have set forth a claim that mail and wire fraud had occurred, such is alleged to be in furtherance of Defendant's medical, janitorial and stationary supply businesses, which cannot be stated to be inherently unlawful. In sum, the Complaint simply does not satisfy the continuity requirement under RICO, either through the "closed-ended" or "open-ended" theory.

The alleged injury, as set forth above, must have a strong connection to the racketeering activity under 18 USC § 1962. Lost sales and lost profits in connection with commercial activity can arise from any number of factors. As stated in **Anza v Ideal Steel Supply Corp**, 547 U S 451 (2006), "(b)usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of (the claimant's) lost sales were the product of (the other entity's) decreased prices". **Id** at 459. Therefore, allegations of lost business due to the sorts of activities set forth by the Plaintiff in the case at bar, in which the "enterprise" is accused of utilizing wrongful means to artificially lower the prices of the Defendant entities and thereby sap the Plaintiff's profits, simply cannot be demonstrated to be the required direct result of the activities. Such would require, according to the Supreme Court: 1) a calculation of what portion of the Defendant's allegedly artificially lowered price is attributable to the racketeering activities; as well as 2) what portion of the Plaintiff's lost sales are attributable to the competitor's prices. When RICO actions are brought by economic competitors claiming lost profits from what are essentially unfair business practices, the line between RICO and common law actions for unfair competition would be blurred and simply cannot survive the direct cause requirement. See, **Anza**, at 460. In any event, lost sales can result from many factors in this case, separate and apart from the alleged improper acts set forth in the Complaint. Accordingly, Plaintiff's Complaint does not meet the statutory requirement of proximate cause.

As set forth above, 18 USC § 1962 (c) requires that the alleged “enterprise” be separate and apart from those persons who are alleged to be conducting the activities thereof. **First Capital Asset Management Inc. v Satinwood**, 385 F 3d 159 (2d Cir 2004). Here Plaintiff has, as Defendants note, referred to individual members of the scheme as the “enterprise”. However, the Court will accept the Plaintiff’s allegation in its papers in opposition to the motion that it has claimed that the individuals and the corporate entities are an “association-in-fact” compromising the enterprise. Despite this allowance, even permitting the Plaintiff’s revised statement to be the real plead allegation does not improve Plaintiff’s ability to meet this 1962 (c) requirement, since an allegation of an “association- in- fact” enterprise is simply not supportable, where all of the alleged fraudulent conduct arises from the predicate acts described in the pleading. See, **First Capital**, supra at 174. The “enterprise” in this case, consisting of former employees of Plaintiff, and newly formed competitor corporations, now either owners , employees of or Plaintiff’s competitors, is alleged to have engaged in predicate acts, consisting of mail and wire fraud, for the sole purpose of diverting Plaintiff’s business to their new business. There is no fraudulent conduct asserted in the Complaint other than the specific predicate acts of mail and wire fraud alleged for the sole purpose of stealing Plaintiff’s customers. As the so-called “enterprise” has no other role than that described in the predicate acts, under the rule set forth by the Second Circuit it simply cannot exist. **Id.**

A claim under 18 USC § 1962(a) must allege 1) that the defendant received income from a pattern of racketeering activity; and 2) that the plaintiff was directly harmed by defendant’s use or investment of such income. Claims under this section that allege injury resulting from the racketeering activity alone rather than from the investment income derived from such activity, are subject to dismissal. **United States Fire Ins Co v United Limousine Service**, 303 F Supp 432 (SDNY 2004). As set forth by Judge McMahon, “(c)onclusory allegations that the defendant ‘used or invested’ income derived from racketeering in its operations are insufficient”. **Id** at 449. Plaintiff in its opposition to the motion to dismiss the

1962 (a) cause of action merely reiterates the general language of its pleading which again sets forth that the damages (lost profits, lost business opportunities) are the injuries suffered as a result of the violation of the statute. Again they are precisely the same injuries allegedly resulting from the racketeering activity alone.

Plaintiff's 18 USC § 1962(b) claim suffers from the same insufficiency. Here a plaintiff is required to allege an acquisition or maintenance injury that is separate and distinct again from the injury suffered as a result of the predicate acts of racketeering. If the injury allegedly suffered (here loss of business and profits) is caused by the racketeering acts, rather than as a result of the defendants' establishment and maintenance of interest in and control over the RICO enterprise, the 1962(b) claim must fail. **Id.** Plaintiff's Complaint fails to meet the separate injury requirements of 1962 (a) or (b) and those claims must be dismissed.

18 USC § 1962 (d) prohibits any person from conspiring to violate any of the substantive provisions of 18 USC§ 1962 (a-c). Therefore, in the Second Circuit, a claim under 1962(d) alleging a conspiracy to violate the other sections will fail as a matter of law if the substantive claims based upon the other subsections are found to be defective. **Crab House of Douglaston, Inc. v Newsday**, 418 F. Supp 2d 193 (2006). As the 1962 (d) claims asserted herein are entirely dependent on the sufficiency of the pleading of the substantive violations of the 1962 (a-c), which this Court has found to be defective, they also must be dismissed.

In dismissing Plaintiff's RICO claims, the Court is not acknowledging that Plaintiff's assertions, if proven to be true, are not evidence of wrongful conduct, entitling Plaintiff to several common law State causes of action, as discussed below. However, this case does, not, in this Court's opinion, represent the kind of wrongful behavior threatening the public good Congress sought to protect in enacting the statute. RICO should not be utilized as a litigation tactic to right

wrongs derived from commercial behavior involving very limited participation, one victim, and damage in the form of lost profits in a competitive market.

### **Common Law Causes of Action**

In its Complaint, Medstock sets forth sixteen common law causes of action against the various individual and corporate Defendants. These constitute, essentially, breaches of the employment contracts of the individual Defendants with the exception of Brand; an Injunction action against Defendant Ubriaco based upon his employment agreement; breach of fiduciary duty against the individual Defendants with the exception of Brand; aiding and abetting breach of fiduciary duty against all the individual Defendants; Diversion of Corporate Opportunity against the individual Defendants with the exception of Brand; Tortious Interference with both current and Prospective Business Relations against all Defendants; Misappropriation of Trade Secrets against all individual Defendants; Commercial Defamation against Defendant Kay; Unjust Enrichment against the corporate Defendants and Kay and Brand; Faithless Servant Doctrine against all individual Defendants with the exception of Brand; Fraud against all the Defendants with the exception of Brand; and Prima Facie Tort against all Defendants.

The bases of Defendants' motions are, in essence, that: 1) the various tort causes of action are all duplicative of the breach of contract causes of action; 2) there were no trade secrets to be misappropriated; 3) the tortious interference claims lack requisite malice as well as demonstration that "but for" Defendants' acts, such customers would have remained with Plaintiff; 4) the fraud cause of action, in addition to duplicating that of breach of contract, lacks the required specificity; 5) the commercial defamation claim lacks the requisite demonstration of malice, specificity and special damages; 6) the prima facie tort claim also does

not set forth malice as sole motivating factor, as required, for Defendants' acts; 7) the unjust enrichment claim is barred based upon the allegation that actual employment contracts exist; and, 8) on behalf of the individual Defendants, other than Kay and Brand, the breach of contract actions are void as against public policy as they contain unenforceable restrictive covenants that are disfavored and overly broad. "In considering a motion to dismiss a pleading for failure to state a cause of action, the court must accept the allegations of the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (CPLR 3211 [a][7]; **Munger v Board of Educ. of the Garrison Union Free School Dist.**, 85 AD3d 747, 748, 924 NYS2d 578, 580 (2d Dept 2011); accord **Leon v Martinez**, 84 NY2d 83, 614 NYS2d 972 (1994)). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient. **Symbol Tech., Inc. v Deloitte & Touche, LLP**, 69 AD3d 191, 193-195, 888 NYS2d 538 (2d Dept 2009). Whether a plaintiff can ultimately establish its allegations is not part of the determination. **Sokol v Leader**, 74 AD3d 1180, 904 NYS2d 153 (2d Dept 2010).

### **Breach of Contract**

As set forth, Plaintiff alleges that all the individual Defendants, with the exception of defendant Brand, breached a contract with the Plaintiff, namely, their employment agreements, either by signing an agreement associated with the employee manual and/or a covenant not to compete. In the fourteenth cause of action alleging a breach of the employee manual, the Plaintiff alleges that the employee manual contains clauses which provide standards of professional conduct, a conflict of interest policy, and a confidentiality agreement with which each employee is required to comply. In the fifteenth and sixteenth causes of action, the Plaintiff states that Defendants Kay and Ubriaco executed non-compete

agreements and breached the agreements by competing with the Plaintiff within two years of their resignations. In the seventeenth cause of action, the Plaintiff asserts that defendant Ubriaco's non-compete agreement contains the ability of the Plaintiff to obtain an injunction upon a finding of breach.

Accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the Court finds that the plaintiff has adequately stated the fourteenth, fifteenth, sixteenth, and seventeenth causes of action. A complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract; and (4) damages as a result of the breach. **JP Morgan Chase v J.H. Electric of N. Y., Inc.**, 69 AD3d 802, 893 NYS2d 237 (2d Dept 2010). The fourteenth cause of action sets forth in detail provisions of an employee manual, received by the individual employees of Plaintiff, its requirements of a duty of loyalty, confidentiality, as well as avoidance of conflict of interest. The fifteenth and sixteenth causes of action set forth a 2 year 25 mile radius non compete provision covering Defendants Kay and Ubriaco; and the seventeenth cause of action sets forth as part of Ubriaco's employment agreement, an acknowledgment that breach of the non compete agreement constitutes the irreparable harm requirement necessary to obtain injunctive relief. While some of the Defendants may refute the factual allegations, the allegations set forth are clearly sufficient to state claims under the general category of breach of contract.

#### **Breach of Fiduciary Duty/Faithless Servant/Diversion of Corporate Opportunity**

A claim of breach of fiduciary duty, as alleged in the fifth cause of action, and the claim of aiding and abetting a breach of fiduciary duty, as alleged in the sixth cause of action, cannot survive when such are premised upon allegations

substantially identical to a plead claim for breach of contract. **Pergament v Roach**, 41 AD3d 569, 838 NYS2d 591 (2d Dept 2007). In general, an employee owes a duty of good faith and loyalty to an employer in the performance of the employee's duties. **Island Sports Physical Therapy v Burns**, 84 AD3d 878, 923 NYS2d 156 (2d Dept 2011). With regard to the seventh cause of action, the doctrine of "corporate opportunity," based on a duty of loyalty to an employer, provides that corporate fiduciaries and employees cannot, without consent, divert and exploit for their own benefit an opportunity that should be deemed an asset of the corporation. **Alexander & Alexander, Inc. v Fritzen**, 147 AD2d 241, 246, 542 NYS2d 530 (1st Dept 1989). As alleged in the thirteenth cause of action, the faithless servant doctrine, also based on a duty of loyalty to an employer, provides that an agent is obligated to be loyal to his employer and is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. **Western Electric Co. v Brenner**, 41 NY2d 291, 295, 392 NYS2d 409 (1977). The Court finds that the fifth, sixth, seventh, and thirteenth causes of action are essentially identical and thus duplicative of the allegations in the fourteenth, fifteenth, sixteenth, and seventeenth causes of action which allege that defendants Kay, Jimenez, Lucas, Ubriaco and Gattus breached the agreements found in their employee manuals and non-compete agreements. Accordingly, even viewing the complaint in the light most favorable to the Plaintiff, the Complaint fails to allege facts sufficient to state the fifth, sixth, seventh, and thirteenth causes of action. Accordingly, those branches of the motions seeking to dismiss the fifth, sixth, seventh, and thirteenth causes of action are granted.

### **Tortious Interference with business Relations and Prospective Business Relations**

The elements of the tort of interference with contract are (1) the existence of a valid contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional procuring of the breach, and (4) resulting damages. **White**

**Plains Coat & Apron Co., Inc. v Cintas Corp.**, 8 NY3d 422, 426, 835 NYS2d 530 (2007). To establish a defendant's liability for damages for tortious interference with prospective contractual relations, the plaintiff must show that (1)the defendant knew of the proposed contract between the plaintiff and third parties; (2) intentional interference with the same; (3) the proposed contract would have been entered into but for the interference; (4)the defendant's interference was accomplished by wrongful means or with malicious intent; and (5) resulting damages. **Carvel Corp v Noonan**, 3 NY 3d 182, 785 NYS 2d 359, 818 NE 2d 1100 (2005). In the Complaint, the Plaintiff alleges that Defendants intentionally misrepresented to Medstock's customers that 1 Stop Medical and Superior Maintenance were the same company as or were affiliated with Medstock and that the Defendants allegedly interfered with Medstock's business by stealing orders from existing customers, stealing new customers, failing to return items from customers and failing to credit the customers for items returned to Medstock. They state further that Defendants actually stole checks and actual purchase orders from actual customers and informed customers of Plaintiff who asked about purchase orders, to purchase from one of the Defendant corporate entities as being the same entity as Plaintiff. In addition, the Plaintiff alleges that Defendant Brand, the son of the chief executive officer of Narco Freedom, Inc., Medstock's largest customer, created Superior Maintenance to provide janitorial supplies to healthcare facilities in competition with Medstock. The Plaintiff further alleges that sometime in 2010 Kay and Brand created a new corporation called 1Stop Medical and at the same time Narco Freedom ceased its business relations with Medstock. At this stage of the litigation, accepting the allegations as true, the Court finds that Plaintiff has set forth causes of action for tortious interference with existing and future contracts based on allegations that go far beyond those for breach of contract. Thus, the motions to dismiss the ninth and tenth causes of action are denied.

### **Misappropriation of Trade Secrets**

A trade secret is “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” **Ashland Mgt. Inc. v Janien**, 82 NY2d 395, 407, 604 NYS2d 912 (1993). Restatement (Third) of Unfair Competition § 39 defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” Whether a customer list is a trade secret or readily ascertainable from public sources is an issue of fact. **Suburban Graphics Supply Corp. v Nagle**, 5 AD3d 663, 774 NYS2d 160 (2004). The Complaint alleges that Plaintiff developed certain knowledge and experience in the business of marketing their products to their clients and developed a system for the sale of same. The system includes techniques for management, promotion and operation, advertising methods and formulae, materials, client lists, vendor lists, product pricing, databases, equipment, specifications, techniques, and other data and called them their “trade secrets.” The Complaint states that these trade secrets were kept confidential and were not shared with every employee. The Complaint further asserts that Kay, with the help of the Defendants, stole the Plaintiff’s proprietary business methods which were customized by the Plaintiff and incorporated the customized methods on a separate computer system in order to compete with the Plaintiff. Based on the above, the Court finds that those branches of the motions seeking dismissal of the tenth cause of action are denied.

### **Commercial Defamation**

Where a statement impugns the basic integrity of creditworthiness of a business, an action for defamation lies and injury is conclusively presumed. Where, however, the statement is confined to denigrating the quality of the business’ goods or services, it could support an action for disparagement, but will do so only if malice and special damages are proven. **Hamlet Development Co. et**

**al., v Venitt**, 95 AD2d 798, 463 NYS2d 514 (1st Dept 1983). Here, the statements to which Plaintiffs object relate solely to the quality of goods and services received; they do not impugn the basic integrity of the Plaintiffs. Nor is there any indication that Defendants' alleged statements "directly affect the [Plaintiff's] credit and necessarily and directly occasions pecuniary injury." **Hamlet Development Co. v Venitt**, supra, quoting, **Union Associated Press v Heath**, 49 AD 247, 253, 63 NYS 96 (1st Dept 1900). In any event, the allegations in the eleventh cause of action are duplicative of the eighth and ninth causes of action, for tortious interference with current and prospective business relations. Accordingly, the branches of the motions seeking to dismiss the eleventh cause of action is granted.

### **Unjust Enrichment**

The elements of a cause of action sounding in unjust enrichment are allegations that the defendant was enriched at the plaintiff's expense and that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. **Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hospital Center**, 59 AD3d 473, 873 NYS2d 679 (2d Dept 2009). Although the Defendants argue that this cause of action must be dismissed as duplicative of the breach of contract claim, such is not the case. Where there is a bona fide dispute as to the existence of a contract, as Defendant Ubriaco claims, the Plaintiff may proceed upon a theory of quasi contract and breach of contract and will not be required to elect its remedies. **Plumitallo v Hudson Atlantic Land Co.**, 74 AD3d 1038, 903 NYS2d 127 (2d Dept 2010); **AHA Sales, Inc. v Creative Bath Prods., Inc.**, 58 AD3d 6, 867 NYS2d 169 (2d Dept 2008). Moreover, it is well settled that a plaintiff may plead both breach of contract and unjust enrichment claims in the alternative. See, e.g., **Auguston v Spry**, 282 AD2d 489, 723 NYS2d 103 (2d Dept 2001). Accordingly, those branches of the motion seeking to dismiss the twelfth cause of action are denied.

## Conversion

A plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff's rights. **Fiorenti v Central Emergency Physicians, PLLC**, 305 AD2d 453, 454-455, 762 NYS2d 402 (2d Dept 2003), quoting **Independence Discount Corp. v Bressner**, 47 AD2d 756, 757, 365 NYS2d 44 (2d Dept 1975) (citations omitted). Here, the Plaintiff alleges that the Defendants obtained customer returns to be credited for Medstock's accounts receivable and, instead of returning the items to Medstock's inventory, kept them for their own sales. In addition, the Plaintiff alleges that the Defendants stole its proprietary computer software which the Plaintiff conceived to manage its accounts. Most significant, the Plaintiff has asserted that the Defendants actually stole purchase orders and checks belonging to Medstock. That is sufficient to state a cause of action for conversion. Accordingly, those branches of the motions which seek to dismiss the eighteenth cause of action are denied.

## Fraud

Turning to the nineteenth cause of action, accepting the factual allegations contained in the complaint and the submissions in opposition to the motions, as true, and giving them every favorable inference, the Court finds that the Plaintiff has failed to state a cause of action for fraud. An action for fraud must be pled "with particularity, including specific dates and items, if necessary and insofar as practicable" (CPLR 3016 [b]), which the Plaintiff failed to do. Conclusory allegations of fraud will not be sufficient. **Robertson v Wells**, 2012 NY App. Div. LEXIS 3422, 2012 NY Slip Op 3432 (2d Dept, May 1, 2012); **Sargiss v Magarelli**, 50 AD3d 1117, 858 NYS2d 209 (2d Dept 2008); **Dumas v Fiorito**, 13 AD3d 332, 786 NYS2d 106 (2d Dept 2004). In order to make a prima facie showing of fraud, a Plaintiff must establish "a representation of fact, which is

either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury.” **Jo Ann Homes at Bellmore, Inc. v Dworetz**, 25 NY2d 112, 119, 302 NYS2d 799 (1969). In any event, it is well settled that a cause of action for fraud does not arise when the only fraud charge relates to a breach of contract. See, **Breco Envtl. Contrs., Inc., v Town of Smithtown**, 307 AD2d 330, 332, 762 NYS2d 822 (2d Dept 2003); **Melissakis v Proto Constr. & Dev. Corp.**, 294 AD2d 342, 343, 741 NYS2d 731 (2d Dept 2002). In the case at bar, while the Plaintiff sets forth a cause of action for certain tortious conduct, it does not really state a cause of action in fraud. The actual fraud alleged, if taken as true, consisted of misrepresentations to Plaintiff’s customers and not to Plaintiff itself. Accordingly, those branches of the motions which seek to dismiss the nineteenth cause of action for failure to state a cause of action are granted.

### **Prima Facie Tort**

Similarly, with regard to the twentieth cause of action, the Complaint fails to set forth facts sufficient to support a cause of action for prima facie tort. The Court finds that the Plaintiff has failed to allege special damages. The four elements of a prima facie tort are (1) the intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful. See **Curiano v Suozzi**, 63 NY2d 113, 117, 480 NYS2d 466 (1984). “There is no recovery in prima facie tort unless the malevolence is the sole motive for defendant’s otherwise lawful act or . . . unless defendant acts from ‘disinterested malevolence.’” **Burns Jackson Miller Summit & Spitzer v Lindner**, 59 NY2d 314, 333, 464 NYS2d 712 (1983), quoting from **American Bank & Trust Co. v Federal Reserve Bank**, 256 US 350, 358, 41 S Ct 499 (1921). “Special damages . . . must be fully and accurately stated. If it was a loss of customers, the persons who ceased to be customers, or who refused to purchase, must be named . . . if they are not named, no cause of action is stated.”

**Continental Air Ticketing Agency, Inc. v Empire Int'l Travel, Inc.**, 51 AD2d 104, 108, 380 NYS2d 369 [4th Dept 1976], quoting **Reporters' Assn. of Amer. v Sun Printing & Pub. Assn.**, 186 NY 437, 442 (1906). General allegations of lost sales from unidentified lost customers are insufficient to support an action for prima facie tort. **DiSanto v Forsyth**, 258 AD2d 497, 684 NYS2d 628 (2d Dept 1999). Accordingly, those branches of the motions seeking dismissal of the twentieth cause of action are granted.

In sum, the motions to dismiss the Complaint are granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eleventh, thirteenth, nineteenth, and twentieth causes of action are dismissed. The motions are otherwise denied. The Defendants are directed to serve and file their answers pursuant to CPLR 3211 (f).<sup>3</sup> Accordingly, based upon the Court's determinations as set forth, it is

**ORDERED** that the motion (001) by Defendants Superior Maintenance Supply, LLC, Jason Brand, Mariela Jimenez, Robert Ubriaco and Jaime Gattus for an order, pursuant to CPLR 3211, dismissing the Complaint as asserted against them is granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eleventh, thirteenth, nineteenth, and twentieth causes of action are dismissed; and it is further

**ORDERED** that the motion (002) by Defendants Scott Kay and MFS Industries, Inc. for an order, pursuant to CPLR 3211, to dismiss the Complaint as asserted against them is granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eleventh, thirteenth, nineteenth, and twentieth causes of action; and it is further

---

<sup>3</sup>Although Defendant Lucas (pro-se) did not move under any of the considered motions, the Court finds that the above determinations apply to that Defendant as set forth herein.

**ORDERED** that the moving Defendants are directed to serve and file an answer pursuant to CPLR 3211 (f); and it is further

**ORDERED** that the parties are directed to appear before the undersigned for a preliminary conference on July 23, 2012 at 10 o'clock a.m.; and it is further

**ORDERED** that counsel for Defendants shall serve a copy of this Order with Notice of Entry upon all parties pursuant to CPLR 2103(b)(2) or (3) within twenty (20) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

Dated: June 27, 2012  
Riverhead, New York

---

**EMILY PINES**  
J. S. C.

Final  
 Non Final