

**North Shore Neurologic Assoc., P.C. v Mobile Health  
Mgt. Servs., Inc.**

2010 NY Slip Op 30615(U)

March 9, 2010

Supreme Court, Suffolk County

Docket Number: 32347-2008

Judge: Emily Pines

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

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

Original Motion Date: 09-03-2009  
 Motion Submit Date: 01-06-2010  
 Motion Sequence No.: 005 MOTD

\_\_\_\_\_ X

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.

Plaintiff,

-against-

MOBILE HEALTH MANAGEMENT SERVICES, INC.,  
 LEE MANAGEMENT, INC., BROOKHAVEN  
 MAGNETIC RESONANCE IMAGING, INC., NORMAN  
 CHERNIK, M.D. and BERT BRODSKY,

Defendants.

X

LEE MANAGEMENT, INC. and MOBILE HEALTH  
 MANAGEMENT SERVICES, INC.,

Counter-Plaintiffs,

-against-

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.

Counter-Defendant,

MARK GUESBLATT, M.D., STEVEN ROSEN, M.D.,  
 SAMSON MEBRAHTU, M.D., NORMAN PFLASTER,  
 M.D., HUGH XIAN, M.D., EDWARD FIROUZTALE,  
 D.O., D.S.C., individually and in their capacity as Directors,  
 Officers and Shareholders of South Shore Neurologic  
 Associates, P.C., HENRY MORETA, M.D., individually and  
 in his capacity as an Officer and Director of South Shore  
 Neurologic Associates, P.C., and ARKS RADIOLOGY  
 MANAGEMENT, INC.,

Additional Counter-Defendants on Counter Claim.

X

Attorneys for Plaintiff/Counter-  
 Defendant and the Additional  
 Defendants on Counterclaim  
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 Kluger, Kaplan, Silverman, Katzen and  
 Levine, PL  
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**ORDERED**, that the motion (motion sequence number 005) by counter-defendant, South Shore Neurologic Associates, P.C. ("South Shore") and additional defendants on counterclaim, Mark Gudesblatt, M.D., Steven Rosen, M.D., Samson Mebrahtu, M.D., Norman Pflaster, M.D., Hugh Xian, M.D., Ph.D., Edward Firouztale, D.O., D.S.C., and Henry Moreta, M.D. (the "SSNA

doctors”) to dismiss counterclaims is determined to the extent set forth herein; and it is further

**ORDERED**, that a compliance conference is scheduled for June 15, 2010 at 9:30 a.m. before the undersigned.

### **Background**

South Shore commenced this action against defendants, Mobile Health Management Services, Inc. (“Mobile Health”), Lee Management, Inc. (“Lee”), Brookhaven Magnetic Resonance Imaging, Inc. (“BMRI”), Norman Chernik, M.D. (“Dr. Chernik”) and Bert Brodsky (“Brodsky”) by the filing of a Complaint, and subsequently an Amended Complaint dated May 8, 2009. The submissions reflect that South Shore is a neurology practice formed in 1989, with offices in Bay Shore, Patchogue, Riverhead and Southampton and that Dr. Chernik was its initial President and Chairman of the Board. At or about the same time, Dr. Chernik, Brodsky and non-party Gerald Shapiro (“Shapiro”) formed BMRI, which was owned 2/3 by South Shore and 1/6 each by Brodsky and Shapiro.<sup>1</sup> The purpose of BMRI was to provide South Shore with an in-house magnetic resonance imaging (“MRI”) facility. According to the Amended Complaint, South Shore and BMRI entered into a “Turnkey Lease Agreement” pursuant to which BMRI was to lease and build space for the MRI facility; acquire the MRI machine and related equipment, supplies, etc.; and provide all managerial and administrative services (other than billing), for the MRI operations. In return, South Shore was to pay a monthly fee to BMRI. South Shore alleges in the Amended Complaint that as of October 2007, the monthly fee was \$110,000.00.<sup>2</sup> Additionally, in September of 1994, BMRI entered into a Management and Administrative Services Agreement with Mobile Health for the latter to provide such services to South Shore. This agreement was for a term of sixteen (16) years, with three (3) five (5) year renewal terms. Finally, South Shore entered into a Billing and Collection Agreement with Lee on or about January 1, 2004, with the same term as the Mobile Health agreement. This agreement provided that South Shore would pay Lee a flat fee of \$45,000.00 per month for billing and collection services for MRI procedures. The agreement further provided that South Shore would be responsible for providing Lee accurate and timely input data relating to the claims for MRI procedures. South Shore alleges in the Amended Complaint that it had been paying \$50,000.00 per month to Lee, despite the fact that the agreement provided for a payment of only \$45,000.00

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<sup>1</sup>The Amended Complaint alleges that upon Shapiro’s death in 1997, Brodsky purchased Shapiro’s shares in BMRI

<sup>2</sup>The Court notes that it does not appear that a copy of this agreement was annexed to the motion papers.

per month. South Shore alleges that Brodsky is also the owner/controlling interest of both Mobile Health and Lee.

The gravamen of the Amended Complaint is that the agreements aforementioned violated New York's prohibition against the corporate practice of medicine and that Brodsky had an improper amount of control and influence over South Shore, a professional medical practice. Additionally, South Shore alleges that the agreements violated both the federal "Stark Law" and New York Public Health Law §238-a(1)(a), which prohibit physicians from referring patients to a health care provider in which they have a financial relationship and; moreover, the agreements contained unlawful fee splitting arrangements. With regard to Dr. Chernik, South Shore alleges that he caused it to enter into these purportedly unlawful agreements with entities owned and/or controlled by Brodsky and discouraged South Shore's Board of Directors from attempting to access the books and records of the company. As a result thereof (and other conduct by Dr. Chernik), on March 16, 2008, the Board of Directors of South Shore resolved to suspend Dr. Chernik as Chief Executive Officer.<sup>3</sup> According to the Amended Complaint, in February of 2009, South Shore terminated Dr. Chernik's association with South Shore and also terminated the aforementioned agreements.

The Amended Complaint sets forth five causes of action: against Dr. Chernik for breach of fiduciary duty (First Cause of Action) and corporate waste (Second Cause of Action); Mobile Health, Lee and BMRI for declaratory judgments, rescission, accountings and damages (Third Cause of Action); against Mobile Health, Lee and Brodsky for unjust enrichment (Fourth Cause of Action); and against Brodsky for breach of fiduciary duty (Fifth Cause of Action). Defendants Lee and Mobile Health filed separate Answers with Counterclaims which were subsequently amended twice. Before the Court now is a motion by South Shore and the South Shore doctors to dismiss certain counterclaims; specifically, the Sixth, Seventh, Eighth, Ninth, Tenth, Twelfth and Thirteenth Counterclaims in the Second Amended Counterclaims asserted by Counter-Plaintiff Lee, and the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Counterclaims in the Second Amended Counterclaims asserted by Counter-Plaintiff Mobile Health.

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<sup>3</sup>Separate Supreme Court actions were commenced arising out of the March 16, 2008 Board meeting; *South Shore Neurologic Assoc., P.C. v. Gudesblatt, et al* (index no. 11809/08) and *Matter of Dissolution of South Shore Neurologic Assoc., P.C.* (index no. 29251-2008).

## The Counterclaims

### **Lee Management Sixth Cause of Action**

### **Mobile Health Third Cause of Action**

In these claims, Lee Management and Mobile Health, respectively assert causes of action against South Shore and the South Shore doctors for breach of fiduciary duty. Specifically Lee and Mobile Health allege that they each share a relationship with South Shore and the doctors, as medical professionals, and that the respective agreements complied with all laws, rules and regulations pertaining to the practice of medicine. Further, they assert, that by negotiating these agreements, South Shore and the doctors assumed a duty to protect Lee and Mobile Health from entering into agreements that would violate regulations imposed upon doctors and they breached these duties.

South Shore argues that these causes of action must be dismissed because Lee and Mobile Health have failed to establish the existence of a fiduciary duty. Specifically, South Shore asserts that Lee and Mobile Health have failed to allege a fiduciary duty separate and apart from the parties' contractual relationship; but, rather, admit that the parties entered into the agreements as "arms length" business transactions. Such is insufficient to establish a fiduciary duty owed by South Shore to Lee and/or Mobile Health. Moreover, South Shore argues that the agreements at issue both contain merger clauses that bar any agreements, understandings or representations not contained therein. Thus, the claims that South Shore and/or the doctors made any representations not contained within the respective agreements must be rejected. Finally, South Shore and the South Shore doctors argue that the claims must be dismissed against the doctors as the doctors only participated in the negotiations (if at all), in their capacity as shareholders, officers and directors of South Shore and such is insufficient to sustain a claim of breach of fiduciary duty.

In opposition, Lee and Mobile Health claim that medical professionals are charged with a higher degree of knowledge of the rules and regulations pertaining to doctors; and, therefore, implicit within the business relationship between South Shore and Lee and Mobile Health was a fiduciary duty. Additionally, they argue that the merger clauses cannot bar a claim for breach of fiduciary duty.

In reply, South Shore and the South Shore doctors reiterate that Lee and Mobile Health have admitted, repeatedly, that the agreements between the parties and the relationship over the years, were arms-length transactions. Moreover, South Shore and the South Shore doctors note that Lee and Mobile Health have not claimed that they relied on any superior knowledge or higher duty imposed upon the doctors. Finally, the plain language of the respective agreements required Lee and Mobile Health to insure that the agreements complied with applicable laws, rules and regulations.

**Lee Management Seventh and Eighth Causes of Action**  
**Mobile Health Seventh and Eighth Causes of Action**

Here, Lee and Mobile Health assert claims against South Shore and the South Shore doctors for constructive fraud, arguing that South Shore represented and warranted that their respective agreements were binding and did not violate either South Shore's by-laws or other laws and regulations. Lee and Mobile Health each assert that they had a fiduciary relationship with South Shore, based on their relationship over a fifteen or twenty year period and they relied to their detriment on the representations of South Shore. Since South Shore (and the doctors) now argue that these agreements violate the by-laws and New York law, Lee and Mobile Health claim South Shore perpetrated a constructive fraud upon these entities.

South Shore argues that these claims must be dismissed because Lee and Mobile Health have not established the elements of constructive fraud; specifically, the establishment of a fiduciary relationship (as argued above) and reliance upon false representations made prior to the time they signed the relevant agreements. Moreover, South Shore argues that Lee and Mobile Health have failed to establish any independent tortious conduct by the doctors, which is required to state a claim for inducing a constructive fraud. Finally, South Shore points to the language of the Lee agreement which stated that it superceded "all prior and contemporaneous agreements of the parties oral and written in connection therewith", and further that no changes could be made except in writing signed by the party sought to be charged. Therefore, South Shore urges the Court to dismiss these counterclaims.

In opposition, Lee and Mobile Health reiterate their claims regarding South Shore and its doctors' fiduciary duty owed as medical professionals.

**Lee Management Ninth and Tenth Causes of Action**  
**Mobile Health Fourth and Fifth Causes of Action**

These causes of action allege unjust enrichment against South Shore and the doctors. Lee and Mobile Health assert that they have each conferred a benefit on South Shore and the doctors as a result of their respective agreements, which South Shore and the doctors now claim violate the by-laws and New York laws. Lee and Mobile Health argue that South Shore and the doctors would be unjustly enriched if they were not required to pay each of them the value of the benefits conferred.

South Shore argues that the unjust enrichment claims must fail because of the existence of written contracts between the parties, thus barring any recovery under a quasi-contract theory. Moreover, with regard to the unjust enrichment claims against the South Shore doctors individually, they argue that Lee and Mobile Health never performed any services for the doctors, individually, but rather only for South Shore. Therefore, South Shore seeks dismissal of these claims.

Lee and Mobile Health do not address the arguments regarding the dismissal of the unjust enrichment claims in their opposition papers.

**Lee Management Twelfth Cause of Action**  
**Mobile Health Sixth Cause of Action**

Lee and Mobile Health further assert claims against the South Shore doctors for tortious interference with a business advantage. Lee argues that the doctors intentionally interfered with the business relationship between Lee and South Shore by seeking another entity (Arks Radiology Management, Inc.) to provide the same services at a lesser price than Lee and also declaring the Lee agreement invalid based upon illegality. As a result, Lee asserts that its relationship with South Shore was injured in that the doctors caused South Shore to repudiate the agreement. Similarly, Mobile Health claims that the South Shore doctors caused South Shore to breach its obligations by declaring the agreement with BMRI invalid, resulting in BMRI's inability to satisfy its obligations to Mobile Health. Again, Mobile Health claims the actions by the South Shore doctors caused South Shore to repudiate the agreement, resulting in damages

to Mobile Health.

The South Shore doctors urge the Court to dismiss these causes of action and refer the Court to a related case, *Chernik v. South Shore Neurologic Associates, P.C.*, index no. 5210-2009. In that action, the Court (EMERSON, J.) dismissed a claim for tortious interference with contract asserted against Dr. Chernik holding that:

A director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract due to the fact that, while acting for a corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken (*Murtha v. Yonkers Child Care Assoc.*, 45 NY2d 913, 915). A corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer and did not commit independent torts or predatory acts directed at another (Id. at 915; *see also Foster v. Churchill*, 87 NY2d 744, 750-51). The plaintiff does not allege any independently tortious conduct or predatory acts on the part of any of the individual defendants. Accordingly, the second cause of action is dismissed.

South Shore claims that as in the related case, neither Lee nor Mobile Health have alleged any "independently tortious conduct" on the part of the South Shore doctors such as to sustain personal liability against them. Additionally, South Shore argues that the only relationship between Lee and South Shore, and Mobile Health and South Shore, was pursuant to their agreements, and any actions by the doctors was solely in their capacity as shareholders, officers and directors and thus cannot result in personal liability for tortious interference with the contractual relationship.

Mobile Health opposes and argues that the allegations in this counterclaim are different from those asserted against Dr. Chernik in the related case and that the allegations contained in this counterclaim set forth independent or predatory acts of the doctors. Specifically, the counterclaim alleges that the doctors engaged in a "hostile ouster" of Dr. Chernik, for the purposes of causing South Shore to breach its agreement with Mobile Health and to cause BMRI to breach. Further, it states that the doctors then wrongly claimed that the agreement was illegal and void, despite the fact that they had been operating under same for the past fifteen (15) years. Such allegations, Mobile Health urges the Court to recognize, amount to separate conduct, outside the doctors' roles as officers and directors making business decisions, and are sufficient to state a cause of action for tortious interference.

In reply, South Shore argues that Mobile Health's claim is nothing more than that South

Shore breached its agreement with Mobile and that such is insufficient to rise to the level of tortious interference by the doctors.

### **Lee Management Thirteenth Cause of Action**

### **Mobile Health Ninth Cause of Action**

These are causes of action by Lee and Mobile Health, respectively, seeking to pierce the corporate veil of South Shore and hold the South Shore doctors personally liable. They argue that the South Shore doctors exercised complete dominion over South Shore and abused the privilege of doing business in the corporate form, causing injury to Lee and Mobile Health.

South Shore seeks dismissal of these causes of action on the ground that no separate cause of action is recognized in New York. On the merits, South Shore argues that Lee and Mobile Health have failed to allege the material elements to pierce a corporate veil in that the complaint merely alleges that the doctors exercised improper dominion over South Shore but does not specify what actions constituted such improper dominion since the doctors are all shareholders and officers/directors and as such would properly control South Shore in such capacity. Moreover, Lee and Mobile never explain how the doctors abused the privilege of doing business in the corporate form or failed to respect the separate legal existence of South Shore. Thus, these causes of action must be dismissed.

Mobile and Lee do not set forth any specific opposition to the arguments raised by South Shore and the doctors on this counterclaim.

### **Discussion**

It is well settled that in “reviewing a motion to dismiss under CPLR 3211(a)(7) for failure to state a cause of action, the allegations of the complaint are deemed to be true. The pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment and the court must give the pleader the benefit of all favorable inferences that may be drawn from the complaint...”. *Dunn v. Gelardi*, 59 A.D.3d 385, 872 N.Y.S.2d 528 (2d Dept. 2009)(internal quotations omitted). *See also, Peterec-Tolino v. Harap*, 68 A.D.3d 1083, 892 N.Y.S.2d 154 (2d Dept. 2009). When evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, the Court must

determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated a cause of action. ***Peter F. Gaito Architecture, LLC v. Simone Development Corp.***, 46 A.D.3d 530, 846 N.Y.S.2d 368 (2d Dept. 2007).

To establish a claim for breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were caused by the misconduct. ***Kurtzman v. Bergstol***, 40 A.D.3d 588, 835 N.Y.S.2d 644 (2d Dept. 2007). The Second Department has stated that:

A fiduciary relationship ...is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another...[and] might be found to exist, in appropriate circumstances, between close friends ...or even where confidence is based upon prior business dealings. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. However, a conventional business relationship, without more, is insufficient to create a fiduciary relationship. Rather, a plaintiff must make a showing of special circumstances that could have transformed the parties' business relationship to a fiduciary one ... such as control by one party of the other for the good of the other."

***AHA Sales, Inc., v. Creative Bath Products, Inc.***, 58 A.D.3d 6, 867 N.Y.S.2d 169 (2d Dept. 2008)(internal citations and quotations omitted). ***See also, WIT Holding Corp., v. Klein***, 282 A.D.2d 527, 724 N.Y.S.2d 66 (2d Dept. 2001)(an arms-length business relationship does not give rise to fiduciary obligations). A cause of action for breach of fiduciary duty may survive for pleading purposes where the complaining party sets forth allegations that, apart from the terms of the contract between the parties, there was a relationship demonstrating a higher degree of trust than would normally arise from the agreement alone. ***EBC I, Inc., v. Goldman, Sachs & Co.***, 5 N.Y.3d 11, 799 N.Y.S.2d 170, 832 N.E.2d 26 (2005).

The Second Department has stated that to recover damages for constructive fraud, the proponent must establish that:

(1) a representation was made, (2) the representation dealt with a material fact, (3) the representation was false, (4) the representation was made with the intent to make the other party rely upon it, (5) the other party did, in fact, rely on the representation without knowledge of its falsity, (6) injury resulted and (7) the parties are in a fiduciary or confidential relationship.

***Del Vecchio v. Nassau County***, 118 A.D.2d 615, 499 N.Y.S.2d 765 (2d Dept.

1986).

In the case at bar, the allegations of Lee's Sixth Cause of Action and Mobile Health's Third Cause of Action, taken as true, do not state a cause of action for breach of fiduciary duty. The allegations do not rise to the level to establish a fiduciary relationship between the parties. Instead, the counterclaims demonstrate that the relationship between the parties, although extended over many years, was contractual only. Moreover, the South Shore doctors, in negotiating these agreements, were acting in their capacity as shareholders, officers and directors only and thus cannot be personally liable for any alleged breach of fiduciary duty. Therefore, these causes of action are dismissed. Likewise, since the Court holds that Lee and Mobile Health have failed to establish the existence of a fiduciary relationship, an element of the claim for constructive fraud, Lee's seventh and eighth causes of action and Mobile Health's seventh and eighth causes of action must also be dismissed.

Turning to the claims seeking recovery under an unjust enrichment theory, to recover under such theory, the proponent must establish that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution. *Spector v. Wendy*, 63 A.D.3d 820, 881 N.Y.S.2d 465 (2d Dept. 2009). *See also, Aha Sales, supra*. Generally, "the existence of a valid and enforceable contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment arising out of the same subject matter." *Yenrab, Inc., v. 794 Linden Realty, LLC.*, 68 A.D.3d 755, 892 N.Y.S.2d 105 (2d Dept. 2009). *See also, Whitman Realty Group, Inc., v. Galano*, 41 A.D.3d 590, 838 N.Y.S.2d 585 (2d Dept. 2007); *Shah v. Micro Connections, Inc.*, 286 A.D.2d 433, 729 N.Y.S.2d 497 (2d Dept. 2001). However, where there is a bona fide dispute as to the existence of a contract to the dispute in issue, a plaintiff may proceed upon a quasi contract theory as well as breach of contract. *Old Salem Development Group, Ltd., v. Town of Fishkill*, 301 A.D.2d 639, 754 N.Y.S.2d 333 (2d Dept. 2003).

Here, the gravamen of these actions revolves around the validity of the agreements between South Shore and Lee and Mobile Health. As such, and given the early stage of these proceedings, the Court will not require Lee and Mobile Health to elect their remedies at this time. Clearly, the Court may revisit this issue when the issue of the validity of the respective agreements has been determined. Based on the foregoing, the motion to dismiss Lee

Management's ninth and tenth cause of action and Mobile Health's fourth and fifth causes of action is denied.

With respect to Lee's twelfth cause of action and Mobile Health's sixth cause of action for tortious interference with business advantage, the Court agrees with South Shore and the determination by Justice Emerson in the related *Chernik* action that these claims must be dismissed. The conclusory allegations of the counterclaims that the South Shore doctors "used dishonest, unfair, or improper means" to interfere with Lee's relationship with South Shore and Mobile Health's relationship with South Shore and BMRI, is insufficient to demonstrate that the doctors were acting outside the scope of their roles as officers and directors of the corporation. *See, e.g., Murtha v. Yonkers Child Care Assoc.*, 45 N.Y.2d 913, 411 N.Y.S.2d 219, 383 N.E.2d 865 (1978). These causes of action are therefore, dismissed.

Finally, Lee and Mobile Health seek to pierce the corporate veil and hold the South Shore doctors personally liable. The Second Department has recently reaffirmed the general principle that a corporation exists independent of its owners who are not personally liable for its obligations. *East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009). In that case, the Court recognized that:

The concept of piercing the corporate veil is an exception to this general rule, permitting in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation. A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff.

Here, the allegations of the respective counterclaims merely state that the doctors exercised "complete dominion over SSNA, which dominion was used to commit a fraud or wrong against Lee Management, and abused the privilege of doing business in the corporate form."<sup>4</sup> Such conclusory statements are insufficient to sustain a cause of action against a shareholder in his individual capacity. *AHA Sales, supra*. Lee Management's thirteenth cause of action and Mobile Health's ninth cause of action are therefore dismissed.

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<sup>4</sup> Lee Management Counterclaim at ¶112. The Mobile Health Counterclaim contains an identical allegation at ¶92.

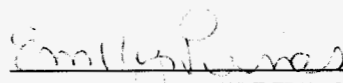
**Conclusion**

Based upon all of the foregoing, South Shore's motion to dismiss is granted to the extent that Lee's sixth, seventh, eight, twelfth and thirteenth counterclaims in the Second Amended Counterclaims are dismissed. Mobile Health's third, sixth, seventh, eighth and ninth counterclaims are also dismissed.

Counsel are reminded that a status conference is scheduled for June 15, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 9, 2010  
Riverhead, New York

  
\_\_\_\_\_  
**EMILY PINES**  
J. S. C.