SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

HEALTH ACQUISITION CORP. d/b/a ALLEN HOME HEALTH CARE BESTCARE, INC. and AIDES AT HOME, INC.,

Plaintiffs,

INDEX NO.: 008714/2010
MOTION DATE: 09/08/2010
MOTION SEQUENCE: 001 and 002

-against-

PROGRAM RISK MANAGEMENT, INC., PRM CLAIMS SERVICES, INC., JOHN CONROY, DeCHANTS, FUGLEIN & JOHNSON, LLP and SGRisk, LLC,

Defendants.

The following papers read on these motions:

Notice of Motion, Affirmation & Exhibits Annexed 1
Defendant SGRisk, LLC's Memorandum of Law in Support of its CPLR 3211(a) Motion to Dismiss 2
Notice of Motion, Affirmation & Exhibits Annexed 3
Memorandum of Law in Support of Defendant DeChants, Fuglein & Johnson, LLP's Motion to Dismiss the Complaint 4
Affirmation of James S. Newfield in Opposition to Defendant's DeChantis, Fuglein & Johnson, LLP and SGRisk, LLC's Motions to Dismiss & Exhibits Annexed 5
Memorandum of Law in Objection to Defendant's DeChants, Fuglein & Johnson, LLP's and SGRisk, LLC's Motions to Dismiss 6
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Motion pursuant to CPLR 3211[a][1], [3],[7] by the defendant SGRisk, LLC for an order dismissing the complaint insofar as interposed against it.

Cross motion pursuant to CPLR 3211[a][7] by Dechants Fuglein & Johnson, LLP for an order dismissing the complaint insofar as interposed against it.

The plaintiffs Health Acquisition Corp., Bestcare, Inc. and Aides at Home, Inc. ["collectively "the plaintiffs"], are health-care providers who were previously members of the "Health Care Providers Self Insurance Trust" ["the Trust"] – a now terminated, New York State Workers Compensation "group self-insurance trust" originally established in 1993 (*see*, Workers Compensation Law ["WCL"] §§ 10, 50 *see also*, 12 NYCRR § 317, *et., seq.*)(Cmplt., ¶¶ 1-3; 64-65).

Codefendants Program Risks Management, Inc. and PRM Claims Services, Inc. ["PRM"], are entities which provided administrative services to the Trust, while codefendants DeChants Fuglein & Johnson, LLP ["DeChants"] and SGRisk, LLC supplied third-party actuarial and/or accounting services to PRM and/or the group Trust (Cmplt., ¶¶ 4-18; 48-56; 57-62; 66-69; 113-115 146-163; 172-205; DeChants Brief at 2-3; SGRisk Brief at 6-7 *see*, 12 NYCRR [*former*] § 317.19[a][3][Cummings Aff., Exh., "O"]).

In sum, Workers Compensation "group self-insurance trusts" are statutorily regulated, employer groups by which employers jointly share the risks, liabilities and expenses associated with providing mandatory compensation coverage to their respective employees (*see generally,* WCL §§ 10, 50[3-a][1], [5]).

Pursuant to New York Law, employer groups engaged in related activities within a given industry "may adopt a plan for self-insurance" and, if qualified, become self-insured entities (WCL § 50[3-a]). Group self-insured employers then manage the claims process and related administrative functions themselves – subject to applicable regulations, financial reporting requirements and Workers Compensation Board oversight [the "Board"](*see generally,* WCL §§ 10, 50[3-a][1], [5]; 12 NYCRR § 317.2[1]; 317.3[a]).

In 2009, the Board suspended and/or terminated the independent operation of subject Trust – apparently upon concluding that the group was insolvent, as defined by applicable law. In conjunction with the foregoing termination, the Board also removed defendant PRM as the Group's licensed program/claims administrator and itself assumed administration of the group (*see generally*, WCL §§ 30[3-a]; 50[5]; 12 NYCRR § 317.20, *et., seq.*)(Cmplt.,¶¶ 70-73; 213-215).

In June of 2010, and based upon, *inter alia*, shortfalls in the subject Trust's available claims reserve, the Board levied interim monetary assessments against the Trust's members, including the plaintiffs Aides at Home, Bestcare and Health Acquisition Corp. – who were, at that time, each assessed in the respective amounts of $424,483.65; $2,516,530.51; and $599,849.15 (*see*, WCL § 50 [3-a][5][g]; 50[3-a][6][b]; [7][b]; 12 NYCRR §§ 317.9; 317.20, *et., seq. see, Aides At Home, Inc. v. State, Workers' Compensation Bd.*, 76 AD3d 727)(Cmplt.,¶¶ 217-219).

Notably, the subject Trust was apparently not the only self-insured group which, in recent years, has experienced financial difficulties, regulatory terminations and/or administrative intervention by the Board. Although New York's group self-insured program was relatively stable before 2006 – with no group having defaulted prior thereto – circumstances changed significantly thereafter, when a number of self-insured groups/trusts began to experience financial shortfalls and ultimately, insolvencies and/or terminations.

A recently published Task Force Report to the Governor and the Legislature concluded that insolvencies would likely generate a projected, state-wide deficit of some $498 million – which in turn, resulted in materially increasing, industry-wide assessments intended to fund unpaid and outstanding claims (*see, Task Force on Group Self Insurance,* Report to the Governor and Legislature [June 2010], at 30-34).

In any event, and in light of the subject assessments levied as against the plaintiffs by the Board, the plaintiffs commenced the within action in April of 2010 against PRM/Conroy, DeChants, and SGRisk (SGRisk Exh., "A"). The plaintiffs' verified complaint contains eleven, separately pleaded causes of action, sounding in, *inter alia*, breach of fiduciary duty, professional malpractice, fraud, negligent misrepresentation and violation of General Business Law § 349.

In sum and substance, the plaintiffs' claims as to Dechants and SGRisk [collectively "the defendants"] are predicated on allegations that these defendants were hired, *inter alia*, for the "benefit of the plaintiffs" and the Trust (Cmplt.,¶¶ 310, 328). According to the complaint, the defendants held themselves out as possessing expertise with respect to, *inter alia*, the auditing, accounting, management and administration of group self-insured trusts, including the import of applicable regulatory law (*e.g.*, Cmplt.,¶¶ 309, 327). Despite these representations, the plaintiffs contend that the defendants thereafter negligently failed to perform their respective administrative, accounting and auditing/actuarial duties by, *inter alia*, underestimating and misrepresenting the Trust's claims reserves and projected liabilities, and/or by otherwise negligently failing to ascertain, disclose and properly document the true nature of the Trust's "financial condition, liabilities assets and exposures" (Cmplt., ¶¶ 313-314 *see also*, ¶¶ 74-84; 98, 100-106; 182-183; 240).

Moreover, the defendants knew or should have known that the individual group Trust members would rely on their respective reports for the purposes of, among other things, assessing the risks of Trust membership and/or whether they should either join the Trust or retain their memberships in the future (Cmplt., ¶¶ 303-304; 317-319; 334-335).

The complaint further alleges that by virtue of the foregoing misconduct, the plaintiffs have suffered undescribed damages and will continue to incur, "undue, excessive and unreasonable costs, liabilities, fees and damages" (Cmplt., ¶¶ 315, 324; 331-332; 341).

The defendants SGRisk and Dechants now move for an order dismissing the complaint pursuant to CPLR 3211[a][1], [3], [7] arguing, among other things, that the plaintiffs' claims are deficient as a matter of law based upon the absence of privity.

On a motion to dismiss pursuant to CPLR 3211[a][7], the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001] *see*, *People ex rel. Cuomo v. Coventry First LLC,* 13 NY3d 108, 115 [2009]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]).

Further, a motion pursuant to CPLR 3211[a] based on documentary evidence, may be

granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.* , 98 NY2d 314, 326 [2002]; *Leon v. Martinez*, *supra,* 84 NY2d at 87-88).

On the other hand, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration'" (*Morris v. Morris*, 306 AD2d 449 *see, Godfrey v. Spano*, 13 NY3d 358, 373 [2009]; *Maas v. Cornell University*, 94 NY2d 87, 91-92 [1999]), and "[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action" *(Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.,* 46 AD3d 530 *see, Deutsche Bank Nat. Trust Co. v. Sinclair*, 68 AD3d 914).

With respect to Dechants ,and SGRisk, the complaint interposes two essentially identical causes of action sounding in professional negligence and negligent misrepresentation, both based on the factual allegations previously recounted.

The record as presently constituted includes documentation indicating that SGRisk was retained by the Trust's third-party administrator in 1993, as evidenced by a May, 1993 engagement letter. That letter summarizes the services to be performed as encompassing, *inter alia*, actuarial review, including reserve analysis – and certification – where required; rate review, and in general, the provision of advice on other actuarial and/or rate matters (SGRisk Exh., "B").

The actuarial reports and evaluations attached to SGRisk's motion papers commence with a 2001 report, which was submitted to the subject group's third-party administrator, PRM. The report's stated purposed was to, *inter alia*, examine "reserves for losses" and "allocated loss reserve adjustments" (Cummings Exh., "F" [Report at 1-2]). Additional reports extending from 2003 through to 2009 have been included with SGRisk's papers – which reports were also addressed and submitted to PRM's president, codefendant John Conroy (Cummings Aff., Exhs., "G"–"N").

With respect to Dechants, the documents annexed to its motion papers include report cover/retention letters (but not the reports themselves) addressed to the Group Trust, beginning

with a 2003 letter defining the scope and nature of the services to be rendered. The attached letters uniformly state in part that, "[w]e will audit the balance sheets * * * [of the Trust] * * * and the related statements of income and participants' deficit and cash flows and supplementary information * * *" (Dechants Mot., Exhs., "B"-"F"). The letters further state that "[t]he objective of our audits is the expression of an opinion about whether your financial statements are fairly presented in all material respects, in conformity with * * * generally accepted accounting principles * * *" (*e.g.,* Dechants Mot., Exhs., "B" at 1; ¶ 3; Exh., "E", at 1, ¶ 3).

It is undisputed that neither Dechants nor SGRisk entered into any contractual arrangement directly with the plaintiffs, since both entities contracted instead, with either PRM and/or the non-party group Trust (*e.g., Prudential Ins. Co. of America v. Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382-383[1992]).

With respect to the movants' commonly asserted privity dismissal claims, SGRisk and Dechants both contend that the complaint does not set forth facts establishing a relationship with the plaintiffs constituting the functional equivalent of privity, and that therefore, no duty exists to the plaintiffs – including any duty based on a third-party beneficiary theory. The Court agrees.

In cases where there exists no privity of contract, the Court of Appeals has been "cautious" in extending liability to third parties, doing so in "carefully circumscribed" fashion and then only upon "clearly defined * * * circumstances which bespeak a close relationship premised on knowing reliance" (*see, Parrott v. Coopers & Lybrand, L.L.P.,* 95 NY2d 479, 483-484 [2000]; *Securities Investor Protection Corp. v. BDO Seidman, L.L.P.,* 95 NY2d 702, 711 [2001]; *Prudential Ins. Co. v Dewey, Ballantine, Bushby, Palmer & Wood, supra*; *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 79 NY2d 695, 702-703 [1992]; *Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536, 551 [1985]; *White v. Guarente*, 43 NY2d 356 [1977]; *Houlihan/Lawrence, Inc. v. Duval*, 228 AD2d 560, 561-562).

More particularly, and to minimize potentially "limitless liability," the Court has crafted an "analytical framework" which requires a third party plaintiff to establish: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance"

(*Prudential Ins. Co., supra*, 80 NY2d at 384; *State of California Public Employees' Retirement System v. Shearman & Sterling, supra,* 95 NY2d at 434; *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, 79 NY2d at 702; *Credit Alliance Corp., supra*, 65 NY2d at 551 *see, Sykes v. RFD Third Ave. 1 Associates, LLC*, 15 NY3d 370 [2010]; *Parrott v. Coopers & Lybrand, L.L.P.*, 95 NY2d *supra*, at 483-484; *Westpac Banking Corp. v. Deschamps*, 66 NY2d 16, 19 [1985]; *Barrett v. Freifeld*, 77 AD3d 600).

With respect to the latter, "linkage" prong of the test, it is settled that "[b]efore the law will allow a claim of negligence against an accountant by a non-client third party, there must be some allegation of 'linking conduct' by the accountant, that is, 'any word or action on the part of [the accountant] directed to plaintiffs,' so as to 'link' the accountant to the non-client" (*Houbigant, Inc. v. Deloitte & Touche LLP*, 303 AD2d 92, 94 *see, Securities Investor Protection Corp. v. BDO Seidman, L.L.P., supra*, 95 NY2d at 711; *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 NY2d at 553-554 *see generally, J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148 [2007]; *Ideal Steel Supply Corp. v. Anza*, 63 AD3d 884; *Ford v. Sivilli*, 2 AD3d 773, 774-775).

"Notwithstanding some degree of overlap among these [near privity] requirements, they are distinct * * * [and] must be distinctly pleaded * * *" (*LaSalle Nat. Bank v. Ernst & Young LLP*, 285 AD2d 101, 105-107 *see, Parrott v. Coopers & Lybrand, L.L.P., supra,* 95 NY2d at 484).

With these principles in mind, and even upon liberally construing the complaint and its factual averments (*Leon v. Martinez, supra*), the Court agrees that the causes of action sounding in negligent misrepresentations and professional negligence, as interposed against SGRisk and Dechants, fail to state a cause of action and/or are defeated by the documentary evidence submitted.

Although the complaint repeats that the plaintiffs "relied" on the reports drafted by the movants and that the defendants "should have been aware of their reliance (Cmplt., ¶¶ 306-324; 325-341), the plaintiffs' allegations are circular and lack informational content (*see, Depose v. Reznick Fedder & Silverman,* 14 AD3d 302, 303-304; *LaSalle Nat. Bank v. Ernst & Young LLP, supra*, 285 AD2d at 107). They do not depict or set forth facts establishing the sort of

qualitatively special relationship necessary to support a claim of near privity (*Parrott v. Coopers & Lybrand, L.L.P., supra*, 95 NY2d at 483-484).

Specifically, the complaint does not claim – and the facts do not otherwise indicate – that the Trust retained either of the two moving defendants for the particular purpose of inducing the plaintiffs' reliance, or to confer any particular benefit, even indirectly, upon the plaintiffs as individual trust members (*Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co., supra,* 79 NY2d at 703 *see also State of California Public Employees' Retirement System v. Shearman, supra,* 95 NY2d at 434-435).

Rather, the complaint merely alleges, in a factually oblique fashion, that the defendants knew, in some unexplained fashion, that the plaintiffs were relying on and utilizing the defendants' reports in order to assess the financial viability of the Trust, and thereby to determine whether, *inter alia*, they would retain their respective Trust memberships in the future (*see, Depose v. Reznick Fedder & Silverman, supra,* 14 AD3d at 303-304) (*e.g.*, Cmplt., ¶¶ 48-55; 61, 309; 317, 328; 334-335).

These inconclusively framed averments, however, do not, suffice "to demonstrate a relationship or bond with * * * [the defendants] so close as to touch the bounds of privity", *i.e.*, they do not describe "a clearly defined set of circumstances which bespeak a close relationship premised on knowing reliance" *(Parrott v. Coopers & Lybrand, L.L.P., supra*, 95 NY2d at 483-484). Nor they demonstrate the existence of "indispensable linking" type conduct (*Parrott v. Coopers & Lybrand, L.L.P., supra*, 95 NY2d at 484)[emphasis added]; *Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co., supra*, 79 NY2d at 705).

Among other things, the complaint fails to allege that there existed any contacts between the defendants and the plaintiffs which would buttress an inference that the plaintiffs were known to the defendants in any legally significant fashion, *i.e.*, there are absent pleaded facts indicating that there were "multiple, direct and substantive" personal meetings, communications, or interactions of any sort evidencing a meaningful nexus or link between the moving defendants and the plaintiffs as Trust members (*Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co., supra,* 79 NY2d at 705 *see, Sykes v. RFD Third Ave. 1 Associates, LLC, supra,* 67 AD3d 162, 167-168, *aff'd,* 15 NY3d 370; *Parrott v. Coopers & Lybrand, supra*, 263 AD2d 316,

322-323, *aff'd*, 95 NY2d 479; ; *Credit Alliance Corp. v. Arthur Andersen & Co.*, *supra*, 65 NY2d at 553-544; *Carter v. Carlis*, 22 AD3d 296, 297 *see also, Westpac Banking Corp. v. Deschamps*, 66 NY2d at 19; *LaSalle Nat. Bank v. Ernst & Young LLP*, *supra,* 285 AD2d at 107-108).

Notably, "[w]here * * * direct contact between the accountant and the plaintiff is minimal or nonexistent, the plaintiff cannot recover for the accountant's negligence" (*CRT Investments, Ltd. v. Merkin,* ___Misc.3d____, 2010 WL 4340433, at 11-12 [Supreme Court, New York County 2010 *see also, Security Pacific Bus. Credit, Inc. v. Peat Marwick Main & Co.*, *supra*, 79 NY2d at 705-706; *Bri-Den Const. Co., Inc. v. Kapell & Kostow Architects, P.C., supra*).

The mere fact that the plaintiffs were members of an identifiable group does not establish the existence of near privity. The Court of Appeals has "previously rejected a rule "permitting recovery by any 'foreseeable' plaintiff who relied on the negligently prepared report, and have rejected even a somewhat narrower rule that would permit recovery where the reliant party or class of parties was actually known or foreseen" but the individual defendant's conduct did not link it to that third party" (*Parrott v. Coopers & Lybrand, L.L.P. supra*, 95 NY2d at 485 *see generally, Sykes v. RFD Third Ave. 1 Associates, LLC, supra,* 15 NY3d at 373-374; *Marcellus Const. Co., Inc. v. Village of Broadalbin*, 302 AD2d 640, 641-642; *American Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc., supra*).

It is settled that generic allegations that the plaintiffs may have been foreseeable – or even "actually known" recipients of the defendants' work product – will not alone suffice to establish reliance (*Security Pac. Bus. Credit v. Peat Marwick Main* & Co., *supra,* 79 NY2d at 702-703 *see also, Sykes v. RFD Third Ave. 1 Associates, LLC, supra; Parrott v. Coopers & Lybrand, L.L.P., supra*, at 485; *Bri-Den Const. Co., Inc. v. Kapell & Kostow Architects, P.C.,* 56 AD3d 355 *see, American Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc.*, ___ F.Supp.2d ___, 2007 WL 674691, at 6 [E.D.N.Y. 2007]).

The documentary materials submitted similarly fail to establish linking conduct, thereby further undermining the existence of a contractual analog approximating privity or its functional equivalent (*LaSalle Nat. Bank v. Ernst & Young LLP, supra*, at 105-107; *Ideal Steel Supply Corp. v. Anza, supra,* 63 AD3d 884; *Barrett v. Freifeld, supra,* 77 AD3d 600; *Houbigant, Inc. v. Deloitte & Touche LLP*, *supra*, 303 AD2d at 94).

More particularly, the documents submitted substantiate the assertion that the actuarial reports prepared by SG Risk, were not drafted for the individual group members or intended for their individual use. Rather, SGRisk was retained as the Trust's actuarial consultant to prepare administratively required actuarial certifications, which were submitted to the Worker Compensation Board (*see,* SGRisk Reply Brief at 2-3).

Accordingly, SGRisk's reports, which are actually addressed to PRM – not the Trust's officers – were primarily generated to establish compliance with the State's regulatory scheme and/or its administrative disclosure and reporting requirements (*cf., Employee Staffing of America, Inc. v. William H. Mercer, Inc.*, ___F.Supp.2d___, 1998 WL 118166 [S. D.N.Y.1998]; *American Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc., supra* [Cummings Aff., Exh., "P" at 13]).

The reports themselves are technical in import and plainly drafted to be analyzed by individuals possessing expertise in the particular accounting, regulatory and trust reserve matters addressed; they do not purport to review or consider individual claims. Their content does not support the claim that they were even incidentally intended to be used by Trust members to assess subjective and personal needs relating to their status as group members, *i.e.,* as a barometer for determining, whether in a general sense, individual trust members should retain their respective Trust memberships (Cummings Aff., Exhs., "F" - "M"). In accord with this conclusion, several of the more recent SGRisk reports contain disclaimer provisions stating that "this report is intended only for the use of, and should be relied upon the Board of Trustees, PRM and PRN Services" (Cummings Exhs., "L", "M", "N." at pp 2-3)

Similarly, the retention statements defining Dechants' contractual duties indicate that its reports were drafted for the benefit of the Trust administrator so as to facilitate the maintenance and operation of a regulated Trust pursuant to, *inter alia*, applicable law and governing accounting principles – not to confer an benefic upon, or for the use of, individual members of the group Trust (*Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co., supra,* 79 NY2d at 708 *cf., White v. Guarente, supra*; *Caprer v. Nussbaum*, 36 AD3d 176, 196-198).

Moreover, the complaint does not allege that Dechants crafted its opinions to meet any specific monitoring needs of the plaintiffs or that it was required to do so; that it engaged in, or

was duty-bound to engage in, any meaningful dialogue or interaction with the plaintiffs relative to its reports; or that, more generally, the "end and aim" of the contractual services it performed was to provide the plaintiffs with information and data relating to Trust finances for their own usage (*e.g.*, *Sykes v. RFD Third Ave. 1 Associates, LLC, supra,* 67 AD3d 162, 167-168).

With these conclusions in mind, and guided by the "cautious" and circumspect approach adopted by the Court of Appeals, the Court agrees that the plaintiffs' allegations establish – at most – that they were incidental or collaterally situated beneficiaries, whose relationship with the movants did not amount to the functional equivalent of privity (*Security Pacific Business Credit, Inc. v. Peat Marwick Main & Co.*, *supra*, 79 NY2d at 708; *Leff v. Fulbright & Jaworski, L.L.P.*, ___AD3d___, 2010 WL 4643318 [1st Dept. 2010]; *Ideal Steel Supply Corp. v. Anza*, *supra*, 63 AD3d 884; *Depose v. Reznick Fedder & Silverman*, *supra*, 14 AD3d at 303-304; *Ford v. Sivilli*, *supra*, 2 AD3d at 774-775).

Contrary to the plaintiffs' contentions, there are no pleaded claims interposed against the movants based on an "aiding and abetting" theory of recovery, *i.e.*, aiding and abetting the breach of PRM's alleged fiduciary duty to the Trust or its commission of fraud (*e.g.*, Pltffs' [SGRisk] Brief at 5). Rather, the complaint contains only two causes of action involving the moving defendants, both of which assert claims grounded solely on negligent misrepresentation and professional negligence (Cmplt., ¶¶ 146-171; 172-203 *see also*, ¶¶ 306-315; 316-324; 325-332; 332-341).

Even if an unstated, aiding and abetting claim could somehow be discerned from the complaint, it is settled that a plaintiff "may not merely rely on conclusory and sparse allegations" in pleading a cause of action based on an aiding and abetting theory of recovery (*Bullmore v. Ernst & Young Cayman Islands,* 45 AD3d 461, 464, *quoting from, Global Mins. & Metals, supra*, 35 AD3d 93, 101-102 *see, Roni LLC v. Arfa*, 15 NY3d 826, 827 [2010]; *Esteva v. Nash*, 55 AD3d 474, 475 *see also*, *National Westminster Bank USA v. Weksel*, 124 AD2d 144, 148-149; *Rand Intern. Leisure Products, Inc. v. Bruno*,___Misc3d___, 2009 WL 130136 [Supreme Court, Nassau County 2009]).

Accordingly, the seventh and eighth causes of action, as interposed against Dechants, based on professional negligence and negligent misrepresentation, and the ninth and tenth causes

of action asserted against SGRisk, based on the same respective theories of recovery, are dismissed.

In light of the Court's determination that the plaintiffs' causes of action, insofar as interposed against Dechants and SGRisk, are subject to dismissal for the reasons stated above, it is unnecessary to reach the defendants' remaining dismissal claims and contentions.

Lastly, upon the facts presented, the plaintiffs have failed to establish their entitlement to relief permitting them to replead their theories of recovery as against the movants (*see,* CPLR 3211[e]; 3025[b]) – a request made in the concluding paragraphs of counsel's opposing memoranda of law, to which no proposed, amended pleading has been attached (*see*, *Kilkenny v. Law Office of Cushner & Garvey, LLP,* 76 AD3d 512; *Lupski v. County of Nassau*, 32 AD3d 997, 999; *Black Car and Livery Ins., Inc. v. H & W Brokerage, Inc.*, 28 AD3d 595, 596; *Chang v. First American Title Ins. Co. of New York,* 20 AD3d 502; *Mandracchia v. 901 Stewart Partners, LLC,* ___Misc3d___, 2009 WL 5078846 [Supreme Court, Nassau County 2009] *see also, Esteva v. Nash, supra,* 55 AD3d 474, 475).

The Court has considered the plaintiffs' remaining contentions and concludes that they are insufficient to defeat the defendants' motions.

Accordingly, it is,

ORDERED that the motions pursuant to CPLR 3211 by the defendants SGRisk, LLC and Dechants Fuglein & Johnson, LLP, are granted and the seventh through tenth causes of action are dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: December 22, 2010

J.S.C.

ENTERED
DEC 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE