SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ______ **PART** ______

Index Number : 103913/2010
AETNA LIFE INSURANCE
vs
APPALACHIAN ASSET MANAGEMENT
Sequence Number : 005
DISMISS ACTION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/13/12

J.S.C.
CHARLES E. RAMOS

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
--x
AETNA LIFE INSURANCE COMPANY,

Plaintiff,

Index No. 103913/10

-against-

APPALACHIAN ASSET MANAGEMENT CORP.,
WILLIAM MESSMORE, DOUGLAS MCBETH,
SAMEER GARG and GREGORY MCDONALD,

Defendants.
--x

Charles Edward Ramos, J.S.C.:

Motions bearing sequence numbers 005, 006, 007, 008, 009 and 011 are consolidated for disposition.

This is an action by plaintiff Aetna Life Insurance Company (Aetna) for violation of the Connecticut Unfair Trade Practices Act (CUTPA), breach of fiduciary duty and aiding and abetting breach of fiduciary duty, negligence, and recklessness against defendant Appalachian Asset Management Corp. (Appalachian) and individual defendants William Messmore, Douglas McBeth, Sameer Garg and Gregory McDonald. Each of the defendants moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint for failure to state a cause of action. Aetna moves to consolidate this action with a related action and, pursuant to CPLR 3025 (b), for leave to file an amended consolidated complaint. For the reasons stated below, the

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motions to dismiss the complaint are granted in part and the motion for consolidation and to amend the complaint is granted.

Parties

According to the amended complaint, Aetna is a Connecticut life insurance company with its principal place of business in Hartford, Connecticut. Appalachian is a Delaware corporation with its principal place of business in New York, New York. Appalachian was a wholly owned subsidiary of non-party Lehman Brothers Holdings, Inc. (LBHI).

Defendant William Messmore was an officer of Appalachian and a member of the insurance products group at LBHI. Defendant Douglas McBeth was the president and board member of non-party Lehman Re, Ltd. (Lehman Re) and head of the insurance products group at LBHI. Lehman Re was also a subsidiary of LBHI.

The complaint states that defendant Sameer Garg was the principal liaison between Aetna and Lehman Re and served as a board member of Lehman Re and a member of the insurance products group at LBHI. Defendant Gregory McDonald was an assistant vice president in LBHI's Fixed Income Division.

Background

In December 1999, Aetna and Lehman Re executed a Coinsurance Agreement, under which Lehman Re reinsured a substantial group of Aetna's fully paid-up life insurance policies. Lehman Re agreed

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to reimburse Aetna for all claims Aetna paid under the policies, in exchange for receiving a premium from Aetna (Amended Complaint, ¶ 11).

Under the Coinsurance Agreement, Aetna paid a premium of $155,667,717, which was placed in a Trust Account, governed by a Trust Agreement between Lehman Re, Aetna, and the trustee (*Id.* at ¶ 12). The premium, which was made up of various investments, served as collateral to secure Lehman Re's obligations and as the source of payment for Lehman Re's reinsurance obligations.

Section 3 (b) of the Trust Agreement gave Lehman Re the authority to direct the trustee to invest assets of the Trust Account in "Eligible Securities," which included cash, certificates of deposit, and certain types of investments that were regulated by Section 38a-102 of the Connecticut Insurance Code and by regulations adopted by the Connecticut Insurance Commissioner. Section 3 (b) also gave Lehman Re authority to substitute Eligible Securities for assets held in the Trust Account, subject to certain guidelines.

Plaintiff alleges that, on September 9, 2008, McDonald directed the trustee of the Trust Account to remove $48,650,000 worth of securities from the Trust Account and replace them with certain floating rate debt securities issued by Ballantyne Re PLC, with a purported face amount of $44,500,000 (*Id.* at ¶ 30).

According to plaintiff, Ballantyne Re was a special limited purpose reinsurer which issued complex securities to finance its reinsurance activities. Plaintiff alleges that these Ballantyne Re Securities came from LBHI's own inventory and were worth a fraction of their face value.

Plaintiff further alleges that Appalachian, Messmore, McBeth, and Garg were aware of, authorized, and/or directed this transaction (*Id.* at ¶ 35). Plaintiff alleges that this transaction was completed without Aetna's knowledge or consent.

On September 15, 2008, LBHI filed for bankruptcy. On September 19th, Aetna drew down the assets in the Trust Account as a result of impending insolvency proceedings in Bermuda. Aetna states that it promptly determined that it could not carry the Ballantyne Re securities on its books because they were not of a quality that met the requirements of Connecticut law (*Id.* at ¶ 49.

On October 14, 2008, Aetna sold the Ballantyne Re securities for $4.8 million, which was nearly $40 million less than the defendants had paid for them several weeks earlier.

Aetna commenced the instant action in March of 2010, asserting claims for negligence, gross negligence, recklessness and violation of § 42-110b (a) of the Connecticut Unfair Trade Practices Act.

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On February 17, 2011, Aetna amended the complaint to add a cause of action for breach of fiduciary duty against Appalachian and a cause of action for aiding and abetting such breach against defendants Messmore, McBeth, Garg and McDonald. The amended complaint also omitted the cause of action for gross negligence.

The basis for the new causes of action is a June 1, 1998 Investment Advisory Agreement (IAA) between Lehman Re and Appalachian, under which Appalachian agreed to act as an investment adviser and to manage certain assets which were set forth in a schedule attached to the agreement. Section 1 of the IAA directed Appalachian to invest, and reinvest, the assets on behalf of Lehman Re, in such transactions as Appalachian deemed appropriate, in its sole discretion. However, such discretion was limited by any restrictions set forth in the IAA itself or otherwise provided to Appalachian in writing by Lehman Re.

Section 3 of the IAA granted Appalachian unlimited discretionary trading authority over the assets and authorized Appalachian to issue instructions to any custodian as might be appropriate in connection with the management of the assets.

Aetna alleges that, throughout 2008, LBHI was engaged in a de-leveraging strategy, whereby it attempted to reduce its positions in commercial and residential real estate and leveraged loans (*Id.* at ¶ 25). It undertook this strategy in order to

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combat a "perception issue" about the company that was preventing it from raising equity (*Id.* at ¶ 26). However, it was having trouble reducing its inventory because many of its positions had grown increasingly "sticky", i.e. difficult to sell without incurring a substantial loss (*id.*). The amended complaint states that selling sticky inventory at reduced prices could have led to a loss of confidence in Lehman's valuations for its remaining inventory (*id.*).

Aetna alleges that the substitution of the Ballantyne Re securities was an attempt to reduce the amount of such "sticky" assets from LBHI's books (*Id.* at ¶ 38). It alleges that this transaction took place on the same day that LBHI agreed to post an additional $3.6 billion in collateral to J.P. Morgan to prevent the withholding of funding by J.P. Morgan.

Each of the defendants now moves, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint for failure to state a cause of action. "A motion to dismiss under CPLR 3211 (a) (7) assumes the truth of the material allegations and whatever can be reasonably inferred therefrom and should be denied if, from the pleading's four corners, factual allegations are discerned which when taken together manifest any cause of action cognizable at law" (*Le Bar Bat, Inc. v Shallo*, 198 AD2d 49 [1st Dept 1993] [citation omitted]; *see Equis Corp. v Mack-Cali Realty Corp.*, 6

AD3d 264 [1st Dept 2004]).

Choice of Law

The parties agree that Connecticut law applies to Aetna's claim under CUTPA. The parties also agree, with the exception of Messmore, that Connecticut law applies to Aetna's common-law tort claims and they cite to Connecticut cases in their briefs.

Messmore states that New York law should apply to such claims because there does not "appear" to be a conflict between New York and Connecticut law with respect to these claims (Defendant William Messmore's Memorandum of Law at 9).

"The first step in any choice-of-law analysis is to determine if there is actually a conflict between the laws of the competing jurisdictions. If there is none, then the law of the forum state where the action is being tried should apply" (*SNS Bank v Citibank*, 7 AD3d 352, 354 [1st Dept 2004][citation omitted]).

Here, the parties have not adequately briefed the issue of whether there is a conflict between New York and Connecticut law with respect to the claims for negligence, breach of fiduciary duty and recklessness. Messmore states, generally, that there does not appear to be any substantive difference, but he does not specifically address each cause of action.

"In the context of tort law, New York utilizes interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]). "In applying the interest analysis, a 'distinction [is made] between laws that regulate primary conduct (such as standards of care) and those that allocate losses after the tort occurs" (*Shaw v Carolina Coach*, 82 AD3d 98, 101 [2d Dept 2011], quoting *Cooney v Osgood Mach.*, 81 NY2d 66, 72 [1993]). When the conflicting laws regulate conduct, the law of the place of the tort usually applies because that jurisdiction has the greater interest in regulating behavior within its borders (*id.*).

Here, it is undisputed that Aetna is a Connecticut company with a principal place of business in Hartford, Connecticut. Further, the Coinsurance Agreement and the Trust Agreement both contain a Connecticut choice of law clause. Moreover, the amended complaint alleges that the losses were "felt in the state of Connecticut" and that violations of the Connecticut Insurance Code would be remedied through this litigation (Amended Complaint, ¶ 55).

In light of these factors, the court finds that Connecticut has a greater interest in having its law applied here than does New York (*see id.*). Therefore, the court will apply Connecticut law to the common-law tort claims.

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Unfair Trade Practices

The first cause of action alleges that the substitution of the Ballantyne Re securities violated CUTPA, § 42-110b (a), which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

As a threshold matter, Appalachian argues that this cause of action should be dismissed because CUTPA does not apply to claims arising from the purchase or sale of securities. However, Appalachian improperly raised this argument for the first time in its reply brief, depriving Aetna of an opportunity to respond (*see 385 Third Ave. Assoc., L.P. v Metropolitan Metals Corp.*, 81 AD3d 475 [1st Dept 2011]; *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [1st Dept 2006]; *Cooper v Tomback*, 5 Misc 3d 1007[A], 2004 NY Slip Op 51259[U] [Sup Ct NY County 2004, Ramos, J]).

In any event, the parties have not adequately demonstrated whether the substitution of the securities occurred as the result of a purchase or sale of securities. Therefore, the Court declines to dismiss the first cause of action on these grounds.

Defendants also argue that the first cause of action should be dismissed because the complaint fails to allege the elements of a CUTPA claim.

In determining whether a practice violates CUTPA, Connecticut courts look to the criteria set forth in the

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"cigarette rule" articulated by the Federal Trade Commission for determining when a practice is unfair:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, competitors or other businesspersons

(*Hartford Elec. Supply Co. v Allen-Bradley Co., Inc.*, 736 A2d 824, 842-843 [Conn 1999]). "All three criteria do not need to be satisfied to support a finding of unfairness" (*Id.* at 843). Instead, "[a] practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three" (*id.*).

The amended complaint states that the substitution of the Ballantyne Re securities violated the terms of the Coinsurance Agreement and the Trust Agreement, which governed the manner in which the securities could be invested.

Aetna asserts a CUTPA claim on the grounds: 1) that the substitution of the Ballantyne Re securities violated Connecticut insurance law and regulations, which prohibit certain types of risky investments in accounts such as the Trust account in the

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instant action; and 2) that defendants' actions in making the substitution were unscrupulous because they were done in order to unload sticky assets at Aetna's expense.

The motion to dismiss this cause of action is denied.

Aetna alleges participation by the defendants that offends public policy. The substitution at issue offends public policy because it violated Connecticut insurance law and regulations, which seek to insure that accounts such as the Trust Account have sufficient funds to pay off claims. The amended complaint adequately alleges that it was the defendants here who directed and/or caused the substitution.

According to Aetna, as set forth in its proposed second amended complaint, these defendants acted at the direction of nonparty Christopher McDougal, who was a vice president at nonparty Lehman Brothers, Inc. Aetna states that McDougal regularly directed the substitution of securities into and out of the Trust account and he directed the substitution at issue here.

Although the amended complaint does not distinguish among the other defendants to demonstrate what specific role each one played in connection with the substitution, the allegations are sufficient to sustain the claim at this stage.

If true, the allegation that the substitution was undertaken to help LBHI unload its sticky assets to favor itself, to the

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detriment of Aetna, is sufficient support a CUTPA claim against the parties here.

Breach of Fiduciary Duty

Aetna's second cause of action is for breach of fiduciary duty against Appalachian. The amended complaint alleges that

> Appalachian knew that Aetna was the beneficiary of the Trust Account, knew that the assets in the Trust Account were maintained principally for the benefit of Aetna in order to pay consumer claims on fully paid-up life insurance policies, and knew that the assets in the Trust Account were required to be invested in a conservative manner subject to limitations imposed by the Trust Agreement and statutory and regulatory requirements of the Connecticut Insurance Code (Amended Complaint, ¶ 57).

Aetna also asserts that "Appalachian possessed sole discretion with complete and unlimited discretionary trading authority over the assets in the Trust Account, and therefore owed Aetna a fiduciary duty in its management of the assets in the Trust Account" (*Id.* at ¶ 58).

As a threshold matter, some of the defendants argue that a fiduciary duty could not arise on Appalachian's part because the IAA does not list the Trust assets in the schedule of assets to be managed by Appalachian. They also note that the Trust assets could not have been included in the schedule because the IAA was executed before the Coinsurance Agreement and the Trust were executed. However, Appalachian does not deny that it participated in managing the Trust assets and none of the defendants has adequately demonstrated that the Trust assets were not included in the assets managed by Appalachian. Therefore, the court will assume for the purposes of this motion that the Trust assets were among those managed by Appalachian pursuant to the IAA.

Under Connecticut law, "[a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interest of the other" (*Jarvis v Lieder*, 978 A2d 106, 115 [Conn App 2009][internal quotation marks and citation omitted]). The fiduciary's superior position affords a "great opportunity for abuse of the confidence reposed" in the fiduciary (*id.*).

A fiduciary duty arises "only where one party to a relationship is unable to fully protect its interests [or where one party has a high degree of control over the property or subject matter of another] and the unprotected party has placed its trust and confidence in the other" (*Hi-Ho Tower, Inc. v Com-Tronics, Inc.*, 761 A2d 1268, 1280 [Conn 2000] [internal quotation marks and citation omitted]). "The fact that one business person trusts another and relies on [the person] to perform [its obligations] does not rise to the level of a confidential relationship for purposes of establishing a fiduciary duty" (*id.* [internal quotation marks and citation omitted]).

Here, Aetna has adequately alleged the existence of a fiduciary relationship between itself and Appalachian. The amended complaint sets forth facts that would give rise to a fiduciary duty on Appalachian's part.

Although it is undisputed that there was no direct contractual relationship between Aetna and Appalachian, Appalachian could be found to have assumed Lehman Re's responsibilities. A fiduciary duty can be found to exist because Appalachian had the "complete and unfettered discretion" to manage the Trust assets. This discretion, it is alleged, placed Appalachian in a superior position to Aetna which created a duty on Appalachian's part. This is so, even if the IAA did not provide Appalachian with complete and unfettered discretion to manage the Trust assets and merely directed Appalachian to "engage in such transactions...as Appalachian may deem appropriate, in Appalachian's sole discretion, subject to the Investment guidelines" attached to the IAA, which could be amended by Lehman Re (*see* IAA, ¶ 2). The question is not that Lehman Re, not Appalachian, was supposed to control the types of investments that could be made with the Trust assets, rather it is what was in fact done with those assets and under what circumstances.

The fact that Lehman Re's actual authority, and therefore Appalachian's as well, to engage in transactions involving Trust assets, was limited by the guidelines set forth in the Coinsurance Agreement, (which stated that such transactions were subject to regulation under the Connecticut Insurance Code) can not warrant a dismissal.

Appalachian can be found to have assumed discretion to manage Aetna's funds that would give rise to a fiduciary relationship. Discovery may reveal that it was McDonald, an employee of Lehman Re, who directed the substitution of the Ballantyne Re securities. Although Aetna states, in a conclusory fashion, that defendants "were aware of, authorized, and/or directed the transaction" (Amended Complaint, ¶ 35), the fact that Appalachian admits to administration of some or all of these assets, is sufficient to deny this motion.

Aiding and Abetting

Aetna also asserts a cause of action for aiding and abetting a breach of fiduciary duty, against defendants Messmore, McBeth, Garg, and McDonald. In light of the Court's finding that the amended complaint states a cause of action for breach of

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fiduciary duty by Appalachian, the cause of action for aiding and abetting is sustained at this stage.

Negligence

Aetna's fourth cause of action is for negligence against all of the defendants. The amended complaint asserts that defendants "had a duty to manage the assets of the Trust Account in a reasonably prudent manner" and that they breached that duty in connection with the substitution of the Ballantyne Re securities because they were aware of, authorized, and/or directed such substitution (Amended Complaint, ¶¶ 35, 67, 68). Aetna further asserts that the harm to it was foreseeable because it was the principal beneficiary of the Trust Account (*Id.* at ¶ 69).

The elements of a cause of action for negligence are duty, breach of such duty, causation and damages (*Sturm v Harb Dev., LLC*, 2 A3d 859, 870 [Conn 2010]; *Medcalf v Washington Heights Condominium Assn., Inc.*, 747 A2d 532, 535 [Conn App 2000]). "A duty to use care may arise from a contract, from a statute, or from circumstances under which a reasonable person, knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act" (*Sturm v Harb Dev.*, LLC, 2 A3d at 870-71, quoting *Pelletier v Sordoni/Skanska Constr. Co.*, 945 A2d 388 [2008]; *see Neuhaus v DeCholnoky*, 905 A2d 1135, 1152 [Conn

2006]).

Although a duty of care may arise out of a contract, when the claim is brought against a defendant who is not a party to the contract, the claim must arise from something other than a failure to perform properly under the contract (*Sturm v Harb Dev.*, LLC, 2 A3d at 871; *D'Angelo Dev. & Constr. Corp. v Cordovano*, 995 A2d 79, 91 [Conn 2010]).

For example, in *Sturm*, the plaintiff asserted a claim for negligent construction of a home against the building company with whom it had contracted. The plaintiff also asserted a negligence claim against the principal of the company in his individual capacity. The Connecticut Supreme Court dismissed the claim against the principal on the ground that the only duty of care asserted by the plaintiff arose from an obligation to perform under the contract to which the principal was not a party (*Sturm v Harb Dev.*, LLC, 2 A3d at 871). The plaintiff failed to identify a separate duty owed to it by the principal.

Here, Aetna's claim is that the Ballantyne Re securities were substituted into the Trust in place of more valuable securities, in breach of the terms of the Coinsurance Agreement and the Trust Agreement, which both contained specific guidelines setting forth the manner in which the assets could be managed. Thus, Aetna's claim arises from its assertion that the terms of the contract were not properly performed.

However, neither Appalachian nor any of the individual defendants here was a party to the Coinsurance Agreement or the Trust Agreement. As such, Aetna must allege the existence of a duty arising in connection with something other than defendants' contract-related performance (*see Sturm v Harb Dev.*, LLC, 2 A3d at 871).

Aetna argues that defendants' duty of care arises from common-law foreseeability and public policy (*see* Plaintiff's Memorandum of Law at 20, n 10). Aetna argues that the various defendants each owed Aetna a duty to manage the Trust assets in a prudent manner and failed to do so.

The amended complaint does allege facts to demonstrate that Appalachian assumed a duty of care to Aetna in connection with the management of the Trust assets. The amended complaint suggests that Appalachian could owe a duty of care not only to Lehman Re in connection with performance of the IAA but also to Aetna while administering its assets.

However, the amended complaint does not allege facts to demonstrate that Messmore, Garg, McDonald or McBeth assumed a duty of care to Aetna in their individual capacities.

Therefore, this claim is dismissed as to Messmore, Garg, McDonald or McBeth.

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Recklessness

Aetna's fifth cause of action is for recklessness, asserted against each of the defendants. Aetna alleges that the substitution of the Ballantyne Re securities was "willful, wanton, reckless, highly unreasonable, and involved an extreme departure from ordinary care, in a situation where a high degree of danger to Aetna was apparent" (Amended Complaint, ¶ 74).

Under Connecticut law, recklessness involves "highly unreasonable conduct" and an "extreme departure from ordinary care," where a "high degree of danger is apparent" (*Matthiessen v Vanech*, 836 A2d 394, 402 [Conn 2003]; *Craig v Driscoll*, 813 A2d 1003 [2003]). Here, as set forth above, Aetna has adequately alleged a cause of action for negligence and a violation of CUTPA. Similarly, the cause of action for recklessness is also sustainable. The amended complaint alleges conduct by defendants which involved an extreme departure from ordinary care and/or a high degree of danger.

Amend Complaint/Consolidation

Aetna moves to consolidate this action with an existing action against McDougal in this court, titled *Aetna Life Insurance Company v Christopher McDougal*, Index No. 652476/11. Aetna also seeks leave to file a Consolidated Amended Complaint, which amplifies its allegations against the defendants in the instant action.

"A motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit" (*Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011][internal quotation marks and citation omitted]).

Here, the proposed amended complaint seeks to add certain allegations demonstrating that defendants knew, or should have known, that the Ballantyne Re securities were unsuitable for substitution into the Trust account. Specifically, it sets forth information which was publicly available, such as newspaper and magazine articles, which indicated that the value of such securities was depressed.

The motion to amend is granted.

Accordingly, it is

ORDERED that the motion to dismiss the complaint by defendant Appalachian Asset Management Corp. (motion sequence 5) is denied; and it is further

ORDERED that the motion to dismiss the negligence claim by defendant Sameer Garg (motion sequence 6) is granted, and that claim is dismissed; and it is further

ORDERED that the motion to dismiss the negligence claim by defendant Douglas McBeth (motion sequence 7) is granted, and that

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claim is dismissed; and it is further

ORDERED that the motion to dismiss the negligence claim by defendant William Messmore (motion sequence 8) is granted, and that claim is dismissed; and it is further

ORDERED that the motion to dismiss the negligence claim by defendant Gregory McDonald (motion sequence 9) is granted, and that claim is dismissed; and it is further

ORDERED that the motion to consolidate and for leave to amend the complaint by plaintiff Aetna Life Insurance Company (motion sequence 11) is granted; and it is further

ORDERED that all other motions are denied.

DATED: April 13, 2012

ENTER:

J.S.C.

CHARLES E. RAMOS