STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PAUL ISAAC AND PARAMOUNT SETTLEMENT PLANNING, INC.,

Plaintiffs,

vs.

COMMERCIAL DIVISION
DECISION AND ORDER
Index No.: 2013-883

MEDICAL LIABILITY MUTUAL INS. CO.;
RINGLER ASSOCIATES, INC.;
BLACK, HOLCOMB, SMITH & ASSOC, INC.;
KIPNES CROWLEY GROUP, LLC;
MJW SETTLEMENTS INC.; and
THE PENSION COMPANY,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES:

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WALKER, J.

Defendants have each moved to dismiss Plaintiffs' Second Amended Complaint. The Court considered the parties' submissions and heard oral argument on January 13, 2014. For the reasons that follow, the Court will grant Defendants' motions.

Procedural History and Parties

Plaintiffs Paul K. Isaac and Paramount Settlement Planning, Inc. commenced this action in March 2013, and filed a First Amended Complaint adding two defendants in May 2013. Defendant Medical Liability Mutual Ins. Co. ("MLMIC") moved to dismiss the First Amended Complaint, and the five (5) remaining defendants (the "Broker Defendants") filed similar motions. In response, Plaintiffs cross-moved for leave to amend the complaint a second time.

By oral decision from the bench following argument on July 22, 2013, the Court denied Defendants' motions and granted Plaintiffs' cross-motion. By letter dated August 1, 2013, the Court clarified that the denial of Defendants' motions pertained only to the First Amended Complaint: "In its decision on the record after oral argument, the Court declined to consider Defendants' respective motions as applicable to a proposed pleading that had not yet been served . . . ." (Exhibit A to the Affirmation of Jeremy R. Lacks ("Lacks Aff.")) (emphasis in original).

In the current motions, Defendants seek an order dismissing the Second Amended Complaint for failure to state a claim upon which relief can be granted.[1]

Structured Settlement Annuity Arrangements

Structured settlement annuities convert lump sum damage awards and settlements into periodic payments, and are used in cases involving personal injury and physical sickness (SAC ¶ 16). Federal law authorizes tax-favored treatment for payments made pursuant to structured settlement arrangements, permitting personal injury claimants ("Claimants") to exclude from gross income future periodic payments, provided Claimants do not take actual or constructive receipt of the payments or have the economic benefit of the cash, annuity or obligation funding the payments (*Id.* ¶ 17). Periodic payments pursuant to a structured settlement arrangement are generally either (i) self-funded by the defendant's liability insurer; (ii) funded by that liability insurer's purchase of an asset, typically an annuity, which remains an asset of the liability insurer; or (iii) funded by a third-party assignee – typically affiliated with a life insurance company issuing an annuity – that receives a lump sum payment from the liability insurer and assumes responsibility for the periodic payments to Claimants (*Id.* ¶ 18). This case deals with the third category of structured settlement arrangements.

Plaintiffs' Allegations

What follows are Plaintiffs' allegations relative to the motions pending before the Court, with references to the Second Amended Complaint.

[1] A copy of the Second Amended Complaint is attached as Exhibit B to the Lacks Aff. and is cited as "SAC."

Paul K. Isaac is a licensed insurance agent and the owner of Paramount Settlement Planning, Inc. ("Paramount") (SAC ¶ 14). Plaintiffs are in the business of designing and writing annuities for structured settlements and supplemental needs trusts for Claimants (i.e., that Plaintiffs act as "Claimants' Brokers") (*Id.* ¶ 15), and work with Claimants' personal injury attorneys to prepare structured settlement packages and proposals for Claimants in the underlying personal injury litigation (*Id.* ¶ 21).

As to Defendants, MLMIC is an insurer that "utilizes the services of a structured settlement broker to provide benefits to [Claimants]" (*Id.* ¶ 23), and is the "largest medical malpractice carrier in New York . . . ." (*Id.* ¶ 26). The Broker Defendants sell structured settlement annuity products throughout New York State (*Id.* ¶ 20), and compete with Plaintiffs "for the same structured settlement opportunities" (*Id.* ¶¶ 20, 22).

As compensation for services in preparing and placing structured settlement annuities, brokers are paid a standard sales commission of four percent (4%) of the annuity's cost (*Id.* ¶ 31). Although MLMIC selects the broker, this commission is paid directly by the life insurance company to the broker and not by MLMIC (*Id.* ¶ 41), and "[i]n practical reality that commission is generally broken down to 2% [paid] to [the Broker Defendants] and 2% [paid] to [Claimants' Brokers, such as Plaintiffs]" (*Id.* ¶ 31).

In negotiating structured settlements with Claimants, MLMIC mandates that Claimants forgo the retention of Claimants' Brokers and instead utilize the Broker Defendants (*Id.* ¶¶ 29, 36). The "intent, purpose and effect" of MLMIC's conduct is to deny free competition in the structured settlement market and deny Claimants the ability to hire their own brokers (*Id.* ¶ 36). An additional consequence is the "doubling" of the commissions paid to the Broker Defendants

who, pursuant to MLMIC's mandate, are prohibited from sharing their commissions with Claimant's Brokers, like Plaintiffs (*Id.* ¶¶ 38-39, 42). Plaintiffs allege that the Broker Defendants collude and conspire with MLMIC to enforce this scheme by, for instance, omitting Plaintiffs' names from the form sent to the life insurance company, and by not paying Plaintiffs one-half of the 4% commission (*Id.* ¶¶ 40-41). Finally, Plaintiffs contend that MLMIC's exclusive use of the Broker Defendants has resulted in a "conspiracy," "monopoly" and "unlawful restraint of trade." (*Id.* ¶¶ 43-46, 49, 55-64).

In support of their allegations, Plaintiffs quote unidentified correspondence, purportedly from MLMIC's attorneys, dictating that Claimants' Brokers may not share in commissions (*Id.* ¶ 37); allege, upon information and belief, that MLMIC requires attorneys representing Claimants, as a condition precedent to settlement, to sign this letter and agree that any annuity structure will be arranged by one of the Defendant Brokers (*Id.* ¶ ¶ 46-48); refer to conversations with representatives of certain of the Broker Defendants, in which these individuals advised Plaintiffs that MLMIC prohibited them from sharing their commissions with Plaintiffs (*Id.* ¶ 39); allege that unidentified personal injury attorneys advised Plaintiffs that MLMIC will not conduct settlement negotiations involving Claimants' Brokers (*Id.* ¶ 53); and allege that, when Plaintiffs asked unnamed MLMIC representatives about doing business with MLMIC, they were told that MLMIC only worked with the Broker Defendants and would not allow Claimants' Brokers to participate in the process (*Id.* ¶ 54).

Based on these allegations, Plaintiffs claim Defendants violated New York General Business Law ("GBL") Section 340 (New York's Antitrust Statute) (the "Donnelly Act") (*Id.*¶¶

30, 64), and New York General Obligations Law Section 5-1702, et seq. (New York's Structured Settlement Protection Act) (the "SSPA") (*Id.* ¶¶ 67-70)

Discussion

A. Standard of Review.

In deciding a motion to dismiss, the complaint shall be liberally construed and the court "must determine whether the allegations in the complaint set forth a cause of action" (*Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 609 [2d Dep't 2002]; *see* CPLR 3026;). Accepting the factual allegations in the complaint as true and affording the plaintiff the benefit of every favorable possible inference, the court must determine "whether the facts alleged in the complaint fit within any cognizable legal theory" (*Palladino v. CNY Centro, Inc.*, 70 A.D.3d 1450, 1451 [4th Dep't 2010]). While the facts are presumed to be true, the presumption "does not apply to allegations consisting of bare legal conclusions" (*SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 331 [2d Dep't 1987]; *see also Dominski v. Frank Williams & Son, LLC*, 46 A.D.3d 1443, 1444 [4th Dep't 2007] ["While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support"] [citation omitted]; *Mazur v. Ryan*, 98 A.D.2d 974, 976 [4th Dep't 1983] ["mere conclusory allegations are not deemed to be true when examining the sufficiency of a petition against a motion to dismiss"]).

Moreover, "[s]tatements in a pleading . . . shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved . . . " (CPLR 3013). Failure to provide a factual basis for each cause of

action is fatal (*see, e.g., DiPace v. Figueroa*, 128 A.D.2d 942, 942-43 [3d Dep't 1987]; *Shapolsky v. Shapolsky*, 22 A.D.2d 91, 92 [1st Dep't 1964] [complaint that fails to give notice of the material elements of each cause of action does not comply with minimal requirements of CPLR 3013]; *Drexel Burnham Lambert Grp., Inc. v. Vigilant Ins. Co.*, 157 Misc. 2d 198, 214-15 [Sup. Ct. N.Y. County. 1993] [dismissing complaint where plaintiff failed to "spell out the individuals involved, what transactions, when they occurred and when they were discovered"]).

B. The Donnelly Act Claims.

The Donnelly Act prohibits any contract, agreement, arrangement or combination whereby:

> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained. . . .

(GBL §340[1]).

In order to state a claim under the Donnelly Act, a plaintiff must (1) identify the relevant market affected, (2) describe the nature and effect of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and

(4) show a conspiracy or reciprocal relationship between two or more entities (*see, e.g., Shaw v. Club Managers Ass'n of Am., Inc.*, 84 A.D.3d 928, 929 [2d Dep't 2011]; *Capitaland United Soccer Club Inc. v. Capital Dist. Sports & Entm't Inc.*, 238 A.D.2d 777, 779 [3d Dep't 1997]). A plaintiff's failure to allege any one of these elements is fatal to the claim (*Shaw v. Club Managers Ass'n of Am., Inc.*, 2010 N.Y. Slip Op. 30511(U), *4 [Sup. Ct. Nassau County. Mar. 1, 2010], *aff'd*, 84 A.D.3d at 929).

In the First Amended Complaint, Plaintiffs alleged that MLMIC violated the Donnelly Act by refusing to include Plaintiffs among the limited group of annuity brokers with which it does business. In the Second Amended Complaint, which differs slightly, Plaintiffs now allege that MLMIC mandates that Claimants not retain Plaintiffs, and that the Broker Defendants not share commissions with Plaintiffs.

However, a Donnelly Act claim requires pleading facts that show "a reciprocal relationship of commitment between two or more legal or economic entities" (*State v. Mobil Oil Corp.*, 38 N.Y.2d 460, 464 [1976]). The Fourth Department has recognized that "the statutory term 'arrangement,' like the statutory terms 'contract,' 'agreement' and 'combination,' refers to bilateral conduct and does not connote a 'one-sided practice'" (*Matter of Commonwealth Elec. Inspection Servs., Inc. v. Town of Clarence*, 6 A.D.3d 1185, 1186 [4th Dep't 2004]). Moreover, a complaint that describes only unilateral conduct may not infer a conspiracy based upon that conduct in order to defeat a motion to dismiss (*see, LoPresti v. Mass. Mut. Life Ins. Co.*, 5 Misc. 3d 1006(A), 2004 N.Y. Slip Op. 51223(U), *2 [Sup. Ct. Kings County. Oct. 19, 2004], *aff'd*, 30 A.D.3d 474, 475 [2d Dep't 2006]).

In short, routine bilateral business dealings that may have the effect of disadvantaging certain competitors are "not . . . the type of 'arrangement' that gives rise to a cause of action under the Donnelly Act" (*Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 356 (1st Dep't 1989) (Sullivan, J. dissenting) (citing *Mobil Oil*, 38 N.Y.2d at 464), *rev'd for reasons in dissenting opinion*, 75 N.Y.2d 830 [1990]). Rather, as Justice Sullivan noted:

> Conspirators under the antitrust laws include competitors who agree among themselves to fix prices, competitors who agree among themselves to divide markets, competitors who agree among themselves to boycott a fellow competitor, and competing distributors who conspire among themselves and with a supplier to terminate a fellow distributor for selling at a discount (*Creative Trading*, 148 A.D.2d at 356 [citations omitted]).

Specifically, Plaintiffs allege that MLMIC selects an annuity broker to place a structured settlement annuity (SAC ¶¶29, 36) and, as a condition of that selection, requires that the selected broker accept a commission check paid by the life insurance company without paying half of that commission to Plaintiffs. (*Id.* ¶41). Within this sequence of actions, Plaintiffs allege an agreement or several agreements between MLMIC and one or all of the Broker Defendants to discriminate against Plaintiffs. Plaintiffs assert that it is this agreement or set of agreements that constitutes the reciprocal conduct giving rise to the conspiracy. (*Id.* ¶¶42-45).

These allegations are "impermissibly vague and conclusory" and cannot sustain a Donnelly Act claim (*LoPresti*, 30 A.D.3d at 475). The Second Amended Complaint lacks any reference to the "date, time or place" of the supposed conspiracy (*Victoria T. Enters., Inc. v. Charmer Indus., Inc.*, 63 A.D.3d 1698, 1698 [4th Dep't 2009]); *see also Creative Trading*, 148 A.D.2d at 355 (plaintiff cannot simply "parrot the words 'conspiracy and reciprocal relationship',

without specifying the dates or places relevant to the alleged conspiracy"). Plaintiffs also fail to describe when, where and how the conspiracy began; who from Defendants participated in or furthered the conspiracy or how they did so; when and how the conspiracy was discovered; or the existence, substance or content of any meeting or communication between alleged coconspirators.

Unable to define the conspiracy with particularity, Plaintiffs infer it, while alleging only unilateral conduct.

In *Mobil Oil*, the Court of Appeals held that an oil company's allegedly discriminatory distribution of rebates to certain dealers failed to state a Donnelly Act claim, because plaintiff offered no evidence of a bilateral agreement between the oil company and its dealers (38 N.Y.2d at 464). Although the court recognized that the conduct alleged was "bilateral" in the sense that "it pertains both to the oil company and to its dealers," the court determined that "there is no allegation of any **agreement** or **commitment** on the part either of the oil company or of its dealers or any of them" (*Id.*) (emphasis added). The court added that the "addition of a conclusory allegation as to the **effect** of a described practice . . . cannot operate, of course, to bring a one-sided practice which is outside the scope of the statute within its proscription" (*Id.*) (emphasis added).

Similarly, Plaintiffs allege wholly unilateral conduct on the part of MLMIC in selecting a broker on the condition that the broker not share its commission, and wholly unilateral conduct on the part of the Broker Defendants in accepting a commission paid by a life insurance company. Aside from the fact that the conduct pertains to both MLMIC and the Broker

Defendants as parties involved in business transactions, Plaintiffs point to no actual agreement or commitment.

Instead, Plaintiffs add a conclusory allegation that Defendants have violated the Donnelly Act based on the effect of these one-sided practices - namely, Plaintiffs' purported loss of commissions in which they "generally" share (SAC ¶31).

In *Creative Trading*, plaintiff trade show exhibitors claimed that the defendant trade show organizers conspired with certain exhibitors to provide them with preferred booth placement (148 A.D.2d at 354). The Court of Appeals dismissed the claim, adopting the reasoning in Justice Sullivan's dissent to the First Department's ruling in the case (75 N.Y.2d 830 [1990]). Justice Sullivan's dissent noted that agreements with exhibitors were a necessary aspect of the defendants' business and that entry into such agreements did not necessarily make the defendants party to a conspiracy (148 A.D.2d at 355-56). Justice Sullivan drew a distinction between bilateral agreements that discriminate against a competitor - which potentially violate the Donnelly Act - and those agreements that merely have the effect of disadvantaging a competitor, which do not (*Id).* Justice Sullivan then focused on the "first come, first served" aspect of plaintiffs' allegations, concluding that the plaintiffs' "real grievance" was not with the manner in which the defendants allocated booth space, but rather its disadvantageous effect - namely, inferior space (*Id.* at 356). He then noted that alleging such an effect is not sufficient to plead a Donnelly Act conspiracy, and that the complaint failed to allege that the preferred exhibitors had agreed to pay first **both** in order to obtain preferred exhibition space **and** in order to discriminate against the plaintiffs, which would constitute a conspiracy (Id. at 357).

Plaintiffs are analogous to the disadvantaged exhibitors in *Creative Trading*: instead of being compensated by sharing in commissions paid by the life insurance company - their preferred method of payment - MLMIC's alleged unilateral insistence on the use of a particular broker requires Plaintiffs to seek payment for their services directly from Claimants. Thus, Plaintiffs' grievance is not that they are barred from advising Claimants in structured settlements altogether - in fact, they are not - but rather **how they get paid**. Instead of looking to the Broker Defendants for compensation, Plaintiffs must instead look to Claimants. Like the trade show exhibitors operating in an inferior location, Plaintiffs are not barred from plying their trade altogether; MLMIC's alleged conduct merely forces Plaintiffs to participate from an inferior position. But *Creative Trading* makes clear that conduct that has the effect of placing a competitor in an inferior position does not violate the Donnelly Act unless Plaintiffs can allege some reciprocal conduct designed to discriminate against them (148 A.D.2d at 357). Such allegations are absent here.

LoPresti (2004 N.Y. Slip Op. 51223(U)), is also directly on point. In that case, an insurance salesperson (who sold retirement annuities to employees of a nonprofit hospital) alleged that the hospital had conspired with insurance carriers to limit the pool of annuity providers with which hospital employees could deal in establishing retirement annuities, excluding plaintiff and thereby denying him commissions (2004 N.Y. Slip Op. 51223(U) at *2). The trial court dismissed the complaint, in part because the allegations were "devoid of any facts to suggest that the limiting of 403(b) providers at [the hospital] had anything to do with a conspiracy, as opposed to a unilateral act by [the hospital] that may have inured to the benefit of other existing 403(b) providers" (*Id.*) The trial court specifically rejected plaintiff's attempt to

infer a conspiracy from the hospital's unilateral actions, finding that "[t]here is no allegation here that any defendant gave or received consideration to or from the other for instituting the limitation of choice of annuity providers" (*Id.* at *4). The Second Department affirmed, stating that plaintiff's "vague, conclusory allegations [were] insufficient to adequately plead conspiracy or reciprocal relationship between two or more entities" (30 A.D.3d at 475).

As in *LoPresti*, Plaintiffs seek to infer the existence of a reciprocal conspiracy without facts suggesting anything other than unilateral conduct by MLMIC in selecting brokers that inures to the benefit of the Broker Defendants and to the detriment of Plaintiffs.

Numerous other courts, including the Fourth Department, have similarly recognized that allegations of purely unilateral conduct cannot support a Donnelly Act claim (*see, e.g., Commonwealth Elec.*, 6 A.D.3d at 1186 [enactment of ordinances by a municipality was a "purely unilateral" act that did not give rise to a Donnelly Act claim]; *Yankees Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 678-79 [S.D.N.Y. 2002] [dismissing Donnelly Act claim where plaintiff regional sports network alleged no facts to suggest that the defendant cable operator's refusal to carry plaintiff network "was the product of a conspiracy or reciprocal arrangement, as opposed to a unilateral act" that inured to the benefit of certain competitor networks]; *Beyer Farms Inc. v. Elmhurst Dairy, Inc.*, 142 F. Supp. 2d 296, 301 [E.D.N.Y. 2001] [plaintiff failed to allege that dairy processor/supplier had conspired with other suppliers to divide up retail outlets where "[t]he only factual allegations supporting this claim . . . deal exclusively with the conduct and decisions of Elmhurst alone"], *aff'd* 35 Fed. Appx. 29 [2nd Cir. 2002]).

In addition to requiring reciprocal conduct, allegations of a monopoly "must be supported by proof of power in the relevant market rather than by a mere presumption thereof" (*Victoria T. Enters.*, 63 A.D.3d at 1699 *quoting Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 36 [2006]). "Market power" in the antitrust context is defined as an entity's ability "to raise prices significantly without losing business" or, more generally, "to impose onerous economic terms without suffering competitive detriment" (*Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 732 [2012]).

Beyond the repeated use of the term "monopoly" (SAC ¶¶28, 57, 59, 61, 63-64), the Second Amended Complaint contains no allegations detailing the extent of MLMIC and the Broker Defendants' market power in the relevant market or their ability to charge higher prices in the market for structured settlement annuities. There is no allegation that life insurance companies pay the Broker Defendants anything more than the standard 4% commission typically paid in structured settlements or that MLMIC has imposed onerous economic terms on Claimants. Plaintiffs' allegation that Claimants are compelled as a result of Defendants' purported conspiracy to purchase structured settlement annuities "at rates and fees . . . which may not be competitive in the industry" is vague, conclusory and unsupported elsewhere in the Second Amended Complaint (*see Victoria T. Enters.*, 63 A.D.3d at 1699 [bare allegation that a seller controls a specific brand of product is insufficient to establish that the seller has market power]).

Furthermore, Plaintiffs' allegations as to MLMIC's size in the market for malpractice insurance (SAC ¶¶24-28) do not support the notion that this power affects Claimants' rights when considering settlement of malpractice claims. In particular, Plaintiffs' allegation that

Claimants are "invariably forced at some point to deal with" MLMIC has nothing to do with anticompetitive conduct on the part of MLMIC, the use of a broker to structure a settlement, or an attempt to restrain trade. Rather, that Claimants must deal with MLMIC to resolve their claims results entirely from the defendant-healthcare provider's choice of insurer. Claimants' purported lack of choice in this area is no different from any other personal injury litigant who claims to have been harmed by a defendant carrying insurance; the claimants do not choose the insurer with which to negotiate because that choice has already been made. Once a claim arises, Claimants cannot try to settle with a different malpractice insurer any more than MLMIC can try to settle with a different claimant. In the absence of factual allegations regarding Defendants' market power in the relevant market, Plaintiffs' boilerplate references to a monopoly are insufficient to survive a motion to dismiss (*see, Floors-N-More, Inc. v. Freight Liquidators*, 142 F. Supp. 2d 496, 502 [S.D.N.Y. 2001]).

The Second Amended Complaint also fails to allege antitrust injury in the form of a restraint of trade namely, "that the challenged action has had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice" (*Korshin v. Benedictine Hosp.*, 34 F. Supp. 2d 133, 137 [N.D.N.Y. 1999]) (quotations and citations omitted).

Although Plaintiffs allege that Claimants are harmed by being unable to retain Plaintiffs (SAC ¶¶43-44, 50-54, 56, 60), these allegations do not sufficiently specify the nature of the harm, nor do they show that the harm occurs within Plaintiffs' market. First, MLMIC's alleged insistence on using the Broker Defendants to place a structured settlement annuity does not, as Plaintiffs claim, require that Claimants forgo representation and advice altogether. Indeed,

Claimants remain free to hire a representative, including Plaintiffs, to provide advice and the other services Plaintiffs describe. Moreover, MLMIC is not required to enter into structured settlements with Claimants at all, and settlement of litigation is always voluntary. MLMIC's alleged insistence on using the Broker Defendants represents a negotiating position that Claimants must weigh against the tax advantages of a structured settlement annuity. Even accepting Plaintiffs' allegations as true, the Second Amended Complaint at most alleges that MLMIC's conduct forces Claimants who choose to pursue annuities to accept them "at rates and fees . . . which may not be competitive in the industry . . . ." (*Id.* ¶*60*). Such a vague and equivocal statement, without more, does not rise to the level of antitrust injury.

Such harm to Claimants, to the extent it occurs at all, does so within the market in which Plaintiffs **do not operate** - the market for settling personal injury litigation - and Plaintiffs lack standing to assert claims on behalf of Claimants.

Analyzing an identical claim in the structured settlement market, the Ninth Circuit Court of Appeals concluded that an insurer's exclusion of a particular plaintiffs' broker does not constitute an antitrust injury **in the broker's market** based on alleged harm to tort plaintiffs (*see Legal Econ. Evaluations, Inc. v. Metro. Life Ins. Co.*, 39 F.3d 951, 954-56 [9th Cir. 1994])[2]. As the court explained, "the alleged harm to competition - decreased annuity benefits to tort plaintiffs . . . nevertheless occurs in markets in which [the broker] does not compete" (*Id.* at 955) (emphasis added). The court continued, "[e]ven if tort plaintiffs as a class are worse off because a plaintiff's broker might be able to find a better deal, their harm flows from what makes a structured settlement economically attractive, not from anticompetitive conduct. . . . [T]o the

[2]The claim was brought under the Clayton Act (15 USC §15).

extent that tort plaintiffs are harmed, that harm arises **in the market for settling litigation**" (*Id.*) (emphasis added). Simply, MLMIC's conduct that allegedly denies Plaintiffs a share of brokerage commissions does not restrain Plaintiffs from providing services to personal injury claimants or harm competition in the market for such services.

Plaintiffs' focus on the alleged harm to Claimants merely distracts from their true grievance: lost commissions. (SAC ¶¶38-42). However, under New York law, a single competitor's financial injury - such as a loss of profits or commissions - is not a cognizable antitrust injury that can sustain a Donnelly Act claim (*Victoria T. Enters.*, 63 A.D.3d at 1699; *see also Continental Guest Services Corp v International Bus Serv.*, 92 AD3d 570, 573 [1st Dept 2012] [plaintiff hotel concierge desk company did not suffer antitrust injury from vertical arrangements between bus company and ticker distributors; plaintiff failed to allege an antitrust injury in that market, i.e. "attributable to an anti-competitive aspect of the practice under scrutiny"]; *Benjamin of Forest Hills Realty Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 97-98 [2d Dep't 2006] ["behavior which hurts or even destroys an individual competitor is not illegal under anti-trust laws unless it also adversely affects competition" and competitor's loss of commissions is "clearly not tantamount to injury to competition in the market as a whole"] [citation omitted]; and *Simon & Son Upholstery, Inc. v. 601 W. Assocs. LLC*, 2003 N.Y. Slip Op. 51281(U), *4 [Sup. Ct. N.Y. County Aug. 27, 2003] ["antitrust laws are concerned with acts that harm competition, not competitors"] [quotation and citation omitted]).

The trial court in *LoPresti* reached an identical conclusion, noting that the plaintiff was not a hospital employee whose choice had been limited - as Claimants' choice of brokers has allegedly been limited here - but rather a competing salesperson whose sole injury was the loss of

commissions (*LoPresti,* 2004 N.Y. Slip Op. 51223(U), at *3). The Second Department affirmed, concluding that the complaint "failed to identify . . . an injury to competition cognizable under the statute" (*LoPresti,* 30 A.D.3d at 475).

C. The SSPA Claims.

Plaintiffs allege that MLMIC has "continuous[ly] violat[ed]" the SSPA (SAC ¶68). However, these violations can only be enforced by the "attorney general in the name of the people of the state of New York" or by "[a]ny payee injured by a violation of this title" (GOL § 5-1709[b]). Plaintiffs are neither the Attorney General, nor payees injured by MLMIC's alleged violations of the SSPA (*see* GOL § 5-1701[h], defining "payee" as "an individual who is receiving tax free payments under a structured settlement and proposes to make a transfer of payment rights thereunder").

Thus, Plaintiffs lack standing and legal capacity to bring a claim under the SSPA (CPLR 3211[a][2]; CPLR 3211[a][3]).

Substantively, section 5-1702 (e) obligates a defendant who proposes a structured settlement to advise the settling plaintiff to obtain "independent professional advice" regarding the settlement. Plaintiffs cannot qualify as "independent advisors", because the compensation to which they claim entitlement here **is** "affected by whether a settlement ... occurs" (GOL §5-1701[e][iii]).

CONCLUSION

For the reasons set forth above, it is hereby

ORDERED, that Defendants' respective motions to dismiss are hereby granted, in their entirety; and it is further

ORDERED, that the Second Amended Complaint is hereby dismissed, with prejudice.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The mailing of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: April 23, 2014
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

APR 23 2014

BY JOHN H. GARDO, JR.
COURT CLERK