

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
IN RE PLATINUM-BEECHWOOD LITIGATION,	:	Index No. 18-CV-6658 (JSR)
	:	
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	:	
MELANIE L. CYGANOWSKI, as Equity	:	Index No. 18-CV-12018 (JSR)
Receiver for PLATINUM PARTNERS	:	
CREDIT OPPORTUNITIES MASTER	:	
FUND LP, PLATINUM PARTNERS	:	
CREDIT OPPORTUNITIES FUND (TE)	:	
LLC, PLATINUM PARTNERS CREDIT	:	
OPPORTUNITIES FLIND LLC,	:	
PLATINUM PARTNERS CREDIT	:	
OPPORTUNITIES FUND	:	
INTERNATIONAL LTD., PLATINUM	:	
PARTNERS CREDIT OPPORTUNITIES	:	
FLIND INTERNATIONAL (A) LTD., and	:	
PLATINUM PARTNERS CREDIT	:	
OPPORTUNITIES FUND (BL) LLC,	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
BEECHWOOD RE LTD., <i>et al.</i> ,	:	
	:	
Defendants.	::	
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**MEMORANDUM OF LAW IN SUPPORT OF DAVID OTTENSOSER’S PARTIAL
MOTION TO DISMISS THIRD-PARTY COMPLAINT OF BANKERS CONSECO
LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE
COMPANY**

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We respectfully submit this memorandum of law in support of David Ottensoser's partial motion to dismiss certain causes of action in the third-party complaint (ECF No. 204, the "TPC") of Bankers Consec Life Insurance Company and Washington National Insurance Company (collectively, the "TPPs") pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

FACTUAL BACKGROUND

Count One and Count Two of the TPC allege that Ottensoser and others engaged in a Racketeer Influenced and Corrupt Organizations Act ("RICO") enterprise "to defraud WNIC, BCLIC and other institutional investors and to obtain their money and property by means of false pretenses, representations and promises" and "fraudulently induce institutional investors, such as WNIC and BCLIC, to entrust funds to Beechwood and the Co-conspirators via reinsurance or other arrangements under which the Co-conspirators would control the institutional investors' assets." *Id.* ¶¶ 789, 796. The money and property obtained from the TPPs was then allegedly channeled into funds owned or controlled by Platinum Management. *See id.* ¶¶ 532, 550-571.

Count Eighteen of the TPC alleges that any liability attributed to WNIC and BCLIC from the PPCO Receiver is "wholly as a result of the fraudulent and other wrongful conduct of each of the Cross-claim and Third-party Defendants that WNIC and BCLIC sue in this action," and on that basis WNIC and BCLIC are entitled to indemnity from, *inter alia*, Ottensoser. *Id.* ¶ 921.

Count Nineteen of the TPC alleges that "[a]ll of the Cross-claim and Third-party Defendants in this action were unjustly enriched, at WNIC's and BCLIC's expense." *Id.* ¶ 924.

ARGUMENT

To avoid unnecessary duplication, Ottensoser expressly adopts the legal analysis and standards set forth in the various motions to dismiss (and corresponding memoranda) filed by Cross-Claim or Third-Party Defendants of the Third-Party Complaint of Bankers Consec Life

Insurance Company and Washington National Insurance Company, that apply to Count One (Violation of Civil RICO), Count Two (RICO Conspiracy), Count Eighteen (Contribution and Indemnity), and Count Nineteen (Unjust Enrichment). *See, e.g.*, ECF Nos. 332, 352, 360.

As more thoroughly explained in this Court's April 23, 2019 Opinion (ECF No. 292, the "Opinion"), the TPPs' RICO claims (Count One and Count Two) are barred by Section 107 (the "RICO Amendment") of the Private Securities Litigation Reform Act ("PSLRA"). Specifically, the gravamen of TPPs' RICO allegations is that third-party defendants "funneled [TPPs'] assets into Platinum-related securities." Opinion at 21. Because "the funds were obtained precisely for the purpose of acquiring the securities . . . the RICO Amendment applies." *Id.* at 22.

Count Eighteen of the TPC is barred because the Receiver's claims against the TPPs are based on intentional or fraudulent conduct. *See* First Am. Compl., *Cyganowski v. Beechwood Re Ltd.*, No. 18-cv-06658 (S.D.N.Y. Mar. 29, 2019), ECF No. 209. But "courts have held that indemnification is not available with respect to any . . . claims . . . which are based in part on [plaintiff's] intentional conduct." *Charmac Props., Inc. v. Pike*, 1993 WL 427137, at *6 (S.D.N.Y. Oct. 19, 1993) (collecting cases).

Count Nineteen of the TPC is barred because TPPs have not alleged with specificity that Ottensoser was actually enriched, much less how, by the alleged conduct. *See* TPC ¶ 924. Moreover, "the existence of a valid and binding contract governing the subject matter at issue in a particular case *does* act to preclude a claim for unjust enrichment even against a third party non-signatory to the agreement." *Law Debenture v. Maverick Tube Corp.*, 2008 WL 4615896, at *12 (S.D.N.Y. Oct. 15, 2008) (collecting cases), *aff'd sub nom. Law Debenture Tr. Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458 (2d Cir. 2010). Here, the unjust enrichment claims

are predicated on the reinsurance agreement between TPPs and Beechwood Re. Accordingly, a claim for unjust enrichment cannot lie.

CONCLUSION

For all the foregoing reasons, and for all the reasons set forth in the motions and memoranda by all other moving Cross-Claim or Third-Party Defendants, David Ottensoser respectfully requests the Court enter an order dismissing Counts One, Two, Eighteen, and Nineteen of the TPC as against him, with prejudice.

Dated: May 15, 2019

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