UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION	Consolidated Case No. 18-cv-6658 (JSR)
MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, Plaintiffs, v. BEECHWOOD RE LTD., et al. Defendants.	Civil Action No. 18-cv-12018 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Third-Party Plaintiffs, v. MARK NORDLICHT, et al., Third-Party Defendants.	

THIRD-PARY DEFENDANT WILL SLOTA'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF THIRD-PARTY PLAINTIFFS WASHINGTON NATIONAL INSURANCE COMPANY AND BANKERS CONSECO LIFEINSURANCE COMPANY PURSUANT TO FED R. CIV. P. 9(b) and 12(b)(6)

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Defendant Will Slota ("Slota"), by his undersigned attorneys, respectfully submits the following memorandum of law in support of his motion pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Third-Party Complaint (the "TPC")[1] of third-party plaintiffs Washington National Insurance Company ("WNIC") and Bankers Conseco Life Insurance Company ("BCLIC") (WNIC and BCLIC are collectively the "TPPs").

PROCEDURAL HISTORY

Slota is filing this motion today, eight days after the filing of motions by other third-party defendants, pursuant to a so-ordered stipulation filed May 16, 2019 (ECF No. 208), which confirmed that a second service of the TPC extended Slota's time to respond to the TPC.[2, 3]

STATEMENT OF FACTS

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

ARGUMENT

[redacted]

POINT I
THE RICO COUNT MUST BE DISMISSED AS TO SLOTA AS IT IS BARRED BY STATUTE AND RIFE WITH PLEADING AND PROCEDURAL DEFICIENCIES

To establish a violation of 18 U.S.C. § 1962(c) a plaintiff must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *DeFalco v. Bernas*, 244 F.3d

[redacted]

286, 306 (2nd Cir. 2001). A pattern of racketeering activity consists of two or more "predicate acts," which are enumerated at 18 U.S.C. § 1961(1), (5). *In re Platinum-Beechwood Litigation*, No. 18-cv-6658 (JST), 2019 WL 1759925, *7 (S.D.N.Y. Apr. 22, 2019).

A. RICO does not apply to claims arising out of the purchase or sale of securities

18 U.S.C. § 1964(c) provides in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962*.

(Emphasis added.)

Last month, in separate litigation (the "SHIP Action"), this Court granted a motion by Beechwood Re and several related persons to dismiss a RICO claim based on mail fraud and wire fraud based [redacted]. Relying on *MLSLK Investment Co. v. JP Morgan Chase & Co.*, 651 F.3d 268 (2nd Cir. 2011), this Court held that the RICO claim was barred by express language of 18 U.S.C. § 1964(c) for the principle that [redacted] *In re Platinum-Beechwood Litigation*, 2019 WL 1759925, *8.

Likewise, in this action the TPPs assert a RICO claim against the cross-claim defendants and third-party defendants on the grounds that [redacted]

[redacted]. Under the reasoning of this Court's decision in the SHIP Action, the RICO claim at Count One must be dismissed as barred by 18 U.S.C. § 1964(c).

B. Numerous fatal pleading deficiencies require dismissal of the RICO Count

In addition to being barred by 18 U.S.C. § 1964(c), the RICO claim is riddled with defects. Although it relies on alleged predicate acts of wire fraud and mail fraud, there is insufficient information pleaded about the few communications specifically alleged to be sent by email, and otherwise the TPC makes impermissible blanket allegations that all communications alleged were conducted by email. It consists of impermissible "group pleading," alleging generally that the Defendants collectively committed predicate acts. It fails to allege predicate acts with the required particularity, which is especially high when it comes to mail fraud and wire fraud. [redacted]

1. Count One does not identify two predicate acts committed by Slota

All elements of a RICO cause of action must be pleaded adequately against each defendant alleged to be part of the enterprise: "The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d)" (i.e., the RICO conspiracy statute). *DeFalco*, 244 F.3d at 306, *citing U.S. v. Persico*, 832 F.2d 705 (2nd Cir. 1987).

The starting point for evaluating the viability of a RICO claim is the allegation of predicate acts, since they are the basic elements of a "pattern of racketeering activity."[18] The TPPs specify that the predicate acts constituting a pattern of racketeering activity are mail fraud and wire fraud as defined at 18 U.S.C. § 1341 and 18 U.S.C. § 1343, respectively. TPC 789. However, [redacted] Count One consists of impermissible "group pleading": identifying a group of defendants and alleging that they collectively perpetrated predicate acts. In the same way that the TPC consistently attributes actions collectively to the open-ended collection of "Co-conspirators," Count One omits any attempt at pleading with particularity. [redacted]

Wire fraud and mail fraud are subject to the heightened pleading requirements of Fed. R. Civ. Proc. 9(b). Such allegations must state the contents of the communications, who was involved, where and when they took place, and explain why they were fraudulent." *Knoll v. Schechtman*, 275 F. App'x 50, 51 (2nd Cir. 2008), *citing Mills v. Polar Molecular Corp.*, 12 F.3d

[18] "'Pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years…after the commission of a prior act of racketeering activity. 18 U.S.C. § 1961(5). [redacted]

1170, 1176 (2nd Cir.1993). In *Knoll*, a RICO claim based on predicate acts of wire fraud set forth the dates, locations, senders and recipient of the allegedly fraudulent communications, but the Court of Appeals for the Second Circuit still dismissed it because it made only conclusory assertions as to their contents and the reason each communication was fraudulent. *See also Gross v. Waywell*, 629 F. Supp.2d 475, 494-95 (S.D.N.Y. 2009)(particularity sufficient for purposes of Federal Rule of Civil Procedure 9(b) requires details regarding the alleged predicate acts in which each particular defendant was directly or indirectly involved or had responsibility, as well as information concerning where, when and by which defendant any representations involved in the alleged fraudulent scheme constituting deception of plaintiffs were communicated by use of the mail and/or wires, and how such statements actually deceived plaintiffs).

Similarly, as referenced above, the heightened particularity requirements of Rule 9(b) renders impermissible group pleading (pleading RICO predicate acts by a group of defendants, without itemizing which defendant performed which predicate act). *Gross* at 495 (S.D.N.Y. 2009) ("Thus, the pleadings do not indicate individually which of the three defendants actually engaged in the particular predicate acts of mail or wire fraud offenses that Plaintiffs allege constitutes a pattern of racketeering. Such 'group pleading' does not comply with the requirements of RICO or the particularity standards of Rule 9(b).")

[redacted]

[redacted]

2. The four-year RICO Statute of Limitations has expired as to Slota

The statute of limitations for civil claims under the RICO statute is four years. *Koch v. Christie's International PLC*, 699 F.3d 141, 148 (2nd Cir. 2012). In order to establish a defendant's violation of section 1962(c), at least one predicate act must have been committed *by that defendant* within the limitations period. *Persico*, 832 F.2d at 714, citing *U.S. v. Walsh*, 700 F.2d 846, 851 (2nd Cir. 1983). The TPC was filed on March 27, 2019. [redacted]

3. Count One fails to plead a pattern of racketeering activity

[redacted]

However, the "pattern" element of RICO contains other requirements, in particular, as relevant here, a showing of "continuity." Continuity "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *In re Platinum-Beechwood Litigation*, 2019 WL 1759925, *10. Where the pattern is closed-ended, the Second Circuit has held that predicate acts occurring over less than a two-year period may not be deemed a pattern. *Id., citing First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 168 (2nd Cir. 2004).

[redacted]

[redacted]

4. Count One does not sufficiently plead the "conduct or participate" element of RICO

[redacted]

> To conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs requires participation in the operation or management of the enterprise. In this Circuit, the operation and management test is an extremely rigorous test. There is a substantial difference between actual control over an enterprise and association with an enterprise in ways that do not involve control; only the former is sufficient…because the test is not involvement but control. It is not enough to merely take directions and perform tasks that are necessary and helpful to the enterprise. Nor is it enough to simply provide…services that ultimately benefit the enterprise. The deciding issue, then, is whether the provision of these services allows the defendant to direct the affairs of the enterprise.

U.S. Fire Insurance v. United Limousine Service, Inc., 303 F.Supp.2d 432, 451-52 (S.D.N.Y. 2004) (internal citations and punctuation omitted).

[redacted]

[redacted].

POINT II
THE RICO CONSPIRACY COUNT MUST BE DISMISSED AS TO SLOTA

In the absence of a viable substantive RICO claim under 18 U.S.C. § 1962(c), there can be no RICO conspiracy. "Any claim under section 1962(d) based on a conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient." *Knoll*, 275 Fed. App'x at 51; *Nasik Breeding & Research Farm Ltd. v. Merck & Co., Inc.*, 165 F. Supp.2d 514, 541 (S.D.N.Y. 2001).

Further, Count Two fails due to insufficient pleading of the elements of RICO conspiracy. To state a claim for RICO conspiracy: "a plaintiff must allege that each defendant, by words or actions, manifested an agreement to commit two predicate acts in furtherance of the common purpose of a RICO enterprise. An individual may be liable only if he knew of the conspiracy's goals and agreed to facilitate them." *Nasik Breeding*, 165 F. Supp.2d at 540. The plaintiff must allege as to each alleged co-conspirator:

> (1) an agreement to join the conspiracy; (2) the acts of each co-conspirator in furtherance of the conspiracy; (3) that the co-conspirator knowingly participated in the same. Bare and conclusory allegations are insufficient to withstand a motion to

> dismiss and a plaintiff must plead facts sufficient to show that each defendant knowingly agreed to participate in the conspiracy.

Id. (dismissing conspiracy claim where plaintiff did not specifically allege any agreement among the defendants to defraud it). [redacted]

POINT III
THE FRAUD AND FRAUDULENT INDUCEMENT COUNT MUST BE DISMISSED AS TO SLOTA

Common law fraud requires a "representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Kaufman v. Cohen*, 307 A.D. 2d 113, 119 (1st Dep't 2003). Common law fraud based on an omission requires that a plaintiff specify "(1) what the omissions were; (2) the person responsible for the failure to disclose; (3) the context of the omissions and the manner in which they misled plaintiff; and (4) what defendant obtained through the fraud." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 293 (S.D.N.Y. 2000). Where a fraud claim is grounded in an alleged omission, there must be a showing that a duty of disclosure existed. *In re Stage Presence, Inc.*,

[redacted]

Case No. 12-10525 (MEW),18-cv-10662 (JSR), 2019 WL 2004030, *8 (S.D.N.Y. May 7, 2019).

After several hundred paragraphs of factual allegations, Count Three starts over again, making broad conclusory allegations [redacted]

[redacted]

POINT IV
THE AIDING AND ABETTING FRAUD COUNT MUST BE DISMISSED AS TO SLOTA

It is well-settled that:

> …[A] claim of aiding and abetting fraud requires a plaintiff to plead pursuant to Rule 9(b), Fed.R.Civ.P., the existence of a fraud, a defendant's knowledge of the fraud, and a defendant's substantial assistance to advance the commission of the fraud. With respect to a defendant's knowledge of the fraud, the actual knowledge of the fraud may be averred generally. Pleading knowledge in the alternative with an allegation of reckless disregard is insufficient to allege a claim. The substantial assistance prong is fulfilled where a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed. Substantial assistance requires a plaintiff to allege that the action of the aider and abettor proximately caused the harm on which the primary liability is predicated. The injury suffered by the plaintiff must be a direct or reasonably foreseeable result of the conduct.

In re WorldCom, Inc. Securities Litigation, 382 F.Supp.2d 549, 560 (S.D.N.Y. 2005) (internal citations and punctuation omitted). [redacted]

[redacted]

[redacted]

[redacted] "A corporate officer is individually liable for fraudulent acts or false representations *of his own, or in which he participates*, even though his actions in such respect may be in furtherance of the corporate business." *Cohen v. Koenig*, 25 F.3d 1168, 1173 (2nd Cir. 1994), *citing A–1 Check Cashing Service, Inc. v. Goodman, 148 A.D.2d 482, 482 (2nd Dept. 1989)*(emphasis added).

[redacted]

[redacted]

[redacted]

POINT V
THE AIDING ABETTING BREACH OF FIDUCIARY DUTY COUNT MUST BE DISMISSED AS TO SLOTA

"To state a claim for aiding and abetting breach of fiduciary duty, a plaintiff must show (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2nd Cir. 2006). As with aiding and abetting fraud, these elements must be pleaded with particularity. *Krys v. Pigott*, 749 F.3d 117, 129 (2nd Cir. 2014).

[redacted]

[redacted]

POINT VI
THE CLAIMS FOR CONTRIBUTION AND INDEMNIFICATION MUST BE DISMISSED AS TO SLOTA

[redacted]

Indemnification is not available to persons held liable for common law intentional torts. *Barbagallo v. Marcum LLP*, No. 11–CV–1358, 2012 WL 1664238, *7 (E.D.N.Y. May 11, 2012); *Chamarac Properties v. Pike*, No. 86 Civ. 7919 (KMW), 1993 WL 427137, *6 (S.D.N.Y. Oct. 19, 1993). Neither contribution nor indemnification is available to persons held liable for federal statutory claims, including RICO, *Friedman v. Hartmann*, 787 F. Supp. 411, 415 (S.D.N.Y. 1992), and securities law violations, *In re Residential Capital*, LLC, 524 B.R. 563, 594-96 (Bankr. S.D.N.Y. 2015).

Contribution for intentional torts requires a showing of how the acts of the party against whom contribution is sought caused injury to the person injured. *Amusement Industry, Inc. v.*

[25] ECF 1.

Stern, 693 F.Supp.2d 319, 324 (S.D.N.Y. 2010). [redacted]

[redacted]

The Eighteenth Count must be dismissed as to Slota.

POINT VII
THE UNJUST ENRICHMENT/CONSTRUCTIVE TRUST COUNT MUST BE DISMISSED AS TO SLOTA

> The essence of an unjust enrichment claim is that one party has received money or a benefit at the expense of another. To bring such a claim, the plaintiff must have bestowed the benefit on the defendant. It is not sufficient for defendant to receive some indirect benefit—the benefit received must be specific and direct to support an unjust enrichment claim.

M + J Savitt, Inc. v. Savitt, No. 08 Civ. 8535(DLC), *10, 2009 WL 691278 (S.D.N.Y. Mar. 17, 2009)(internal citations omitted).

[redacted]

Even under the low pleading threshold of Rule 8, a court may not credit "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Gillespie*, 343 F. Supp. 3d at 339, *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "This pleading standard does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Geldzahler v. N.Y. Med. Coll.*,

663 F. Supp. 2d 379, 385 (S.D.N.Y. 2009). All the more so does an unjust enrichment claim require dismissal of a threadbare claim when, where as here, it is subject to Rule 9(b) because it is based on claims arising out of alleged fraud. *Tyman v. Pfizer, Inc.*, 16-CV-06941 (LTD)(BCM), 2017 WL 6988936 (S.D.N.Y. Dec. 27, 2017).

CONCLUSION

For the foregoing reasons, each Count asserted against Slota, and the TPC in its entirety, should be dismissed with prejudice as against Slota.

Dated: New York, NY
May 23, 2019

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing THIRD PARTY DEFENDANT WILL SLOTA'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT AND CROSS CLAIMS PURSUANT TO FED R. CIV. P. 9(b) and 12(b)(6) was electronically served on all counsel of record in the above-captioned matter by the EM/ECF system on this 23rd day of May, 2019.

Respectfully submitted,

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