UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	Civil Action No. 1:18-cv-06658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Cross-Claim and Third-Party Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, et al., Cross-Claim and Third-Party Defendants.	Civil Action No. 1:18-cv-12018 (JSR)

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT ON BEHALF OF DEFENDANTS CNO FINANCIAL GROUP, INC. AND 40|86 ADVISORS, INC.

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PRELIMINARY STATEMENT

In their opening brief, Defendants CNO Financial Group, Inc. ("CNO") and 40|86 Advisors, Inc. ("40|86 Advisors") demonstrated that the Receiver's claims should be dismissed for at least two reasons. *First*, the Receiver alleges no facts plausibly suggesting that either Defendant is liable. *Second*, neither Defendant is subject to personal jurisdiction in New York. Nothing in the Receiver's opposition changes the conclusion that the claims against CNO and 40|86 Advisors should be dismissed.

I. THE RECEIVER DOES NOT IDENTIFY FACTUAL ALLEGATIONS IN HER FIRST AMENDED COMPLAINT PLAUSIBLY SUGGESTING THAT CNO OR 40|86 ADVISORS ARE LIABLE TO PPCO.

In their opening brief, CNO and 40|86 Advisors demonstrated that the Receiver's RICO, aiding and abetting, and securities fraud claims against them were wholly conclusory and relied largely on unidentified misrepresentations.[1] The Receiver does little to dispute this—nor can she: the FAC is simply deficient.

The Receiver alleges nothing to support her RICO claims against CNO or 40|86 Advisors. Neither defendant is mentioned (either specifically or generally as part of the "CNO Defendants") in the portion of her opposition brief devoted to RICO. *See* Opp. Br., at 20-25. By failing to rebut CNO's and 40|86 Advisors' motion to dismiss the RICO claims, the Receiver has waived those claims. *See Lipton v. Cty. of Orange, N.Y.*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004) ("This Court

[1] Unless stated otherwise, citations to the docket refer to the docket in *Cyganowski v. Beechwood Re et al.*, 1:18-cv-12018-JSR. Citations to "Br." refer to CNO's and 40|86 Advisors' brief in support of their motion to dismiss (Dkt. No. 174). Citations to "Opp. Br." refer to the Receiver's opposition brief (Dkt. No. 256). Citations to paragraph numbers refer to the First Amended Complaint (Dkt. No. 83, the "FAC"), and defined terms have the same meaning as those in the FAC.

may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.").

To support her aiding and abetting claims, the Receiver merely argues that she has adequately pleaded aiding and abetting as to the "CNO Defendants." She does not identify any action undertaken specifically by CNO or 40|86 Advisors, however. But as set forth in BCLIC's and WNIC's reply brief in support of their motion to dismiss—which is incorporated by reference here—the Receiver cannot rely on group pleading. Moreover, her allegations against BCLIC and WNIC fall well short of satisfying the pleading standard of Rule 8, let alone Rule 9(b), and, for that reason too, fails to state claims for aiding and abetting against CNO or 40|86 Advisors.

The Receiver fares no better in defending her securities fraud claim against CNO and 40|86 Advisors:

First, the Receiver generally concludes that CNO (but not 40|86 Advisors) made unidentified "misrepresentations" to PPCO. *See, e.g.*, Opp. Br., at 25–27, 30–31. That is, of course, insufficient to meet the stringent PSLRA pleading requirements. 15 U.S.C. § 78u-4(b)(1) ("[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.").

Second, the Receiver argues that she has pleaded "facts demonstrating that CNO and 40|86 Advisors' Chief Investment Officer, Eric Johnson [], who was also the Executive Vice President for BCLIC and WNIC, knew the truth behind the Platinum-related transactions at issue." Opp. Br., at 28. But conclusory allegations alone are insufficient to plead securities fraud. *See Kosovich v. Metro Homes, LLC*, 2009 WL 5171737, at *3 (S.D.N.Y. Mar. 30, 2009). And the mere fact that

the CNO Defendants shared an officer is insufficient to establish liability against corporate affiliates. *See Kalin v. Xanboo, Inc.*, 526 F. Supp. 2d 392, 404 (S.D.N.Y. 2007) (merely having common offices, principals, and owners is insufficient to impute liability).

Third, the Receiver argues that her "Fifth Claim for Relief sufficiently pleads violations of Section 20 of the Exchange Act" by alleging that CNO (but not 40|86 Advisors) was a "control person of BCLIC and WNIC." Opp. Br., at 34. But the Receiver's fifth cause of action is brought against only Feuer and Taylor. ¶¶ 317–21. The Receiver argues that CNO was "obviously" intended to be included in this cause of action but was omitted due to a "scrivenor's [sic] error." Opp. Br., at 35 n.11. This is belied by her own allegations: the fifth cause of action describes conduct by only Feuer and Taylor—it does not mention any of the CNO Defendants. ¶¶ 317–21. Perhaps even more tellingly, the Receiver's original complaint asserted a Section 20 claim against only Feuer and Taylor. *See* Dkt. No. 1, ¶¶ 519–23. This was not mere oversight. The Receiver could have corrected this "obvious[]" error when amending her complaint, but chose not to. In any case, the Receiver does not explain how her amended complaint pleads *facts* showing that CNO "was in some meaningful sense a culpable participant in" the controlled person's fraud, a necessary element of Section 20 liability. *In re Alston SA Sec. Litig.*, 406 F. Supp. 2d 433, 486 (S.D.N.Y. 2005) (quotation omitted). To do so, the Receiver "must state with particularity facts giving rise to a strong inference that the defendant acted with recklessness." *Id.* at 491. The conclusory allegations that CNO "directed" BCLIC's and WNIC's activities fall well short of that requirement. *Id.* at 493 (allegation that defendant exercised "control" over alleged bad actor was "not enough to plead culpable participation").

In short, the Receiver fails to state any claims against either CNO or 40|86 Advisors and her claims against them should be dismissed.

II. **CNO AND 40|86 ADVISORS ARE NOT SUBJECT TO PERSONAL JURISDICTION IN NEW YORK.**

The Receiver does not seriously dispute that this Court lacks general personal jurisdiction over CNO or 40|86 Advisors. Yet she advances several meritless theories of potential specific personal jurisdiction over CNO and 40|86 Advisors.

First, the Receiver argues that CNO and 40|86 Advisors are subject to jurisdiction in New York because they "transacted business" here. Opp. Br., at 59. But the Receiver points to nothing either company has done in New York. Instead, she concludes that CNO and 40|86 Advisors "directed" BCLIC and WNIC to enter into various transactions in New York, subjecting CNO and 40|86 Advisors to jurisdiction here. *Id.* Such conclusory allegations are insufficient to establish personal jurisdiction. *See First Capital Asset Mgmt. v. Brickellbrush, Inc.*, 218 F. Supp. 2d 369, 395 (S.D.N.Y. 2002) (conclusory allegation that defendant "dominates and controls" the alleged agent is a "conclusory allegation of control [that] is not sufficient to make out [a] *prima facie* showing of jurisdictional facts"), *aff'd sub nom. First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004). Moreover, most of the paragraphs cited by the Receiver merely describe alleged conduct by the "CNO Defendants" (¶¶ 176, 181, 207, 329, 336), which is insufficient to establish personal jurisdiction over CNO or 40|86 Advisors specifically. *Tera Grp., Inc. v. Citigroup, Inc.*, 2018 U.S. Dist. LEXIS 169625, at *8 (S.D.N.Y. Sept. 28, 2018) ("This group pleading—conflating UBS AG and UBS Securities LLC as 'UBS'—fails to establish personal jurisdiction over 'each defendant.'"). The Receiver cites no case exercising jurisdiction under CPLR § 302(a)(1) under similar circumstances.

Second, the Receiver argues that CNO (but not 40|86 Advisors) is subject to personal jurisdiction in New York because "BCLIC and WNIC acted in New York for the benefit of, with the consent of, and under the control of CNO." Opp. Br., at 60. But to establish agency

jurisdiction, the Receiver "must proffer not bland assertions, but specific facts that show agency." *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 316 (S.D.N.Y. 1986). That is because "the presence of the subsidiary alone does not establish the parent's presence in the state." *Jazini by Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998). Under identical circumstances, the Second Circuit recently affirmed dismissal of a corporate parent on jurisdictional grounds because the plaintiff merely alleged that it "controlled or otherwise directed or materially participated in the operations" of its New York subsidiaries. *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 86 (2d Cir. 2018) (holding that this "bare allegation" was not sufficient to establish personal jurisdiction). The facts here are also remarkably similar to *J.L.B. Equities, Inc. v. Ocwen Fin. Corp.*, where the plaintiff sought to exercise jurisdiction over Ocwen, a "holding company whose business is the management and investment of the excess cash of its subsidiaries." 131 F. Supp. 2d 544, 549 (S.D.N.Y. 2001). Ocwen's New York subsidiary, by contrast, was a "savings and loan institution, engaged in the specialty financial services business and the servicing of resident and commercial mortgages." *Id.* Based on the highly-specialized nature of the subsidiary's operations, the court refused to find jurisdiction under an agency theory, concluding that there was no evidence that the subsidiary "conducted business in New York that Ocwen would have done if it were in state with its own officials." *Id.* The same is true here: CNO is a holding company; BCLIC and WNIC are highly-regulated insurers. *See* ¶¶ 52–53, 129, 152. The Receiver's conclusory allegations that BCLIC and WNIC were agents of its corporate parent do not suffice, and the Receiver cannot rely on agency jurisdiction.[2]

[2] The Receiver argues "[a]lternatively" that CNO and 40|86 Advisors are subject to *general* personal jurisdiction in New York under the "mere department" test. Opp. Br., at 60. But the "mere department" test only applies if the subsidiary is financially dependent on the parent (among other factors). *See Jazini by Jazini*, 148 F.3d at 185. Here, by contrast, the Receiver alleges that

Third, the Receiver argues that CNO and 40|86 Advisors committed tortious acts in Indiana that they "knew would damage PPCO Master Fund, a New York party." Opp. Br., at 61. But the relevant provision of New York's long-arm statute provides that the "situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 209 (2d Cir. 2001) (internal quotation marks omitted). Read charitably (and making a few inferential leaps), the Receiver alleges that CNO and 40|86 Advisors engaged in misconduct in Indiana that caused financial harm to PPCO in New York. The "original event," therefore, was in Indiana—not New York. What's more, the Receiver alleges no facts concerning any act, let alone a tortious one, committed by CNO or 40|86 Advisors in Indiana or anywhere else.

Fourth, the Receiver argues that CNO is subject to personal jurisdiction in New York because it conspired with bad actors who operated here. At a bare minimum, the Receiver must allege that "a conspiracy existed." *Schwab*, 883 F.3d at 87. But the Receiver merely concludes that CNO conspired with others; she does not allege facts plausibly suggesting the existence of a conspiratorial agreement. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007) (requiring dismissal of complaint that "does not set forth a single fact in a context that suggests an agreement"). Even if the Receiver had pleaded facts plausibly suggesting a conspiratorial agreement (and she has not), it is doubtful that conspiracy jurisdiction comports with due process. For example, in *Walden v. Fiore*, the Supreme Court clarified that it has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts

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the parent (CNO) was financially dependent on its subsidiaries (BCLIC and WNIC). ¶ 129. The "mere department" theory of personal jurisdiction therefore does not apply. *See J.L.B. Equities, Inc.*, 131 F. Supp. 2d at 549 (no jurisdiction when "the facts alleged suggest that the [subsidiary] generates the bulk of [the parent's] income").

between the plaintiff (or third parties) and the forum state." 134 S. Ct. 1115, 1122 (2014). That is precisely what conspiracy jurisdiction (improperly) seeks to do—link a defendant to a jurisdiction through the acts of third parties (the alleged co-conspirators). *See, e.g.*, *In re N. Sea Brent Crude Oil Futures Litig.*, 2017 U.S. Dist. LEXIS 88316, at *31–32 (S.D.N.Y. June 8, 2017) ("It therefore stands to reason that a defendant has not established minimum contacts with a forum on the basis of his co-conspirator's conduct in the forum state alone."); *In re Dental Supplies Antitrust Litig.*, 2017 U.S. Dist. LEXIS 153265, at *30 (E.D.N.Y. Sept. 20, 2017) ("[I]t is highly unlikely that any concept of conspiracy jurisdiction survived the Supreme Court's ruling in *Walden* . . . .").

Fifth, the Receiver argues that CNO and 40|86 Advisors are bound by forum selection clauses in the "PPCO Loan Transactions documents." Opp. Br., at 62. But the Receiver conveniently glosses over the fact that *none* of the CNO Defendants are parties to those transactions. *See* Weinick Decl., Dkt. No. 70, Exs. A–G. Undeterred, the Receiver argues that those agreements subject CNO and 40|86 Advisors to jurisdiction in New York because these defendants were "otherwise involved in the transaction." Opp. Br., at 62. But she identifies no factual allegations supporting that conclusion. And, the Receiver herself admits that it was the ***Platinum Insiders*** who "caus[ed] and execut[ed] all of the wrongful acts alleged" in the FAC. Opp. Br., at 16.

In short, CNO is merely the ultimate parent holding company, and that is no basis to exercise jurisdiction over it. It merely owns stock in companies that own BCLIC and WNIC, and under settled law that is not enough. The jurisdictional case against 40|86 Advisors is—if possible—even more specious, as the Receiver barely mentions that entity in the FAC, as it is merely a financial advisor and an affiliate of BCLIC and WNIC. The Receiver has simply gone

too far in trying to exercise jurisdiction over these nonresident entities, and her specious arguments should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the Receiver's claims against Defendants CNO and 40|86 Advisors should be dismissed.

Dated: June 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 26th day of June, 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this adversary proceeding.

/s/Adam J. Kaiser
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