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 REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF THIRD-PARTY PLAINTIFFS WASHINGTON NATIONAL INSURANCE COMPANY AND BANKERS CONSECO LIFE INSURANCE COMPANY PURSUANT TO FED R. CIV. P. 9(b) and 12(b)(6)

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Defendant Slota, by his undersigned attorneys, respectfully submits the following reply memorandum of law in further support of his motion to dismiss the TPC as to him.

POINT I
THE RICO CLAIM FAILS IN GENERAL AND AS TO SLOTA IN PARTICULAR

A. The RICO claim is precluded under the plain terms of the statute

Slota relies on the arguments in his initial brief (the "Initial Brief," Doc. 232) in support of dismissal of the RICO Count on the grounds that the RICO Count is precluded as a matter of law, *In re Platinum-Beechwood Litigation*, No. 18-cv-6658 (JSR), 2019 WL 1759925, *7-8 (S.D.N.Y. Apr. 22, 2019) ("In re Platinum-Beechwood Litigation II"), and, to the extent they are consistent, adopts the arguments of the other moving third-party defendants.

As discussed below, CNO[1] seeks to employ a special "group pleading" exception to the prohibition on group pleading in actions subject to the heightened pleading requirements of Rule 9(b). (Opposition Brief at 3-6.) However, the authority on which this Court relied in applying the exception in an earlier decision in additional related litigation, *In re Platinum-Beechwood Litigation*, 2019 WL 1570808, 18-cv-6658 (JSR), 18-cv-10936 (JSR), *8, 15-17 (S.D.N.Y. Apr. 11, 2019) ("In re Platinum-Beechwood Litigation I"), shows that the group pleading exception appears in *securities fraud* actions. *Luce v. Edelstein*, 802 F.2d 49, 55 (2d Cir. 1986); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp.2d 372, 405 (S.D.N.Y. 2010); *Elliott Assocs., L.P. v. Hayes*, 141 F. Supp.2d 344, 354 (S.D.N.Y. 2000). CNO cannot have it both ways: either the RICO claim is based on predicate acts that would have been actionable as securities fraud and

[1] The Initial Brief identified third-party plaintiffs WNIC and BCLIC as plural "TPPs." The Omnibus Memorandum of Law (the "Opposition Brief") (Doc. 253) filed in opposition to the pending motions to dismiss (other than the motion by Lincoln) refers to WNIC and BCLIC collectively as the singular plaintiff "CNO." This reply brief adopts the abbreviation "CNO."

the group pleading exception applies—in which case the claim is precluded by the RICO statute—or it is not so based and the group pleading exception does not save its group pleading.

B. CNO does not address the fatal defects in the RICO count as to Slota

The Initial Brief showed that (1) CNO failed to identify what conduct by Slota constitutes predicate acts (Initial Brief at 11-14), (2) the RICO count is time-barred as to him (*Id*. at 14), (3) Slota appears in the TPC far less than the minimum two-year period required to show continuity for the purposes of establishing a pattern (*Id*. at 14-15), and (4) there are no factual allegations sufficient to show Slota's "participation" in the purported RICO scheme (*Id*. at 15-16). Slota is unique among the third-party defendants: his alleged participation in the events described in the TPC lasts no longer than six months, and there are no allegations of any conduct by him within the RICO statute of limitations period. The section of the Opposition Brief defending the RICO Count does not refer to him, let alone try to explain why he is a proper defendant.[2]

When a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed, the claim should be deemed abandoned. *In re Platinum-Beechwood Litigation I*, 2019 WL 1570808, *19. CNO should be deemed to have abandoned the RICO Count as to Slota.

1. CNO has failed to identify predicate acts

The Initial Brief enumerates the very few actions attributed to Slota in the TPC. (Initial Brief at 4-9) As set forth there, a plaintiff asserting a claim for wire fraud or mail fraud must plead detailed information, including, among numerous other elements, the reason each communication was fraudulent and as to how such statements actually deceived plaintiffs. (*Id*. at 13.) CNO failed to do so. That failure is fatal.

[2] Although the Opposition Brief directs the Court's attention to certain exhibits to the Polivy Declaration (Doc. 254), which index factual allegations as to the third party defendants, it does not reference Exhibit P (Doc. 254-16), the index of references to Slota by name.

The Opposition Brief argues generally in response to the various motions to dismiss that group pleading is permissible here by referring to the "group pleading" exception on which this Court relied in *In re Platinum-Beechwood Litigation I*, 2019 WL 1570808, *13-17. This Court found the doctrine applicable to Bodner, Huberfeld, Ottensoser, Levy, Saks, and the Estate of Uri Landesman, relying on the three securities fraud cases referenced in Point A, i.e., *Luce*, *Anwar*, and *Elliott Associates*. The *Elliott Associates* decision states:

> The group pleading doctrine is an exception to the requirement that the fraudulent acts of each defendant be identified separately in the complaint. *The doctrine allows plaintiffs to rely on a presumption that statements in prospectuses, registration statements, annual reports, press releases, or other group-published information, are the collective work of those individuals with direct involvement in the everyday business of the company*. Where the defendants are insiders, no specific connection between them and the fraudulent representations is necessary. Accordingly, where the defendants are a narrowly defined group of highly ranked officers or directors who participated in the preparation and dissemination of a published company document, plaintiffs are not expected to bear the burden of having to identify the role of each defendant in the fraud without the benefit of any discovery. However, *the group pleading doctrine is extremely limited in scope*. One such limitation is that it applies only to group-published documents, such as SEC filings and press releases.

141 F. Supp.2d at 354 (emphasis added, internal citations and punctuation omitted).

In *In re Platinum-Beechwood Litigation I*, this Court applied the group pleading exception (a) in the context of particular statements issued by those defendants over several years, i.e.: "the relevant published statements for purposes of the [First Amended Complaint's] fraud-based claims are the Platinum Defendants' persistently inflated reports of PPVA's[3] net asset value," *In re Platinum-Beechwood Litigation I*, 2019 WL 1570808, *15, and (b) the

[3] PPVA refers to Platinum Partners Value Arbitrage Fund L.P., a "multi-strategy hedge fund. *In re Platinum-Beechwood Litigation I*, 2019 WL 1570808, *2.

particularly-alleged extensive involvement in the operation of the scheme by the moving defendants, *Id*., *16. There is nothing comparable alleged as to Slota. Group pleading can be used only for a period in which the defendant was a corporate insider.[4] *In re Alstom S.A.*, 406 F. Supp.2d 433, 449-50 (S.D.N.Y. 2005). Slota appears in the TPC for no more than a six-month period (November 2013 to March 2014), which ended a month after CNO signed the Reinsurance Agreements. [redacted]

As to the argument that findings as to other third-party defendants in separate litigation bind Slota, this action is his first appearance in Platinum-Beechwood litigation, and there should be no presumptions as to him from any findings in those other actions to which he is not a party.

CNO is not entitled to the group pleading exception on the grounds that "the particulars of the fraud claims are particularly within the knowledge of the defendants," Opposition Brief at

[4] Further, the use of the term "insider" to refer to Slota is questionable since CNO makes no attempt to establish a defined meaning of "insider," whether for the purpose of RICO wire/mail fraud or common law fraud. (Reliance on the definition of "insider" as used in securities fraud claims would confirm that CNO considers this action to be one for securities fraud and so cannot proceed with a RICO claim.)
[redacted]

5-6, *citing Sunrise Indus. Joint Venture v. Ditric Optics, Inc.*, 873 F. Supp. 765, 772 (E.D.N.Y. 1995). To the contrary, it is apparent that CNO has had access to enough of other third-party defendants' documents to generate a "fact rich Complaint." (Opposition Brief at 6.)[6]

2. CNO has not contested that the RICO claim against Slota is time-barred

The RICO claim should be deemed abandoned and dismissed if only for this reason. *In re Platinum-Beechwood Litigation I*, 2019 WL 1570808, *19.

3. CNO has not contested the absence of a pattern of predicate acts by Slota

In addition, CNO has forfeited any position on the argument that there is no continuity in a pattern of racketeering that lasts less than two years. It rejected Saks' authority for that argument, *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), but ignored Slota's authority, *In re Platinum-Beechwood Litigation II*, which is determinative. In fact, CNO ignores this defect by obfuscating the nature of the claim as a RICO conspiracy, which does not require a minimum two-year period. This tactic does not save the substantive RICO claim.[7]

4. CNO has not contested that the TPC lacks a showing of participation by Slota

CNO did not respond to Slota's arguments that the TPC lacks any sufficient allegations of his alleged participation in the alleged RICO scheme, thereby conceding that this claim should be dismissed. To the extent the Court nonetheless considers the claim, Slota addresses CNO's authority directed to other third-party defendants (and not him). First, *Baisch v. Gallina*, 346 F.3d 366, 376–77 (2d Cir. 2003), is distinguishable since the defendants were alleged to exercise

[6] The statement that "the particularity requirement of Rule 9(b) is appropriately relaxed where the individual defendant is a corporate insider," *Sunrise Indus. Joint Venture*, 873 F. Supp. at 772, is not relevant to Slota. The insider defendant in that fraudulent transfer action was the transferee and the sole shareholder of the defendant transferor.

[7] *Fresh Meadow Food Servs., LLC v. RB 175 Corp.*, 282 Fed. App'x. 94, 99 (2d Cir. 2008), should be disregarded as irrelevant. It refers to the two-year minimum for a pattern of racketeering activity and holds that predicate acts over a three-year period constituted a pattern.

discretionary authority and direction over the enterprise far greater than Slota's. *Maersk, Inc. v. Neewra, Inc.*, 687 F. Supp.2d 300, 335 (S.D.N.Y. 2009), a decision on which CNO relies, cautioned that "the simple taking of directions and performance of tasks that are 'necessary or helpful' to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c)." Slota's alleged actions over the course of a few months, with no indication of any ongoing discretion or authority were, at best, merely "necessary or helpful."

POINT II
THE RICO CONSPIRACY COUNT FAILS AS TO SLOTA

CNO did not respond to Slota's arguments that (a) there can be no RICO conspiracy claim in the absence of a viable substantive RICO violation and that (b) CNO failed to plead any particular facts alleging that Slota agreed to participate in a RICO conspiracy. Slota thus relies on the Initial Brief in support of his motion to dismiss this Count.

POINT III
THE FRAUD AND FRAUDULENT INDUCEMENT COUNT FAILS AS TO SLOTA

CNO repeats the allegation that Slota misrepresented himself to be the COO of Beechwood Re and BAM to show that Beechwood had a "deep bench of management experience." (Opposition Brief at 34.) [redacted]

[redacted]

At most, CNO has alleged but-for causation, not proximate causation. There is no explanation of how the minimal alleged communications by Slota, assuming only for the sake of argument that he actually did make misrepresentations, induced CNO to enter into the Reinsurance Agreements and then not terminate them, and how such misrepresentations could have proximately caused any injury. CNO does not allege that Slota said anything other than that he worked for Beechwood. There is no indication, however, of anything so significant in his

profile that his alleged affiliation with Beechwood could have induced CNO to entrust several hundred million dollars to Beechwood.

POINT IV
THE AIDING AND ABETTING COUNTS FAIL AS TO SLOTA

The aiding and abetting section of the Opposition Brief shows most clearly how far CNO seeks to lead the Court into speculation. [redacted]

[8] As noted in the Initial Brief, there is no allegation as to how long Slota was part of this effort or if he succeeded.

[redacted]

[redacted]

POINT V
THE CONTRIBUTION AND INDEMNITY COUNT FAILS AS TO SLOTA

The Initial Brief accurately argued that indemnification is not available for statutory intentional torts such as RICO (Initial Brief at 23) and therefore the indemnification claim must be dismissed as to Slota. The Initial Brief further showed that contribution for intentional torts requires a showing of how the party from whom contribution is sought injured the person seeking to recover against the party seeking contribution, *Amusement Industry, Inc. v. Stern*, 693 F.Supp.2d 319, 324 (S.D.N.Y. 2010).[10] As set forth above, there are no non-conclusory allegations as to how any conduct by Slota proximately caused the injury for which the Receiver seeks to recover, and therefore the contribution and indemnity count must also be dismissed as to Slota.

[10] The Opposition Brief correctly states that *In re Residential Capital, LLC*, 524 B.R. 563 (Bankr. S.D.N.Y. 2015) does not refer to contribution; Slota withdraws his reliance on that decision. The contribution count should be dismissed on the basis of *Amusement Industry*.

POINT VI
THE UNJUST ENRICHMENT COUNT FAILS AS TO SLOTA

Slota relies on his Initial Brief in support of his motion to dismiss this count. [11]

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
June 26, 2019

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[redacted]

CERTIFICATE OF SERVICE

I hereby certify that the foregoing THIRD PARTY DEFENDANT WILL SLOTA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF THIRD-PARTY PLAINTIFFS WASHINGTON NATIONAL INSURANCE COMPANY AND BANKERS CONSECO LIFE INSURANCE COMPANY 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 26th day of June, 2019.

Respectfully submitted,

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