UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	:	Civil Action No. 1:18-cv-06658
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 FUND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC, Plaintiff, v. BEECHWOOD RE LTD., et al., Defendants.	:	Civil Action No. 1:18-cv-12018

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DEFENDANTS CNO FINANCIAL GROUP, INC. AND 40/86 ADVISORS, INC.

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PRELIMINARY STATEMENT

Defendant CNO Financial Group, Inc. is a holding company that directly or indirectly owns Defendants Bankers Conseco Life Insurance Company ("BCLIC"), Washington National Insurance Company ("WNIC"), and 40/86 Advisors, Inc. In their motion to dismiss, BCLIC and WNIC detail why the Receiver's Complaint should be dismissed. BCLIC and WNIC entrusted almost $600 million to Beechwood[1] to reinsure long-term care insurance liabilities. Beechwood put that money in reinsurance trusts it controlled. Instead of investing that money prudently, Beechwood used the reinsurance trust funds to enrich itself and the Platinum fraudsters, prop up failing Platinum-controlled entities, and pay redemption requests from Platinum investors.[2]

The Receiver alleges that BCLIC and WNIC actively participated in the fraud, making unspecified misrepresentations to PPCO that diverted money from the reinsurance trusts. As BCLIC and WNIC demonstrated in their motion to dismiss, the Receiver's theory makes no sense—it is implausible that BCLIC and WNIC would seek to injure themselves—and is supported by zero factual allegations. Each of these arguments—which are incorporated by reference here—apply with equal or more force to CNO and 40/86 Advisors. In addition, CNO is not subject to personal jurisdiction in New York if the Receiver's RICO claims are dismissed. The Receiver's claims against CNO and 40/86 Advisors should therefore be dismissed.

[1] "Beechwood" means Defendant Beechwood Re Ltd and its affiliates.

[2] Unless separately defined here, defined terms have the same meaning as in the Receiver's Complaint.

STATEMENT OF FACTS[3]

To avoid repetition, CNO and 40/86 Advisors incorporate by reference BCLIC's and WNIC's statement of facts, which identifies the lack of factual allegations and specificity in the Receiver's Complaint. The Receiver is, if possible, even less specific about CNO and 40/86 Advisors. CNO is a holding company that owns BCLIC, WNIC, and 40/86 Advisors. ¶ 196. The Receiver alleges that CNO made unspecified misrepresentations to PPCO. *See*, *e.g.*, ¶¶ 337, 344, 387. The Receiver also vaguely alleges that CNO and 40/86 Advisors "directed" the activities of BCLIC and WNIC. ¶ 211. The Receiver sues 40/86 Advisors in only the three civil RICO counts (6–8), without making any allegations that 40/86 Advisors participated in the operation or management of the alleged RICO enterprises.

As a holding company, CNO has no business operations of its own. Declaration of Karl W. Kindig, ¶¶ 3–4. Instead, it directly or indirectly owns Defendants 40/86 Advisors, BCLIC, and WNIC (among other subsidiaries). *Id.* ¶ 3. CNO was incorporated in 2003 under Delaware law and its primary place of business is in Indiana. *Id.*; Compl. ¶ 38. CNO has never been incorporated under the laws of, nor had any offices in, New York. Kindig Decl. ¶ 5. CNO has never been authorized or licensed to transact business in New York. *Id.* CNO does not have any officers, directors, or employees in New York, and has never owned property or maintained books and records here. *Id.* The Receiver does not allege that CNO did anything in New York.

[3] The facts asserted here are taken from the Complaint. CNO and 40/86 Advisors do not waive their right to contest these facts, but rather accept them as true for purposes of their motion to dismiss. Citations to "¶" refer to paragraphs in the Complaint, unless otherwise noted.

ARGUMENT

The Receiver's claims should be dismissed because (i) the Receiver does not allege facts plausibly suggesting that CNO or 40/86 Advisors are liable to the Receiver and (ii) CNO is not subject to personal jurisdiction in New York.

I. THE RECEIVER FAILS TO STATE A CLAIM AGAINST CNO OR 40/86 ADVISORS.

A. The Receiver Does Not Allege Any Facts Plausibly Suggesting That CNO is Liable to The Receiver.

CNO is a holding company that owns, among other companies, BCLIC and WNIC, two insurance companies. ¶¶ 207–08. BCLIC and WNIC entered into reinsurance agreements with Beechwood. ¶¶ 237–38. Under these agreements, BCLIC and WNIC transferred money to Beechwood, which deposited the money in trusts that Beechwood controlled, as required by law. ¶¶ 239–40. Unbeknownst to BCLIC or WNIC, Platinum and Beechwood Insiders controlled both Beechwood and PPCO and were using Beechwood to perpetrate a fraud. *See, e.g.*, ¶¶ 44–46, 58, 302.

The Receiver cites no facts in her Complaint plausibly suggesting that CNO caused harm to PPCO. Instead, the Receiver generally concludes that CNO and several other defendants made unidentified "misrepresentations" to PPCO. *See, e.g.*, ¶¶ 337, 344, 387. Such generalized allegations are insufficient to meet the requirements of Fed. R. Civ. P. 8, let alone Fed. R. Civ. P. 9(b). *See In re JP Morgan Auction Rate Sec. (ARS) Mktg. Litig.*, 867 F. Supp. 2d 407, 425 (S.D.N.Y. 2012) (holding that generalized, vague, and conclusory statements that "JP Morgan made false and misleading statements" and "directed its brokers" to make misrepresentations were insufficient to state a claim) (internal quotation marks omitted). The Receiver, in short, cites no facts plausibly suggesting that CNO—a holding company with no insurance operations of its

own—harmed PPCO in any way. The Receiver's claims against CNO should therefore be dismissed.

B. The Receiver's Lone Allegation Against 40/86 Advisors is Legally Insufficient.

The Receiver's sole allegation against 40/86 Advisors is a conclusory statement that it "directed the activities of BCLIC and WNIC." ¶ 211.

But the Receiver's only allegation as to how 40/86 Advisors supposedly "directed the activities of BCLIC and WNIC" is that 40/86 Advisors directed them to reinsure liabilities with Beechwood. ¶ 211 ("40/86 Advisors, directed the activities of BCLIC and WNIC . . . to reduce and mitigate its LTC exposure, particularly, through contracting with Beechwood"); *see also* ¶ 247 (40/86 Advisors "directed the activities of BCLIC and WNIC in connection with their dealings with Beechwood"). Even assuming that allegation to be true (even though it is ridiculous), there is nothing illegal about a corporate entity directing an affiliate to "contract with" another party, and such a direction creates no liability as to PPCO, a stranger to BCLIC's and WNIC's reinsurance agreements with Beechwood. The Receiver does not claim that PPCO was harmed merely because BCLIC and WNIC reinsured liabilities through Beechwood. Nor does the Receiver allege that 40/86 Advisors did anything else. Therefore, the Receiver's claims against 40/86 Advisors should be dismissed.

II. CNO IS NOT SUBJECT TO PERSONAL JURISDICTION IN NEW YORK.[4]

The Receiver "bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30,

[4] 40/86 Advisors is also not subject to personal jurisdiction in New York because it is a Delaware company with its principal place of business in Indiana. *See* ¶ 38. But the Receiver asserts only RICO claims against 40/86 Advisors. 40/86 Advisors reserves the right to seek dismissal on jurisdictional grounds if the Receiver later attempts to assert any non-RICO claims against it.

34 (2d Cir. 2010). To withstand a motion to dismiss for lack of personal jurisdiction, the Receiver must "make a prima facie showing that jurisdiction exists" by "making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *Id.* at 34–35 (internal quotation marks and citations omitted). Courts "will not draw argumentative inferences in the plaintiff's favor" and are not "required to accept as true a legal conclusion couched as a factual allegation." *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012) (internal quotation marks and citations omitted).

There are two types of personal jurisdiction. First, general jurisdiction permits a defendant to be sued in its "home" forum on any topic. *See Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017). Second, specific jurisdiction permits a defendant to be sued in other forums in limited circumstances. *Id.* Neither type of jurisdiction exists here.

A. New York Does Not Have General Personal Jurisdiction Over CNO.

A corporation is subject to general jurisdiction only where it is "fairly regarded as at home." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (quotation omitted). The "paradigm" all-purpose forums for a corporation are its state of incorporation and its principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). The Supreme Court has repeatedly rejected attempts to broaden general jurisdiction. *Id.* at 752, 761 (no general jurisdiction despite defendant's "substantial, continuous, and systematic" contacts in forum); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (no general jurisdiction even though railroad had 2,000 miles of track and 2,000 employees in forum).

CNO is not "at home" in New York. It is incorporated in Delaware and has its principal place of business in Indiana. Kindig Decl. ¶ 2; ¶ 38. The Receiver does not allege any facts remotely suggesting that CNO could be considered "at home" in New York. And the mere fact

that a CNO subsidiary (BCLIC) happens to be a New York company does not in and of itself subject CNO to general jurisdiction here. *See Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (holding that presence of subsidiaries in New York "do not shift the [parent] company's primary place of business (or place of incorporation) away from Turkey").

B. New York Does Not Have Specific Personal Jurisdiction Over CNO.

To establish specific personal jurisdiction over CNO, the Receiver must show that (1) jurisdiction is warranted under New York's long-arm statute and (2) exercising jurisdiction comports with the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Sonera Holding B.V.*, 750 F.3d at 224. The Receiver's Complaint does not attempt to make either required showing, let alone both.

New York's long-arm statute permits the exercise of specific personal jurisdiction over a foreign defendant in limited circumstances, none of which apply here. For example, the long-arm statute grants jurisdiction over defendants who transact business in New York, commit torts in New York, or own real property here. N.Y. C.P.L.R. 302(a)(1)–(2), (4). The Receiver makes no such allegations against CNO. Instead, she vaguely alleges that CNO ignored "red flags" about the Platinum/Beechwood fraud (*see, e.g.*, ¶¶ 231, 282, 336, 343, 395, 397) and made unspecified "misrepresentations" (*see, e.g.*, ¶¶ 337, 387, 485–86). But the Receiver does not allege that CNO did any of these things in New York. In fact, the only geographic allegation regarding CNO points to an event that occurred in *Indiana*—not New York. *See* ¶ 280 (alleged meeting in Carmel, Indiana). Nor does the Receiver allege that CNO owns real property in New York; it does not. *See* Kindig Decl. ¶ 5.

The long-arm statute also permits jurisdiction over a defendant who commits a tort outside New York that causes an injury in New York if certain conditions are met. N.Y. C.P.L.R.

302(a)(3). The Receiver does not allege facts meeting those conditions.[5] But, even if she did, no "injury" occurred in New York. For purposes of New York's long-arm statute, 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, the Receiver's Complaint concludes that CNO engaged in misconduct in Indiana that caused financial harm to PPCO in New York. But the "occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York." *Id.* (internal quotation marks and citation omitted).

Even if there was jurisdiction under New York's long-arm statute (there is not), due process would forbid subjecting CNO to suit in New York. "[S]pecific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation marks omitted). To exercise specific jurisdiction, the defendant therefore must have "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 924 (internal quotation marks omitted). Specific jurisdiction thus focuses solely on the "defendant's contacts with the *forum*." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (internal quotation marks omitted). In-forum contacts of

[5] The Receiver must show that the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state" or "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." N.Y. C.P.L.R. 302(a)(3)(i)–(ii). The Receiver does not allege any facts showing that these conditions have been satisfied, nor could it, as CNO is merely a holding company.

the plaintiff or third parties are irrelevant. *See Walden v. Fiore*, 134 S. Ct. 1115, 1123 (2014) ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.") (internal quotation marks omitted). Here, the Receiver alleges no facts showing that CNO purposefully availed itself of the privileges of doing business in New York. She does not allege that CNO did anything in New York at all. The Court lacks personal jurisdiction over CNO for the Receiver's non-RICO claims. And, because the Receiver has not adequately pleaded her RICO claims, any remaining claims against CNO should be dismissed under Rule 12(b)(2).

CONCLUSION

The Receiver's claims against Defendants CNO and 40/86 Advisors should be dismissed.

Dated: March 8, 2019

Respectfully submitted,

ALSTON & BIRD LLP

By: */s/Adam J. Kaiser*

Adam J. Kaiser
John M. Aerni
Daniella P. Main
Jenna C. Polivy
90 Park Avenue
New York, New York
10016
(212) 210-9400
adam.kaiser@alston.com
john.aerni@alston.com
daniella.main@alston.com
jenna.polivy@alston.com

Attorneys for CNO Financial Group, Inc. and 40/86 Advisors, Inc.

CERTIFICATE OF SERVICE

It is hereby certified that on this 8th day of March, 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
Adam J. Kaiser