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 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,	:	Civil Action No. 1:18-cv-12018
Plaintiffs,	:	
v.	:	
BEECHWOOD RE LTD., et al.,	:	
Defendants.	:	

THE RECEIVER'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS FILED BY DEFENDANTS CNO FINANCIAL GROUP, INC. AND 40/86 ADVISORS, INC.

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Melanie L. Cyganowski, as Receiver for the above-named Platinum entities (the "Receiver"), respectfully opposes the Motion to Dismiss [Dkt. No. 174] filed by CNO Financial Group, Inc. ("CNO") and 40/86 Advisors, Inc. ("40/86").[1]

PRELIMINARY STATEMENT

The Motion should be denied because, notwithstanding CNO and 40/86's attempt to distance themselves from BCLIC/WNIC, the Receiver has stated specific claims against them, and the Court has jurisdiction over CNO. Nothing highlights this more than the activities of Eric Johnson ("Johnson") who served as Chief Investment Officer for CNO and 40/86. As alleged in the Complaint, Johnson, among others, directed the activities of *all* the CNO Defendants, which activities had direct and negative impacts in New York sufficient to give rise to personal jurisdiction over CNO.

STATEMENT OF FACTS

The relevant facts are those alleged in the Receiver's Complaint ("Complaint" or "RC"), incorporated by reference herein, and cited where appropriate below.

ARGUMENT

I. THE RECEIVER'S CLAIMS AGAINST 40/86 SHOULD BE SUSTAINED.

Out of the thirty-three pages of briefing submitted by the CNO Defendants in support of their motions to dismiss, only fourteen lines are allocated to an attempt to demonstrate why 40/86 should be dismissed from this action. For the reasons set forth in Sections I and II of the Receiver's opposition to BCLIC/WNIC's motion to dismiss (in particular, the Receiver's analysis of group pleading standards at page 3 thereof), the Receiver's allegations against 40/86 are sufficient to sustain all of the Receiver's claims against 40/86.

[1] In addition, "BCLIC/WNIC" refers to Bankers Conseco Life Insurance Company and Washington National Insurance Company. BCLIC, WNIC, CNO, and 40/86 are collectively referred to as the "CNO Defendants."

Specifically, in 2014, after agreeing to terms with Beechwood concerning the Reinsurance Agreements, BCLIC/WNIC learned that they were buying and selling inflated Platinum investments in the four reinsurance trusts – BRe BCLIC Primary, BRe BCLIC Sub, BRe WNIC 2013 LTC Primary, and BRe WNIC 2013 LTC Sub (the "Reinsurance Trusts") – and they willingly continued to do so because (i) the dire financial circumstances of their long-term care insurance ("LTC") business left them with no alternative, and (ii) of the promised significant returns along the lines that Platinum had long boasted. (*See* RC ¶¶ 60-61.) Far from being an "implausible" theory that the CNO Defendants were knowingly committing "financial suicide," at a time in 2014 when from all outward appearances Platinum was an extraordinarily successful investment enterprise, the CNO Defendants willingly joined and continued their membership in an illicit venture.

As one example, the Complaint alleges that when BCLIC/WNIC entered into the Reinsurance Agreements, they were initially enticed by the very favorable deal offered by Beechwood, which, *inter alia*, included highly advantageous terms requiring Beechwood to "top-up" the trust assets should their market values fall "below 102% of statutory liabilities." (RC ¶¶ 237-247) The CNO Defendants declined to pass up this seemingly "no-lose" proposition, especially given the abysmal track record of the LTC industry. (RC ¶¶ 176-224)

Later in 2014, upon analyzing the actual investments in the Reinsurance Trusts, it became clear to Johnson that Beechwood was investing assets held in the Reinsurance Trusts in Platinum assets. This prompted communications and in-person meetings among Johnson, BCLIC, WNIC and Beechwood because, as specifically pled in both the Complaint and the BCLIC Complaint, such non-investment grade investments were unsuitable to insurance companies such as BCLIC/WNIC. (RC ¶¶ 278-280) Despite knowing and understanding that the value of the

Platinum investments was inflated, BCLIC/WNIC continued to buy and sell these investments for two more years. (RC ¶¶ 280-286) These, along with other allegations in the Complaint specific to or including 40/86, are more than enough to overcome 40/86's one paragraph Motion to Dismiss (*See e.g.*, RC ¶¶ 211, 247). To the extent further argument on this point is warranted, the Receiver respectfully refers the Court to her opposition to BCLIC/WNIC's motion to dismiss.

II. CNO IS SUBJECT TO PERSONAL JURISDICTION IN NEW YORK.

CNO argues that it is not subject to personal jurisdiction in New York under either New York's long-arm statute or the United States Constitution. To the contrary, the Complaint sets forth purposeful contacts by CNO with New York sufficient to subject it to personal jurisdiction under both constitutional standards and New York's long-arm statute:

- By 2013, CNO had a lengthy history of trying to reduce its exposure to LTC policies written by its subsidiaries. (RC ¶¶ 176-220)
- As part of its efforts to reduce its exposure to LTC policies, CNO contacted Beechwood in New York, conducted due diligence and at its direction, BCLIC/WNIC entered into the Reinsurance Agreements with Beechwood and paid more than $550 million into the Reinsurance Trusts. (RC ¶¶ 211, 228, 237)
- Soon after the Reinsurance Agreements were entered into, CNO learned that the Reinsurance Trusts were investing assets held in the Reinsurance Trusts with funds managed by Platinum in New York, and had e-mail communications with Beechwood about this. (RC ¶¶ 280, 282)
- CNO directed and ratified investments of more than $550 million in New York for more than two years even though it knew that those monies were being used to fuel a fraud and breaches of fiduciary duty occurring in New York. (RC ¶ 286)
- Along with the other Defendants, CNO knowingly "orchestrated" the PPCO Loan Transactions and Securities Purchases – a series of transactions in which tens of millions of dollars of value were transferred from PPCO (based in New York) to CNO's subsidiaries BCLIC/WNIC in which (a) SHIP and the Reinsurance Trusts (the sole beneficiaries of which were BCLIC/WNIC) sold nonperforming loans to PPCO (in New York) at wildly inflated purchase prices, PPCO borrowed the monies to pay for them from BCLIC/WNIC and SHIP which were guaranteed by

PPCO and its subsidiaries, and PPCO and its subsidiaries granted the purchasers security interests in substantially all of their assets. (RC ¶¶ 315, 401-32)

- In the transaction documents for these transactions, the parties agreed that New York law would apply and consented to the application of New York law. *E.g.*, Weinick Decl. in Opposition to Motions to Dismiss Filed by Defendants Bankers Conseco Life Insurance, Washington National Insurance Company, CNO Financial Group, Inc., and 40/86 Advisors, Inc. at Exs. "A"-"G" submitted herewith.

- CNO misrepresented the value of the securities that were sold to PPCO in connection with those transactions. (RC ¶ 337)

This is more than enough to meet both constitutional standards and the standards of the New York long-arm statute. "At the pleading stage – and prior to discovery – a plaintiff need only make a prima facie showing that jurisdiction exists." *Schentag v. Nebgen*, 2018 WL 3104092, at *13 (S.D.N.Y. June 21, 2018). "Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited[,] would suffice to establish jurisdiction over the defendant." *Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 81 (2d Cir. 2018).

A. New York Has Specific Jurisdiction Over CNO.

New York has specific jurisdiction over CNO under the New York long-arm statute.

First, CPLR § 302(a)(3) provides for long-arm jurisdiction where the defendant "[c]ommits a tortious act without the state causing injury to person or property within the state" and the defendant either "(i) regularly does or solicits business, or engages in any other course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state," or "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce[.]" The requirement that CNO "expect[ed] or should [have] reasonably expect[ed]" its actions to have consequences in New York is easily satisfied because CNO knowingly aided and abetted breaches of fiduciary

duty and committed other tortious acts that it knew would damage a party in New York. The requirement that CNO "derives substantial revenue from interstate or international commerce" is satisfied because, among other things, CNO has subsidiaries that write insurance in multiple states. In the event CNO denies these facts, jurisdictional discovery regarding them is appropriate.

The Complaint alleges that CNO committed tortious acts and RICO violations causing tens, if not hundreds, of millions of dollars in damages to PPCO in New York by, *inter alia*, "orchestrat[ing]" the PPCO Loan Transactions and Securities Purchases and the other transactions described above. While CNO claims that PPCO's injury somehow occurred in Indiana because CNO orchestrated the fraudulent transfers from Indiana, the injury is caused where the first effect of the tort was located that ultimately produced the final economic injury – here, in New York. *Palace Exploration Co. v. Petroleum Dev. Co.*, 41 F.Supp.2d 427, 435 (S.D.N.Y.1998); *Weintraub v Empress Travel Trevose, Two-L's Ltd.*, 2018 WL 4278336, at *5 (S.D.N.Y. 2018); *Justen-Marks Mfg., Ltd. v Soft Things, Inc.*, 2009 WL 10706038, at *10 (E.D.N.Y. 2009). Injury in New York was also entirely foreseeable to CNO, as required by CPLR 302(a)(3)(ii). CNO certainly knew that PPCO was located in New York. The PPCO Loan Transactions and Securities Purchases included New York choice of law and forum clauses. Weinick Decl. Exs. "A"-"G." It is immaterial that the misrepresentations were transmitted from Indiana.

Second, CNO is subject to long-arm jurisdiction in New York because BCLIC and WNIC acted as agents for CNO and committed tortious acts in New York for the benefit of CNO. CPLR 302(a)(2) permits jurisdiction over any non-domiciliary "who in person or through an agent . . . commits a tortious act within the state, except as to a cause of action for defamation

of character arising from the act." CPLR 302(a)(2). New York courts customarily interpret the term "agent" rather broadly. *Topps Co., Inc. v. Gerrit J. Verburg Co.*, 961 F. Supp. 88, 91 (S.D.N.Y. 1997). To allege an agency relationship for jurisdiction under CPLR 302(a)(2), a plaintiff need only allege that the agent acted in New York for the benefit of, with the consent of, and under some control by the non-resident principal. *Emerald Asset Advisors, LLC v. Schaffer*, 895 F. Supp.2d 418, 430 (E.D.N.Y. 2012). The Complaint satisfies these requirements by alleging that: (i) the chief investment officer of 40/86 also served as an executive officer of the insurance subsidiaries, WNIC and BCLIC (RC ¶ 210); (ii) CNO, and its wholly-owned subsidiary, 40/86, directed the activities of BCLIC and WNIC with respect to efforts to reduce and mitigate its LTC exposure though contracting with Beechwood (RC, ¶ 211); (iii) BCLIC and WNIC knew that the assets they invested in were being invested with funds managed by Platinum (RC, ¶ 282); and (iv) CNO, BCLIC, WNIC and Beechwood misrepresented to PPCO the value of securities sold to PPCO. (RC, ¶ 495) These allegations establish that BCLIC and WNIC acted as agents for CNO and confer long-arm jurisdiction over CNO pursuant to CPLR § 302(a)(2) based upon BCLIC and WNIC's activities in New York on behalf of CNO.

Third, New York courts have personal jurisdiction over a defendant who "transacts any business within the state …." CPLR 302(a)(1). By CNO directing and ratifying investments of more than $550 million in New York and knowingly "orchestrat[ing]" the PPCO Loan Transactions and Securities Purchases, CNO transacted business in New York.

Fourth, New York courts also have jurisdiction over CNO as a co-conspirator to the other defendants. In New York, the acts of a co-conspirator may be attributed to a defendant for the purpose of obtaining personal jurisdiction over that defendant. *FIA Leveraged Fund Ltd. v. Grant Thornton LLP*, 150 A.D.3d 492, 496 (1st Dep't 2017). The application of conspiracy

jurisdiction requires a showing that defendants were part of a conspiracy, at least part of which took place within New York. *See CIBC Mellon Tr. Co. v Mora Hotel Corp. N.V.*, 296 A.D.2d 81, 98 (1st Dep't 2002), *aff'd*, 100 N.Y.2d 215 (2003). The elements of conspiracy are: (i) an agreement to participate in an unlawful act; (ii) an injury caused by an unlawful overt act performed by one of the parties to the agreement; and (iii) which overt act was done pursuant to and in furtherance of the common scheme. *O'Sullivan v. Deutsche Bank AG*, 2018 WL 1989585, at *5 (S.D.N.Y. 2018).

The Complaint pleads sufficient facts to support the existence of conspiracy jurisdiction over CNO. It alleges an overt act in furtherance of the conspiracy – the transfer to PPCO of non-operating, unprofitable or financially distressed companies. These facts are sufficient to infer "an agreement" between CNO and the other defendants to participate in a conspiracy to defraud Platinum investors. *See FIA Leveraged* 150 AD3d at 495. In *FIA Leveraged*, the court held that an agreement to participate in a conspiracy to defraud Massachusetts Bay Transportation Authority Retirement Fund could be inferred from the facts alleged in the complaint, namely that the co-conspirators made misrepresentations to the Fund about how its investment would be used and diverted its money. *Id*. at 496. As in *FIA Leveraged*, here, an agreement to participate in a conspiracy to defraud the Platinum investors can be inferred. CNO agreed with others to participate in a conspiracy to defraud Platinum investors, and acts in furtherance of that conspiracy occurred in New York. Accordingly, the Complaint supports the Court's exercise of conspiracy jurisdiction over CNO.[2]

[2] At a minimum, the Receiver is entitled to jurisdictional discovery regarding, among other issues, CNO's role in the matters referred to in the Complaint, including its contacts with New York in connection with those matters. *See Int'l Diamond Importers, Inc. v. Oriental Gemco (N.Y.), Inc.*, 64 F. Supp. 3d 494, 519 (S.D.N.Y. 2014).

B. The Exercise of Personal Jurisdiction Over CNO Is Constitutional

The exercise of personal jurisdiction over CNO is also constitutional. "The Second Circuit has stated that it would be 'rare' and 'unusual' for New York's long-arm statute to be satisfied, but not the Due Process Clause." *Advance Tr. & Life Escrow Servs., LTA v. PHL Variable Life Ins. Co.*, 2019 WL 1130153, at *4 (S.D.N.Y. Mar. 12, 2019) (quoting *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 170 (2d Cir. 2013)). This is not such a "rare" or "unusual" case that due process is absent.

In determining whether an exercise of specific jurisdiction is constitutional, a court must look to "whether there was some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (internal citations and brackets omitted). "[T]he defendant's suit-related conduct must create a substantial connection with the forum State." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). CNO's conduct here, in knowingly aiding and abetting breaches of fiduciary duties, making misrepresentations and committing RICO and securities fraud in transactions involving New York parties, which proximately caused PPCO to incur tens of millions of damages, obviously meets this test. Consequently, CNO purposefully availed itself of the privilege of conducting activities in New York and its suit-related conduct created a substantial connection with New York. Since CNO's tortious conduct proximately damaged the PPCO Funds, the Court's exercise of personal jurisdiction over CNO is constitutional for this reason as well. *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998). *See also United States v. Prevezon Holdings LTD.*, 122 F. Supp. 3d 57 (S.D.N.Y. 2015).

CONCLUSION

For the foregoing reasons, the Motion should be denied.

Dated: New York, New York
March 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 22nd 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.

Respectfully submitted,

OTTERBOURG P.C.

By: */s/ Erik B. Weinick*
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