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 FIRST AMENDED COMPLAINT ON BEHALF OF DEFENDANTS CNO FINANCIAL GROUP, INC. AND 40|86 ADVISORS, INC.

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PRELIMINARY STATEMENT

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

The Receiver makes conclusory allegations that BCLIC and WNIC actively participated in the fraud upon themselves. 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, even after amendment. Each of these arguments—which are incorporated by reference here—apply with equal or greater force to CNO and 40|86 Advisors. In addition, neither CNO nor 40|86 Advisors are subject to personal jurisdiction in New York if the Receiver's RICO claims against them are dismissed. The Receiver's claims against CNO and 40|86 Advisors should therefore be dismissed in their entirety for the additional reasons set forth below.

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

[2] Unless separately defined here, defined terms have the same meaning as in the FAC.

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 FAC as to BCLIC and WNIC. 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. FAC ¶¶ 128–29. The Receiver alleges that unspecified "CNO Defendants" made unspecified misrepresentations to PPCO. *See, e.g.*, FAC ¶¶ 248, 311. The Receiver also vaguely alleges that CNO "directed" the activities of BCLIC, WNIC, and 40|86 Advisors, and makes a conclusory and implausible allegation that CNO "directed" Beechwood. FAC ¶¶ 11, 130, 176.

As a holding company, CNO has no business operations of its own. Declaration of Karl W. Kindig ("Kindig Decl."), ¶¶ 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.* ¶ 2; FAC ¶ 54. 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.*

40|86 Advisors is a Delaware company with its principal place of business in Indiana. *See* FAC ¶ 55. 40|86 Advisors has never been incorporated under the laws of, nor had any offices in, New York. Declaration of Rachel J. Spehler ("Spehler Decl."), ¶ 3. 40|86 Advisors has never been authorized or licensed to transact business in New York. *Id.* 40|86 Advisors does not have

[3] The facts asserted here are taken from the FAC. 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.

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 or 40|86 Advisors did anything in New York.

ARGUMENT

The Receiver's claims should be dismissed because (1) the Receiver does not allege facts plausibly suggesting that CNO or 40|86 Advisors are liable to the Receiver; and (2) CNO and 40|86 Advisors are not subject to personal jurisdiction in New York.

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

The Receiver cites *no* facts in the FAC plausibly suggesting that CNO or 40|86 Advisors caused harm to PPCO. Instead, the Receiver generally concludes that unspecified "CNO Defendants" made misrepresentations or "directed Beechwood" to enter into fraudulent transactions. *See, e.g.*, FAC ¶¶ 11, 248, 311. 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—or 40|86 Advisors—a company that is not alleged to have had any interactions with PPCO—harmed PPCO in any way. The Receiver's claims against CNO and 40|86 Advisors should therefore be dismissed.

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

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,

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. General Personal Jurisdiction Over CNO or 40|86 Advisors Does Not Exist Here.

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).

Neither 40|86 Advisors nor CNO are "at home" in New York. Both are incorporated in Delaware and have their principal places of business in Indiana. Kindig Decl. ¶ 2; Spehler Decl.

¶¶ 2, 3; FAC ¶¶ 54–55. The Receiver does not allege any facts remotely suggesting that 40|86 Advisors or 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 or 40|86 Advisors 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. Specific Personal Jurisdiction Over CNO or 40|86 Advisors Does Not Exist Here.

To establish specific personal jurisdiction over CNO and 40|86 Advisors, 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 FAC 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). But the FAC does not allege that CNO or 40|86 Advisors did anything in New York.

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). In an apparent attempt to manufacture jurisdiction under this prong of New York's long-arm statute, the Receiver alleges that CNO and 40|86 Advisors "interacted by both telephone and email with Beechwood's New York based employees" when negotiating the Reinsurance Agreements between BCLIC, WNIC, and Beechwood Re. FAC ¶ 144. Such a conclusory

allegation is insufficient to establish jurisdiction. *Miller v. Mercuria Energy Trading, Inc.*, 291 F. Supp. 3d 509, 521 (S.D.N.Y. 2018) (Rakoff, J.) ("The plaintiff 'must make allegations establishing jurisdiction with some 'factual specificity' and cannot establish jurisdiction through conclusory assertions alone.'"). Moreover, the Receiver does not allege any misconduct by CNO or 40|86 Advisors in connection with the negotiation of the Reinsurance Agreements in 2014. The Receiver's claims against CNO or 40|86 Advisors are based on alleged misrepresentations and fraudulent conveyances in 2016. FAC ¶¶ 247, 248. And 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). Thus, even if the Receiver were to amend her complaint again to allege that CNO or 40|86 engaged in misconduct over the phone from Indiana when negotiating the Reinsurance Agreements, which hurt PPCO in New York, that would not be enough: the "occurrence of financial consequences in New York due to the fortuitous location of [PPCO] 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 were jurisdiction under New York's long-arm statute (there is not), due process would forbid subjecting CNO and 40|86 Advisors 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 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 and 40|86 Advisors purposefully availed themselves of the privileges of doing business in New York. She does not allege that CNO or 40|86 Advisors did anything in New York at all. And, because the Receiver has not adequately pleaded her RICO claims against WNIC, BCLIC, CNO or 40|86, any remaining claims against CNO and 40|86 Advisors should be dismissed under Rule 12(b)(2).

CONCLUSION

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

Dated: May 15, 2019

Respectfully submitted,

ALSTON & BIRD LLP

By: */s/Adam J. Kaiser*

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CERTIFICATE OF SERVICE

It is hereby certified that on this 15th day of May, 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