UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	:	Index No. 18-CV-6658 (JSR)
MELANIE L. CYGANOWSKI, as Equity Receiver for PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, PLATINUM PARTNERS CREDIT OPPORTLINITIES FUND (TE) LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FLIND LLC, PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND INTERNATIONAL LTD., PLATINUM PARTNERS CREDIT OPPORTUNITIES FLIND INTERNATIONAL (A) LTD., and PLATINUM PARTNERS CREDIT OPPORTUNITIES FUND (BL) LLC,	:	Index No. 18-CV-12018 (JSR)
Plaintiffs,	:	
v.	:	
BEECHWOOD RE LTD., *et al*.,	:	
Defendants.	::	

DAVID OTTENSOSER'S REPLY IN SUPPORT OF HIS PARTIAL MOTION TO DISMISS THE THIRD PARTY COMPLAINT OF BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY

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We respectfully submit this Reply in support of David Ottensoser's partial motion to dismiss Counts One, Two, Eighteen and Nineteen in the Third Party Complaint (DE 204, the "TPC") of Bankers Conseco Life Insurance Company and Washington National Insurance Company (collectively, the "TPPs") pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.[1]

PRELIMINARY STATEMENT

Count One and Count Two of the TPC, which are RICO claims, are barred by the RICO Amendment (Section 107 of the Private Securities Litigation Reform Act) because they are premised on factual allegations that would be actionable under the securities fraud statutes. In addition, Count Eighteen of the TPC, which is a claim for indemnity, fails because indemnity is not available for claims that are based on intentional conduct, such as the claims alleged against Ottensoser in the TPC. Finally, Count Nineteen of the TPC, which is a claim for unjust enrichment, fails because the TPPs do not sufficiently allege that Ottensoser was supposedly unjustly enriched (indeed his name is not even mentioned under Count Nineteen), and because the existence of a contractual agreement between the TPPs and the Beechwood entities bars any unjust enrichment claim against Ottensoser—even if he were construed as a third party beneficiary to that contract. Accordingly, Counts One, Two, Eighteen, and Nineteen of the TPC must be dismissed with prejudice.

[1] Ottensoser expressly adopts, as if fully set forth herein, the legal analysis and standards set forth in the motions to dismiss, and corresponding memoranda, and replies filed by Cross-Claim or Third-Party Defendants of the Third-Party Complaint of Bankers Conseco Life Insurance Company and Washington National Insurance Company, that apply to Count One (Violation of Civil RICO), Count Two (RICO Conspiracy), Count Eighteen (Contribution and Indemnity), and Count Nineteen (Unjust Enrichment). *See*, *e.g.*, DE 332, DE 352, and DE 360.

ARGUMENT

I. The TPPs' RICO claims (Counts One and Two) are barred by the RICO Amendment.

As this Court has previously held, and as the TPPs acknowledge in their opposition brief (the "TPPs Opp. Br.", DE 439), the RICO Amendment bars a party "from asserting a RICO claim . . . that would have been actionable as fraud in the purchase or sale of securities." *See* Order & Opinion re: SHIP Second Amended Complaint (DE 292) (the "SHIP Opinion") at 20, quoting 18 U.S.C. § 1964(c); *see also* TPPs Opp. Br. at 7. To be actionable as securities fraud, and therefore inapplicable as a RICO predicate act, the act "must coincide with the sale of securities" and also be "integral to the purchase and sale of the securities in question." *See Leykin v. AT&T Corp.,* 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006); *aff'd*, 216 F. App'x 14 (2d Cir. 2007); *see, e.g.*, *S.E.C. v. Zanford*, 535 U.S. 813, 820 (2002) (holding that the fraud coincided with securities transaction and that the RICO Amendment applied); *see also* SHIP Opinion at 21-22 (same).

In their Opposition, the TPPs acknowledge that, based on the RICO Amendment, the Court has already dismissed RICO claims in the SHIP Second Amended Complaint ("SAC")—claims which were based on the *same* securities fraud scheme as the securities fraud scheme alleged by the TPPs in the TPC. The TPPs nonetheless attempt to distinguish their funds at issue in the TPC from those funds at issue in the SHIP SAC on the basis that the TPPs were duped into providing reinsurance funds based on allegedly *misstated asset values*. *See* TPPs Opp. Br. at 8-9; *see, e.g.*, TPC at ¶¶ 660, 661, 711. The TPPs fail, however, to provide any authority that supports the proposition that this distinction makes a legally cognizable difference under the RICO Amendment. *See generally id.*

The Court recently rejected the same arguments that the TPPs advance in their

Opposition, when dismissing RICO claims in the Second Amended Complaint filed by the plaintiff receivers (the "Trott SAC"). *See* Order and Opinion re: Trott SAC (DE 488) (the "Trott Opinion") at 13-15. In the Trott Opinion, this Court held that "the scheme in the instant case…"(*i.e.* the same conduct asserted in the TPC), involves substantial allegations of securities fraud in which alleged *misstatement of asset values*, was necessary to "…sustain defendants' Ponzi scheme." *See id.* at 14-15. Therefore, this Court held that the RICO Amendment applied to bar RICO claims based on misstated asset values (like the ones alleged in the TPC) because "conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities" *See id.* at 15, citing *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 n.11 (2d. Cir. 2011) (affirming dismissal of RICO claims as barred by the RICO Amendment). The same result should apply here with equal force.

The opinions that TPPs rely upon in *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 458 (S.D.N.Y. 2009) and *OSRecovery, Inc. v. One Group Int'l, Inc.*, 354 F. Supp. 2d 357, 369 (S.D.N.Y. 2005), are unavailing. As the Court held in the SHIP Opinion and Trott Opinion, unlike *Kottler* or *OSRecovery,* the scheme at issue here is a securities fraud scheme. *See* SHIP Opinion at 21-23; Trott Opinion at 14-15. Specifically, this Court has held that this "is a case in which the funds were obtained precisely for the purpose of acquiring the securities. As a result, the 'fraud coincided' with the securities transactions, and the RICO Amendment applies." *See* SHIP Opinion at 22; *see also* Trott Opinion at 14-15 (holding that the "Ponzi scheme" in this case undoubtedly "did involve securities).[2]

[2] In the Trott Opinion, the Court also rejected the same argument that the TPPs make here regarding predicate acts related to the fair market value of various Trust Assets. *See* Trott Opinion at 13-14. The Court should reject the TPPs argument for the same reasons it rejected that argument in the Trott SAC: "misstatements of asset values, and the attendant withdrawal of unearned fees, is actionable as securities fraud . . . ." and the "scheme in the instant case . . . did involve securities." *See Id.* at 13-14.

Accordingly, Counts One and Two should be dismissed because they are barred by the RICO Amendment.

II. The TPPs' claim for indemnity (Count Eighteen) fails because indemnification is not available with respect to claims based on intentional conduct.

The TPPs fail to identify any body of decisional law—let alone a single case—to rebut Ottensoser's (and other defendants') argument that Count Eighteen must be dismissed because "courts have held that indemnification is not available with respect to any . . . claims . . . which are based in part on . . . intentional conduct." *See Charamac Properties, Inc. v. Pike*, 1993 WL 427137, at *6 (S.D.N.Y. Oct. 19, 1993). Here, the TPPs allege multiple claims against Ottensoser based upon intentional conduct. *See generally,* TPC. Accordingly, the TPPs cannot prevail on a claim for indemnity based on purported intentional conduct (*i.e.* fraud).

In addition, while the TPPs include an "alternative" argument for "contribution" their allegations are wholly insufficient to state a claim for contribution. Regarding "contribution" the TPPs merely state the following:

> 922. In the alternative, should WNIC or BCLIC be found to have any liability to the PPCO Receiver, such liability will be as a result of the fraudulent and other wrongful conduct of each of the Cross-claim and Third-party Defendants that WNIC and BCLIC sue in this action, and therefore WNIC and BCLIC will each be entitled to contribution from each Cross-claim and/or Third-party Defendant.

See TPC at ¶ 922. This is insufficient to establish that they are entitled to contribution "in the alternative." Rather, it is simply a re-pleading of their indemnity claim with the word "contribution" substituted for "indemnity" (a claim that also fails).

Accordingly, Count Eighteen must be dismissed.

III. The TPPs' claim for unjust enrichment (Count Nineteen) should be dismissed as to Ottensoser because the TPC fails to allege facts supporting its claim against him with the requisite specificity.

Under New York law, to state a claim for unjust enrichment, a plaintiff must allege that: "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). In addition, a court may only grant relief for unjust enrichment "in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, *circumstances create an equitable obligation* running from the defendant to the plaintiff." *See Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (emphasis added).

Here, there are no circumstances alleged that could create the type of equitable obligation running from Ottensoser to the TPPs. While the TPPs specifically allege that other third-party defendants might have been enriched at the TPPs expense by virtue of their ownership interests in the Beechwood entities or as beneficiaries of various trusts, nowhere in Count Nineteen (nor anywhere else) do the TPPs allege that *Ottensoser* was enriched, let alone that he was enriched at the TPPs expense. *See, e.g.* TPC at ¶¶ 923-926.

Moreover, the TPPs implicitly concede that their unjust enrichment claim against Ottensoser fails because they do not address the deficiencies in their vague pleading or the thrust of Ottensoser's arguments in their opposition brief. *See* TPPs Opp. Br. at 60-64. Rather, the TPPs painstakingly argue how *other defendants* were enriched. *See id.* As to Ottensoser—in a footnote—the TPPs conclude, without explaining or addressing Ottensoser's arguments, that they somehow have an unjust enrichment remedy against Ottensoser because the "Beechwood Re distributed the fruits of its breaches of contract and other wrongful conduct . . . ." to various unspecified persons. *See id.* at 63 and n.28-29. Yet, even assuming *arguendo* that this is

sufficient to allege how Ottensoser benefited from a breach of contract to which he was not a party—which it is not—the TPPs notably fail to cite any case law in support of its argument that it can sue a third party that "innocently" receives the "fruits" of a breach of contract.

Furthermore, the TPPs' unjust enrichment claim is predicated on alleged breaches of the reinsurance agreement between TPPs and Beechwood Re, which the TPPs allege was valid and binding. This is fatal to their unjust enrichment claim**.** Under New York law, "the existence of a valid and binding contract governing the subject matter at issue in a particular case *does* act to preclude a claim for unjust enrichment *even against a third party* [beneficiary]… to the agreement." *Law Debenture v. Maverick Tube Corp.*, 2008 WL 4615896, at *12 (S.D.N.Y. Oct. 15, 2008) (emphasis added), *aff'd sub nom. Law Debenture Tr. Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458 (2d Cir. 2010). Accordingly, for all of these reasons, a claim for unjust enrichment cannot lie and must be dismissed.

CONCLUSION

For all the foregoing reasons, and for all the reasons set forth in the motions, memoranda and Replies by all other moving Cross-Claim or Third-Party Defendants, David Ottensoser respectfully requests the Court enter an order dismissing Counts One, Two, Eighteen, and Nineteen of the TPC as against him, with prejudice.

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