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March 14, 2025

Via ECF
The Honorable Frederic Block
United States District Court
Eastern District of New York
225 Cadman Plaza E
Brooklyn, NY 11201

Re: *Kolbert v. Benworth Capital Partners LLC et al.*, Case No. 1:25-cv-00117-FB-VMS
Pre-Motion Letter to File Motion to Dismiss Complaint

Dear Judge Block:

Pursuant to Local Rule Section 2.A, on behalf of Defendants Benworth Capital Partners LLC ("**Benworth Capital**"), Benworth Capital Partners PR LLC and Benworth Financial LLC,[1] (collectively, the "**Benworth Defendants**")[2] we respectfully request a pre-motion conference to obtain permission to file a motion to dismiss Plaintiff William Kolbert's ("**Kolbert**") Complaint. Kolbert cannot conjure a RICO claim out of allegations that he was the victim of identity theft by an unknown third party who also defrauded the defendants. Kolbert's complaint must be dismissed under FRCP Rules 9(b), 12(b)(1) and 12(b)(6). An initial case management conference has been scheduled in this matter for May 7, 2025.

1. Kolbert's RICO Allegations

Kolbert claims that an unknown perpetrator created a Fraudulent LLC in his name and without his consent to obtain a PPP Loan in the amount of $18,803 relating to a purported medical laboratory business. Compl. ¶¶ 31-40. Kolbert does not know who stole his identity. Compl. ¶41. He does not allege that the Benworth Defendants had any relationship with the perpetrator let alone directed or controlled the perpetrator. Instead, Kolbert alleges that the Benworth Defendants engaged in a RICO enterprise by "failing to implement fraud controls" for the purpose of defrauding the federal government including the SBA, the Federal Reserve Bank and the general public, by processing, approving and funding thousands of fraudulent PPP loans. Compl. ¶¶ 3, 179, 207.

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[1] Benworth Capital Partners PR LLC and Benworth Financial LLC did not participate in the Paycheck Protection Program ("**PPP**") and were improperly named as defendants in this matter. Benworth Capital Partners PR LLC was not formed until June 2021; after the PPP loan program ended and after the May 2 loan that Kolbert references in the Complaint. Compl. ¶60. Benworth Financial is a licensed Consumer Finance Company that offers second mortgages and did not participate in the PPP loan program. Compl. ¶¶ 9, 68, 69, 76, and 78.

[2] Kolbert has not alleged facts to support personal jurisdiction in this Court. Moreover, Kolbert has not affected service of process on individual defendants related to Benworth Defendants: (i) Bernie Navarro; and (ii) Claudia Navarro (jointly, the "**Navarros**") and accordingly, they have not entered any appearance in this matter. Defendants reserve the right to move to dismiss on these grounds.

For more than 15 years, Benworth Capital has served as a licensed mortgage lender and servicer based in South Florida. Compl. ¶¶ 6, 53. In response to COVID-19, Congress enacted the CARES Act and established the PPP loan program making more than $950 billion in funds available to distressed businesses and individual workers. Benworth Capital was approved by the government to fund PPP loans. Compl. ¶57. Benworth Capital began working with Womply in February 2021 and funded more than 300,000 loans (totaling $4.3 billion) before the PPP Loan program ended in May 2021. Compl. ¶¶ 57, 58.

Kolbert claims that he suffered the loss of $476.57 when the Department of Treasury reduced his September 2024 monthly social security retirement benefit. Compl. ¶21. Kolbert filed an Identity Theft Report with the Small Business Administration ("**SBA**"). Compl. ¶47. The SBA initiated an investigation and halted its collection efforts. Compl. Ex. D.

2. <u>Kolbert's Complaint Fails to State a Claim</u>

Kolbert lacks standing to sue for RICO claims premised on allegations of a scheme to defraud the federal government. To have RICO standing, a plaintiff must show that the defendant's RICO violation was the "proximate cause" of the injury. *Petroff Amshen LLP v. Alfa Rehab PT PC*, No. 21-847, 2022 WL 480475, at *3 (2d Cir. Feb. 17, 2022), the Second Circuit denied RICO standing to plaintiffs who are "neither the target of the racketeering enterprise nor the competitors nor the customers of the racketeer." *quoting In re Am. Exp. Co. S'holder Litig.,* 39 F.3d 395, 400 (2d Cir. 1994). Here, Kolbert has not pleaded any RICO scheme targeted at him, as opposed to directed at the SBA. Furthermore, Kolbert was not a borrower of a PPP loan, and any financial loss he allegedly suffered is, by definition, indirect. Notably, Kolbert ignores the intervening and superseding events that further break any causation when the unknown perpetrator also circumvented the "Know Your Customer" requirements of the SBA, that issued a loan number to fund the PPP loan to the Fraudulent LLC, and MetaBank which opened an account and accepted the PPP loan check for deposit. Benworth Capital's alleged funding of a PPP loan to a Fraudulent LLC is indirect, derivative and too remote to be deemed a proximate cause to Kolbert's claim that he suffered a loss of $476.57 in Social Security retirement benefits.

Kolbert's RICO claims (Count 1 and 3) do not and cannot sufficiently plead RICO "pattern," "enterprise," or "racketeering activity" in connection with the Benworth Defendant's participation as an approved lender in the PPP loan program. To state a claim for violation of RICO, a plaintiff must plausibly plead "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity" *Anatian v. Coutts 223 Bank (Switzerland) Ltd.,* 193 F.3d 85, 88 (2d Cir. 1999).

First, Kolbert cannot establish a "pattern" of purported racketeering activity premised on the Defendants' participation in the PPP loan program which only lasted for a matter months and was discontinued in less than the required minimum two-years for a RICO violation. A RICO pattern requires "continuity," either close-ended (extending over a minimum of two years) or open-ended (ongoing threat of future criminal conduct). *See Grace Int'l Assembly of God v. Festa*, 797 F. App'x 603, 605 (2d Cir. 2019), cert. denied. *Grace Int'l Assembly of God v. Festa, Gennaro, et al*., 141 S.Ct. 358 (2020) (stating that "[s]ince the Supreme Court decided H.J. Inc., we have never found predicate acts spanning less than two years to be sufficient to constitute closed-ended continuity"). Kolbert cannot plead close-ended continuity because the Defendant's participation in the PPP loan program spanned only a few months from February 2021 until the end of the PPP loan program on May 31, 2021[3]; far less than the required two years. Similarly, Kolbert cannot allege open-ended continuity because he concedes that the alleged "unlawful acts or practices with respect to the PPP" ceased "because the program ended." Compl. ¶167(iii). Furthermore, Kolbert cannot claim open-ended continuity because an enterprise that conducts an ongoing legitimate business does not constitute a continued threat. *Spool v. World Child. Int'l Adoption Agency,* 520 F 3d 178, 185 (2d Cir. 2008).

Second, Kolbert fails to adequately plead an "enterprise" or association-in-fact amongst Defendants that is distinguishable from a corporation running its lawful business. Businesses operating in a "unified corporate structure" should not be subjected to RICO liability simply because they choose such a "unified . . . structure" consisting of "separately incorporated structures." "The mere fact of separate incorporation, without more, does not satisfy RICO's distinctness requirement under Section 1962(c)." *U1it4less, Inc. v Fedex Corp*., 871 F3d 199, 205 (2d Cir. 2017). An "enterprise" is also not adequately plead with respect to the Navarros and the Benworth Entities to the extent "[A] corporate entity may not be both the RICO person and the RICO enterprise under section 1962(c)." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A*., 30 F.3d 339, 344 (2d Cir. 1994).

Third, Kolbert's RICO claims lack particularity and fail to connect the alleged predicate acts of wire, mail, bank fraud, and identity theft to the Benworth Defendants' lawful business. In a RICO action "all allegations of fraudulent predicate acts[] are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b)." *First Capital Asset Mgmt. v. Satinwood, Inc.,* 385 F.3d 159, 178 (2d Cir. 2004). Each of the elements of RICO must be "established as to each individual defendant". *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001). Here, Kolbert makes only conclusory allegations that Defendants used the mail and wire to fund PPP loans and profit therefrom without identifying any fraudulent statements made to him, or demonstrating the requisite scienter (or fraudulent intent) with intent to deceive.

Kolbert's claim for RICO conspiracy (Count 4) necessarily fails because without a RICO violation, a claim under 18 U.S.C. §1962(d) for "conspiracy" cannot stand.

Kolbert's state law causes of action for negligence (Count 5), unjust enrichment (Count 6), declaratory judgment (Count 7), deceptive acts (Count 8) and rescission (Count 9) each fail to state a claim and should be dismissed. Of course, if this Court dismisses the RICO claims, the Court has discretion to decline to exercise supplemental jurisdiction over these state law claims arising out of and relating to the alleged garnishment of $476.57 of Kolbert's social security benefits which will be refunded if the SBA confirms Kolbert's alleged identity theft.

Accordingly, we respectfully request permission to move to dismiss Kolbert's Complaint. We are available for a pre-motion conference at the Court's convenience.

Respectfully submitted,

/s/ Sean C. Sheely
cc: Counsel of Record (*via ECF*)

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[3] The PPP Extension Act of 2021 extended the deadline for the PPP program to June 30, 2021, but cut off the acceptance of new lender applications to May 31, 2021. H.R. 1799 117th Cong. (2021)(enacted).