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VIA ECF

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

LETTER MOTION REQUESTING A PRE-MOTION CONFERENCE

Re: *Kolbert v. Benworth Capital Partners LLC et al.*, Case No. 1:25-cv-00117-FB-VMS

Dear Judge Block:

Defendants Oto Analytics, LLC f/k/a Oto Analytics, Inc., d/b/a Womply ("Womply"), and Toby Scammell ("Scammell," and together with Womply, the "Womply Defendants") respectfully submit this Letter Motion requesting a pre-motion conference regarding their anticipated motion to dismiss Plaintiff's Complaint, ECF 1, under Rules 9(b), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure.

This Court has recognized that "plaintiffs wielding RICO almost always miss the mark," and "courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 414 (E.D.N.Y. 2017). This is one of those cases. In short, Plaintiff alleges he lost less than $500 because a third party stole his identity, and now he seeks to obtain a windfall by bringing RICO claims against the entities who were actually defrauded by the third party. This abuse of the RICO statute should not be countenanced.

Plaintiff's claims concern the Paycheck Protection Program ("PPP"), a COVID-19 era federal government loan program that stopped accepting applications on May 31, 2021.[1] As alleged in the Complaint, Womply developed a technology platform called "PPP Fast Lane" in February 2021—just four months before the PPP stopped accepting applications—and it allowed (i) applicants to apply for PPP loans from private lenders, and (ii) lenders to efficiently process and manage those applications. (Compl. ¶¶ 82–86.) Plaintiff alleges that, on or about May 2, 2021, an unknown individual received an $18,803 PPP loan in Plaintiff's name from Defendant Benworth Capital Partners LLC ("Benworth"), a PPP lender. (*Id.* ¶¶ 24–40.) Plaintiff further claims that the U.S. Treasury has since garnished $476.57 of Plaintiff's social security benefits to repay a portion of the loan. (*Id.* ¶ 27.)

To be clear, Plaintiff ***does not*** allege that Defendants are responsible for a third party stealing his identity. In addition, Plaintiff knows very little about the loan or how it was obtained. Plaintiff

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[1] *See Paycheck Protection Programs*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program (last visited Mar. 11, 2025); *see also Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012) ("We also take judicial notice of matters of public record.").

admits that he "does not know who obtained the Fraudulent PPP Loan . . ., how the perpetrator(s) obtained his personal identifying information . . ., or "how the Fraudulent PPP Loan became associated with him personally." (*Id.* ¶¶ 41–42.) Nor does Plaintiff allege that the allegedly fraudulent loan was obtained using Womply's PPP Fast Lane. Nevertheless, the Complaint asserts claims against the Womply Defendants for violations of Section 1962(c) of the RICO statute, claiming that Womply and its CEO were an "enterprise" and engaged in a scheme to "defraud the federal government" by "approv[ing] and fund[ing] fraudulent PPP loans funded using Federal Reserve Bank capital." (*Id.* ¶¶ 179–80.) Plaintiff also alleges that the Womply Defendants conspired with Benworth and related parties in violation of Section 1962(d). Plaintiff's RICO claims suffer from numerous fatal deficiencies, only some of which are addressed below.[2]

First, the Complaint fails to adequately allege a "pattern of racketeering activity," which can be satisfied by alleging either a closed-ended or an open-ended scheme. *Rosner v. Rosner*, 766 F. Supp. 2d 422, 425 (E.D.N.Y. 2011). An open-ended scheme requires "the type of pattern that is likely to continue indefinitely into the future," and courts generally will not find a closed-ended scheme if it lasted "less than two years." *Id.* Here, Plaintiff fails to adequately allege either. Instead, he alleges that the Womply Defendants engaged in an approximately four-month scheme that ended almost four years ago: from February 2021 (when PPP Fast Lane was created) to May 31, 2021(when the PPP stopped accepting applications). Plaintiff fails to allege any post-PPP racketeering activity; to the contrary, Plaintiff concedes that the Womply Defendants' alleged illegal activity "***ceased*** . . . because the [PPP] ended." (Compl. ¶ 182 (emphasis added).) Therefore, Plaintiff could not allege a "pattern of racketeering activity" even if he amended his Complaint, and the RICO claims should be dismissed with prejudice on this basis alone.

Second, Plaintiff lacks standing. The Complaint make clear that Plaintiff was injured by an unknown third party who stole his identity. Plaintiff fails to allege that the loan was obtained using PPP Fast Lane, let alone any facts suggesting the Womply Defendants should have known the PPP loan application in his name was fraudulent, or any other facts establishing that he was a direct victim of the Womply Defendants' alleged scheme to defraud the federal government. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (holding that alleged connection between plaintiff's injury and defendant's alleged tax fraud scheme was too attenuated to support a RICO claim; "[t]he direct victim of this conduct was the State of New York, not [the plaintiff]").

Third, the Complaint fails RICO's "distinctness" requirement. *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.,* 30 F.3d 339, 344 (2d Cir. 1994) ("We have determined that the person and the enterprise referred to [in 18 U.S.C § 1962(c)] must be distinct."). Plaintiff alleges that Womply and its CEO, Scammell, are a RICO enterprise and that Scammell is a "person" liable for RICO violations. (Compl. ¶¶ 171, 173.) It is well established that claims like this one alleging "a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant" violate this distinctness requirement. *Riverwoods*, 30 F.3d at 344.

[2] The Womply Defendants also reserve the right to seek dismissal for lack of personal jurisdiction and improper service of process.

Fourth, the Complaint fails to allege predicate acts with the particularity required under Rule 9(b). *See Flexborrow*, 255 F. Supp. 3d at 420–21 (dismissing RICO claim based on "sweeping and general allegations of mail and wire fraud").

Fifth, Plaintiff's conspiracy claim under Section 1962(d) fails to adequately allege "an agreement to commit predicate acts." *Id.* at 425 (cleaned up). The Complaint merely alleges that a "meeting of the minds" is demonstrated by alleged (but unidentified) "widespread fraud in PPP applications, repeated failures to implement fraud controls, and extensive profit-taking from obviously fraudulent loans" (Compl. ¶ 207), which is insufficient. *See Flexborrow*, 255 F. Supp. 3d at 425 (dismissing RICO conspiracy where plaintiff only "summarily alleged" an agreement).

Plaintiff further asserts state law claims, all of which also fail as a matter of law.

Negligence. Plaintiff was allegedly injured when a third party fraudulently obtained a PPP loan in Plaintiff's name on May 2, 2021 (Compl. ¶ 31), and therefore this claim is time-barred under New York's three-year statute of limitations. *See* N.Y. CPLR § 214(4). Plaintiff also fails to allege that the Womply Defendants owed a duty of care to Plaintiff, who has no relationship with the Womply Defendants. *See Hamilton v. Berretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) (injured party must show more than "a general duty to society" because absent a "specific duty . . . there can be no liability in damages, however careless the conduct or foreseeable the harm"); *see also Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A.*, 261 F.R.D. 13, 27 (S.D.N.Y. 2009) ("Banks do not owe non-customers a duty to protect them from the intentional torts of their customers.") (cleaned up).

Unjust Enrichment. Plaintiff fails to allege that the Womply Defendants "received something of value which belongs to [P]laintiff," which is required to assert an unjust enrichment claim. *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 260 (S.D.N.Y. 2012) (cleaned up).

N.Y. Gen. Bus. Law § 349. This claim is time-barred. *See Statler v. Dell, Inc.*, 841 F. Supp. 2d 642, 648 (E.D.N.Y. 2012) (three-year statute of limitations). It also fails because the Womply Defendants' alleged deceptive acts were directed to the federal government, and not to consumers.[3] *See Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir. 2000) (per curiam) ("[A] plaintiff must demonstrate that [] the defendant's deceptive acts were directed at consumers . . . .").[4]

Respectfully submitted,

/s/ Alexander L. Cheney

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[3] The alleged "deceptive acts" in the FTC complaint cited in the Complaint relate to "promises that small business consumers would get PPP loan funds" (Compl. ¶ 96), which is unrelated to Plaintiff's alleged injury. *Gale v. Int'l Bus. Machines Corp.*, 781 N.Y.S.2d 45, 47 (2d Dep't 2004) (holding plaintiff must demonstrate a "connection between the deceptive act and [his] injury").

[4] Plaintiff's declaratory judgment claim fails because it does not concern Defendants at all. Instead, it seeks to define the rights of the Plaintiff, the unknown fraudster, and the government.