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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 Amended Complaint ("AC"), ECF 32, under Federal Rules of Civil Procedure 9(b), 12(b)(5), 12(b)(6), and 15(a)(3). Plaintiff's Amended Complaint does not cure the deficiencies identified in Defendants' first set of letter motions, ECF 16 & 17, and dismissal is required. This is not the result of inartful pleading—the facts simply do not support a RICO claim or any of Plaintiff's state law claims. *Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 414 (E.D.N.Y. 2017) ("[P]laintiffs wielding RICO almost always miss the mark," and "courts should strive to flush out frivolous RICO allegations at an early stage of the litigation.").

Plaintiff's claims concern the Paycheck Protection Program ("PPP"), a COVID-19 era federal government loan program. The Amended Complaint alleges that Womply developed a technology platform called "PPP Fast Lane" in February 2021—just three months before the PPP stopped accepting applications in May 2021—that allowed (i) applicants to apply for PPP loans from private lenders, and (ii) lenders to efficiently process and manage those applications. (AC ¶¶ 123–127.) 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.* ¶¶ 59–74.) Plaintiff further claims that the U.S. Treasury garnished $476.57 of Plaintiff's social security benefits to repay a portion of the loan but paused collections after being notified of the fraud. (*Id.* ¶¶ 7, 62.)

Plaintiff ***does not*** allege that Defendants are responsible for a third party stealing his identity. Instead, he 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.* ¶¶ 75–77.) In fact, he still fails to allege that the PPP loan at issue was obtained using Womply's PPP Fast Lane. Nevertheless, the Amended Complaint asserts claims for violations of Section 1962 of the RICO statute against the Womply

Defendants arising out of the third-party identity theft, which suffer from numerous fatal deficiencies, only some of which are addressed below.[1]

First, Plaintiff does not (and cannot) adequately allege closed-ended continuity to plead a "pattern of racketeering activity." (*Id.* ¶¶ 204–15.) Courts in this district regularly dismiss RICO claims where—as here—the alleged predicate acts lasted for "less than two years." *Rosner v. Rosner*, 766 F. Supp. 2d 422, 425 (E.D.N.Y. 2011). As pled, the Womply Defendants' participation in the alleged predicate acts was limited to operating PPP Fast Lane (AC ¶ 201 (alleging that "Womply and Scammell controlled the intake, flow, and approval of applications" through PPP Fast Lane)), which only operated for about three months from February 2021 to May 2021. (*Id*. ¶¶ 123–127.) The Amended Complaint attempts to extend the purported "pattern of racketeering" beyond three months by claiming that the "scheme began at the beginning of 2020, right after Benworth FL obtained its consumer finance company license" and lasted "into late 2023 and beyond" as a result of "fraudulent transfers of illicit gains and related assets." (*Id.* ¶¶ 206, 208). But these allegations about Benworth FL's pre- and post-PPP actions have nothing to do with the Womply Defendants or the alleged predicate acts that form the basis of Plaintiff's RICO claims, and therefore cannot save Plaintiff's claims. *See Flexborrow*, 255 F. Supp. 3d at 418 (explaining that alleged predicate acts must "have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics").

Second, Plaintiff also does not (and cannot) adequately allege open-ended continuity. (AC ¶¶ 211–15.) Plaintiff concedes that the "PPP program expired in May 2021" (*id.* ¶ 211), and the mere *possibility* that Womply "could continue to redirect [] its fraudulent methods and conduct to new programs" (*id.* ¶¶ 211-15) is insufficient to state a claim. *See Grace Int'l Assembly of God v. Festa*, 797 F. App'x 603, 606 (2d Cir. 2019) (summary order) ("[S]peculative claims regarding how long the fraud would continue do not . . . support a showing of open-ended continuity").

Third, Plaintiff continues to lack standing. 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]").

Fourth, the Amended Complaint fails to allege predicate acts with the particularity required under Rule 9(b). *See Flexborrow*, 255 F. Supp. 3d at 422 (dismissing RICO claim based on "sweeping and general allegations of mail and wire fraud") (citation omitted). Plaintiff continues to assert conclusory allegations that cannot survive dismissal. (*See, e.g.,* AC ¶ 196 (alleging that "Defendants coordinated these actions through verbal, written, and digital agreements" without identifying the agreements), ¶ 197 (alleging that "[t]he enterprise also enlisted the use of sham entities and accounts" without identifying the entities or accounts or how they were enlisted).)

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

Fifth, Plaintiff's conspiracy claim under Section 1962(d) fails to adequately allege "an agreement to commit predicate acts." *Flexborrow*, 255 F. Supp. 3d at 425 (cleaned up). The Amended Complaint alleges that a "meeting of the minds" is demonstrated by alleged "widespread and repeated failures to implement fraud controls, utter disregard for an avalanche of fraudulent loans coupled with extensive profit-taking from obviously fraudulent loans." (AC ¶ 227; *see also id.* ¶ 226.) But even accepting Plaintiff's allegations as true for purposes of a motion to dismiss, the mere fact that unknown third parties defrauded Defendants by fraudulently obtaining loans does not suggest that there was an agreement among the Defendants to facilitate the fraud.

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

Negligence. Plaintiff allegedly was injured when a third party fraudulently obtained a PPP loan in his name on May 2, 2021 (AC ¶ 66), and therefore this claim remains 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 him—a non-customer—a general duty of care. *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); (*cf.* AC ¶¶ 238–39).

Unjust Enrichment. This claim fails because the Womply Defendants are not alleged to have "received something of value which belongs to [P]laintiff." *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.[2] *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 . . .").[3]

Respectfully submitted,

/s/ Alexander L. Cheney

[2] The alleged "deceptive acts" in the FTC complaint relate to "promises that small business consumers would get PPP loan funds" (AC ¶ 137), 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").

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