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May 30, 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
<u>Pre-Motion Letter to File Motion to Dismiss Amended Complaint</u>

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, Benworth Financial LLC,[1] Bernie Navarro and Claudia Navarro [2] (collectively the "**Benworth Defendants**") we respectfully request a pre-motion conference to obtain permission to file a motion to dismiss Plaintiff William Kolbert's ("**Kolbert**") Amended Complaint dated May 16, 2026 [ECF No. 32] (the "**Amended Complaint**"). Despite substantial amendments to his Complaint, Plaintiff was not able to cure the defects in his case and his pleadings fall short of the requirements for a RICO claim. Kolbert's Amended Complaint must be dismissed pursuant to Rules 9(b), 12(b)(1) and 12(b)(6). A pre-motion conference relating to Kolbert's initial Complaint was previously held on April 25,2025.

The Benworth Defendants hereby incorporate by reference the arguments set forth their initial pre-motion letters [ECF No. 17 and ECF No. 23] which continue to apply with equal force to dismiss Plaintiff's Amended Complaint. As a matter of law, Kolbert's Amended Complaint fails. At its core, the Amended Complaint claims that an unknown perpetrator created a Fraudulent LLC in Kolbert's name and without his consent obtained a PPP Loan in the amount of $18,803 relating to a purported medical laboratory business. Am. Compl. ¶¶ 59-74.

Kolbert does not know who stole his identity. Am. Compl. ¶3. 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 "[systematically failing] to prevent PPP fraud" in order to "monetize on the avalanche of fraudulent loans, that [Defendants] were knowingly processing, approving and funding". Am. Compl. ¶7. Kolbert claims that he suffered the loss of $476.57 when the Department of Treasury reduced his September 2024 monthly social security retirement benefit. Am. Compl. ¶¶7,62.

[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 Amended Complaint. Am. Compl. ¶60. Benworth Financial is a licensed Consumer Finance Company that offers second mortgages and did not participate in the PPP loan program. Am. Compl. ¶¶ 15, 16, 109 and 110.

[2] Kolbert has not alleged facts to support personal jurisdiction in this Court and has not effectuated service of process on the individual defendants. Contrary to the affidavits of service [ECF No. 19 and 25]. Mr. and Mrs. Navarro do not currently have a residence in Florida where Kolbert attempted to serve them and will also be seeking dismissal of the Amended Complaint on those grounds.

Kolbert concedes that after he filed an Identity Theft Report with the Small Business Administration ("**SBA**"), the SBA paused its collection efforts. *Id.*

1. <u>Kolbert's Lacks Standing to Assert a RICO claim</u>

First, to state a civil RICO claim, a plaintiff must show a "direct" and "straightforward" connection between the defendant's conduct and the alleged injury. *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Kolbert asks the Court to "go beyond the first step" of causation by asserting that a lawful federal loan program was exploited to target identity theft victims as PPP loan "borrowers" to funnel funds to fraudsters. Am. Compl. ¶91. The Amended Complaint fails to allege that any RICO scheme was *directly* aimed at him. Instead, Kolbert describes a broader scheme directed at defrauding the "government and the Federal Reserve Bank's lending facilities" that allegedly relied indirectly on unknown third parties to use stolen identities, from unwitting individuals (like Kolbert) to capitalize on fraudulent loans. Am. Compl. ¶¶89–92. Despite Kolbert's assertion that it was the "natural and foreseeable consequence" that he was an intended target of the alleged RICO enterprise, the facts he alleges about identity theft demonstrate, at best, that he was an victim of an independent crime committed by a unrelated third party, with no "direct" or "straightforward" connection or relationship to the Benworth Defendants.

Likewise, Plaintiff's asserted injuries related to reputational harm to his integrity in financial matters as a CPA, Am. Compl. ¶¶7, 87 are not cognizable under RICO. Reputational injuries have been held by this Court to be too speculative and thus not recoverable as RICO injury. *See Kerik v. Tacopina*, 64 F. Supp. 3d 542, 561 (S.D.N.Y. 2014) (finding reputational injuries are insufficient to support a civil RICO claim and holding that even if such injury were cognizable, it would be "difficult to discern how much of it was due to the [RICO] acts"); *See also Kimm v. Chang Hoon Lee & Champ, Inc.*, 196 Fed.Appx. 14, 16 (2d Cir. 2006) (summary order) ('As written, the generalized reputational harms alleged, including the risk of future lost business commissions, are too speculative to constitute an injury to business or property.').

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

A defect in pleading any of the complex RICO elements may render a RICO claim futile. *Fossil Grp., Inc. v. Angel Seller LLC*, 627 F. Supp. 3d 180, 199 (E.D.N.Y. 2022) (*Citing Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983) (setting forth the elements required to allege a civil RICO claim). Here, despite adding additional facts, Kolbert's Amended Complaint cannot cure the fundamental RICO deficiencies in his case. Kolbert's amended RICO claim (Count 1) does 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 because the PPP loan program only lasted for a matter months and was discontinued in less than the required minimum two-years for a RICO violation. In the Amended Complaint, Kolbert attempts to get around the two-year time period by adding allegations that Benworth obtained its consumer finance license on January 22, 2020 as well as "certain acts of fraudulent asset transfers, well into at least late 2023". Am. Compl ¶¶202, 203, 206. But Kolbert's amendments do not relate to any predicate acts and therefore they cannot extend the time frame for any "pattern" or any threat of continuing criminal activity. *See*

Cofacrèdit, S.A. v. Windsor Plumbing Supply Co., 187 F.3d 229, 242 (2d Cir.1999), (citing H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Furthermore, Kolbert's amendments cannot claim open-ended continuity because an enterprise that conducts legitimate business does not constitute a continued threat. *Spool v. World Children Int'l Adoption Agency,* 520 F 3d 178, 185 (2d Cir 2008).

Second, Kolbert's amendments fail 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, 209 (2d Cir 2017).

Third, Kolbert's amended 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. Kolbert's claim for RICO conspiracy (Count 2) necessarily fails because without a RICO violation, a claim under §1962(d) for "conspiracy" cannot stand.

Finally, Kolbert's state law based causes of action for negligence (Count 3), unjust enrichment (Count 4), declaratory judgment (Count 5) and deceptive acts (Count 6) fail to state a claim and should be dismissed for the following reasons: (i)Kolbert's negligence claim fails because the Benworth Defendants owed no duty of care to him. Kolbert concedes he is not a "borrower," and even if he were deemed one, New York law does not recognize a special duty owed by a lender to a borrower. *Myamoto v. Bank of Am., N.A.,* 2020 WL 5577730, at *3 (E.D.N.Y. Sept. 17, 2020). Moreover, the negligence claim is time-barred under New York's three-year statute of limitations. *See* N.Y. CPLR § 214(4). (ii) The unjust enrichment claim is untimely to the extent Kolbert seeks monetary relief. *See Ingrami v. Rovner*, 847 N.Y.S.2d 132, 134-35 (2d Dep't 2007); *see also Grynberg v. Eni S.p.A*., 2007 WL 2584727, at *3 (S.D.N.Y. Sept. 5, 2007) (unjust enrichment subject to three-year period where "restitution for monetary damages is sufficient to fully compensate plaintiffs"); (iii) Kolbert's claim for declaratory judgment also fails. Declaratory relief is a procedural mechanism that must be based on a substantive legal violation, and no such independent basis exists here. *In re Methyl Tertiary Butyl Ether ("MTBE")* *Prods. Liab. Litig.* 247 F.R.D. 420, 422-23 (S.D.N.Y. 2007). Without a viable RICO claim, declaratory relief is unavailable; (iv) Kolbert's deceptive acts claim under N.Y. Gen. Bus. Law § 349 is subject to a three-year statute of limitations, which begins to run upon injury caused by the alleged deceptive act and are therefore also time barred. *Buyers & Renters United to Save Harlem v. Pinnacle Grp. N.Y. LLC,* 575 F. Supp. 2d 499, 512 (S.D.N.Y. 2008). 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 Plaintiff himself has acknowledged is no longer being collected by the SBA. Am. Compl ¶7.

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

Respectfully submitted,
Sean C. Sheely

cc: Counsel of Record (*via ECF*)